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## Is the Missouri Sales Tax Being Eroded? Examining a Conflict Among the Executive, Legislative, and Judicial Branches in Missouri

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## NOTE

# Is the Missouri Sales Tax Being Eroded? Examining a Conflict Among the Executive, Legislative, and Judicial Branches in Missouri

*Miss Dianna's Sch. of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405 (Mo. 2016)

Courtney Lock\*

### I. INTRODUCTION

Miss Dianna's School of Dance, Inc. ("the School") teaches dance lessons and instructs students on various dance techniques.<sup>1</sup> The School has been in business for forty-three years.<sup>2</sup> In January of 2016, the Supreme Court of Missouri determined that it was a place of "amusement, entertainment, or recreation"<sup>3</sup> for purposes of section 144.020.1(2) of the Missouri Revised Statutes.<sup>4</sup> This resulted in the School owing a significant amount of unpaid taxes.<sup>5</sup> Over time, the State of Missouri has applied several different tests to determine whether businesses are considered places of "amusement, entertainment, or recreation" for purposes of the statute, which holds businesses liable for sales

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\* B.A., Rockhurst University, 2015; J.D. Candidate, University of Missouri School of Law, 2018; Note and Comment Editor, *Missouri Law Review*, 2017–2018. I would like to extend a special thank you to Professor Michelle Arnopol Cecil for her constant support and guidance throughout law school, particularly through the learning, writing, and editing process of this Note. I would also like to thank the entire *Missouri Law Review* staff for their support and guidance in writing this Note.

1. *Miss Dianna's Sch. of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405, 406 (Mo. 2016) (en banc).

2. MISS DIANNA'S SCH. DANCE, <https://misdiannas.com> (last visited Sept. 22, 2017).

3. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 408.

4. This section imposes a sales tax "equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." MO. REV. STAT. § 144.020.1(2) (2016).

5. The Director of Revenue determined that Miss Dianna owed sales tax and assessed \$73,276.21 in liability for the unpaid tax and interest but later amended the amount sought to \$28,214.60, plus interest, which were the unpaid taxes from 2010 to 2012. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 407.

tax.<sup>6</sup> The two principle tests are the primary purpose test and the de minimis test, which are explored in greater detail in this Note.

This case and the legislative enactments that followed it raise more questions than they answer. While courts struggle to determine the proper scope of the statute, the legislative branch recently enacted an amendment excluding places of instruction from the scope of section 144.020.<sup>7</sup> Although Governor Jay W. Nixon vetoed this legislation, the legislature overrode the veto in September of 2016, and the amendment became law on October 14, 2016.<sup>8</sup>

This Note examines the Supreme Court of Missouri's holding in *Miss Dianna's School of Dance, Inc. v. Director of Revenue*, ascertains the holding's scope in light of recent statutory amendments, and explores whether Missouri sales tax is at a precipice going forward. Part II discusses the facts and holding of *Miss Dianna's School of Dance*. Part III explores the Supreme Court of Missouri's fluctuating interpretations of the statute. Part IV provides an in-depth analysis of the Supreme Court of Missouri's reasoning in *Miss Dianna's School of Dance* and its relevance to the interpretation of the statute going forward, including an examination of Judge George W. Draper III's dissent. Finally, Part V discusses the effect of recent statutory amendments, both on *Miss Dianna's School of Dance* and on future cases involving amusement, entertainment, and recreation. This Note argues that both the court's decision in *Miss Dianna's School of Dance* and the subsequent statutory amendments to section 144.020 leave businesses in a more difficult position regarding whether to impose sales tax. Ultimately, this Note concludes that the future of the Missouri sales tax remains in doubt because of the ambiguity of the statutory enactment.

## II. FACTS AND HOLDING

The School, located in Kansas City, Missouri, offers dance classes in tap, ballet, jazz, acrobats, lyrical, hip-hop, and pom-pom for all ages.<sup>9</sup> Prior to being audited in 2012, the School did not file any sales tax returns because it does not sell retail merchandise.<sup>10</sup> Rather, it relied on a 2008 Missouri Department of Revenue letter ruling, addressed to a different business,<sup>11</sup> stating that fees

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6. See *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681–82 (Mo. 1988) (en banc) (applying the de minimis test); *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 809–10 (Mo. 1998) (en banc) (applying the primary purpose test), *overruled by Wilson's Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

7. See § 144.020.1(2).

8. *Id.*

9. *MISS DIANNA'S SCH. DANCE*, *supra* note 2.

10. See *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 407.

11. A letter ruling is the Department of Revenue's response to a taxpayer's request for specific information about the tax treatment for that particular taxpayer. *What Is a Binding Letter Ruling?*, MO. DEP'T REVENUE, <http://dor.mo.gov/rulings/search> (last visited Sept. 22, 2017). Letter rulings are binding on the Department of Revenue for

charged by that business for dance lessons were not subject to sales tax.<sup>12</sup> However, the Director of Revenue determined that the School owed \$73,276.21 in unpaid taxes and interest.<sup>13</sup>

Section 144.020.1(2) of the Missouri Revised Statutes imposes a sales tax “equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events.”<sup>14</sup> The School argued that it was not a place of amusement, entertainment, or recreation because its main purpose was to teach students how to dance and that, therefore, the tax should not apply.<sup>15</sup>

Although the School’s website portrayed that the classes involved skill, learning, and technique, it also included various statements emphasizing the fun and enjoyment that the classes offered.<sup>16</sup> The website stated, “We are confident you can find a class that will make you and your family happy!”<sup>17</sup> Further, the website described various youth classes as “fun classes to add variety to your dancer’s week!” and invited adults to “[t]ake a little ‘Me Time’ and have some fun with us!”<sup>18</sup> It also advertised a tap class where adults “will be amazed at how fun and athletic tap exercises can be” and promoted a day camp where “dancers will also be doing crafts and decorating their dance camp shirts.”<sup>19</sup> In addition, at the Administrative Hearing Commission hearing, the School’s founder admitted that participants “get recreation” from the dance classes and that she wanted the participants to have fun while learning to dance.<sup>20</sup>

The Administrative Hearing Commission held that the School was subject to sales tax under section 144.020.1(2).<sup>21</sup> The Commission noted that the entertainment, amusement, and recreation were not a de minimis component of the School’s dance lessons and ruled that the School was liable for \$23,984.93 in unpaid taxes.<sup>22</sup> The School petitioned to the Supreme Court of Missouri for review and challenged the imposition of liability for sales tax.<sup>23</sup> The sole issue

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the taxpayer to whom the ruling was issued but not for any other taxpayer. *Id.* However, the letter ruling may provide guidance to another taxpayer. *Id.*

12. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 407.

13. *Id.*

14. MO. REV. STAT. § 144.020.1(2) (2016).

15. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 408.

16. *Id.*

17. *Id.* at 406. The website also described the School as “[a] Dance Studio focused on performance quality in a fun and family friendly atmosphere.” *Id.*

18. *Id.*

19. *Id.* The other advertisements included: an all-boys class “full of energy, fun, and structure,” “a fun dance & tumbling class,” and a musical theater workshop described as “a fun way to develop your dance and acting skills.” *Id.*

20. *Id.*

21. *Id.* at 407.

22. *Id.*

23. *Id.*

before the Supreme Court of Missouri<sup>24</sup> was whether the School was a place of “amusement, entertainment, or recreation” for purposes of section 144.040.1(2), thus subjecting the School to sales tax liability.<sup>25</sup> The Supreme Court of Missouri held that the School was subject to sales tax under section 144.020.1(2) because it charged a fee, which was paid in part for “amusement,” “entertainment,” and “recreation,” and the amusement or recreational activities comprised more than a de minimis portion of the School’s business activities.<sup>26</sup>

### III. LEGAL BACKGROUND

Section 144.020.1(2) of the Missouri Revised Statutes<sup>27</sup> imposes a sales tax “equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events.”<sup>28</sup> Over time, the Supreme Court of Missouri has applied several tests to determine whether a business is subject to sales tax under section 144.020.1(2).<sup>29</sup> This Part outlines the history of the two primary tests used by the court: the de minimis test and the primary purpose test.

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24. This petition involved a revenue law of Missouri, so the Supreme Court of Missouri had jurisdiction pursuant to article V, section 3 of the Missouri Constitution, which states:

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

MO. CONST. art. V, § 3.

25. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 407. The Supreme Court of Missouri will uphold the Commission’s decision if it is “authorized by law and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly.” 801 Skinker Boulevard Corp. v. Dir. of Revenue, 395 S.W.3d 1, 3–4 (Mo. 2013) (en banc).

26. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 409.

27. MO. REV. STAT. § 144.020.1 (2016).

28. § 144.020.1(2).

29. See *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681–82 (Mo. 1988) (en banc) (applying the de minimis test); *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 809–10 (Mo. 1998) (en banc) (applying the primary purpose test), *overruled by Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

### A. *The De Minimis Test as Applied in Spudich*

Prior to 1998, the Supreme Court of Missouri utilized a de minimis test when applying section 144.020.1(2).<sup>30</sup> Under the de minimis test, the court considered three factors to determine whether a business was a place of amusement, entertainment, or recreation.<sup>31</sup> First, the court considered whether the manner in which the business held itself out to the public inferred that it was a place of amusement, entertainment or recreation.<sup>32</sup> Second, the court considered whether the revenue generated by amusement or recreational activities was considered a significant amount.<sup>33</sup> Lastly, the court examined whether the amusement and recreational activities were pervasive.<sup>34</sup>

These three factors originated in *Spudich v. Director of Revenue* in 1988.<sup>35</sup> In *Spudich*, Robert Spudich, the plaintiff and sole proprietor of Columbia Billiard Center and Spudich Supply Co., operated and maintained billiard tables and coin-operated game devices and sold food, beverages, and billiard supplies.<sup>36</sup> Although only about twenty-five percent of Spudich's sales were derived from billiard charges and coin-operated amusements, the court found that the billiard center was a "place of amusement" within the meaning of section 144.020.1(2).<sup>37</sup> The conclusion was based, in part, on the fact that Spudich portrayed itself as a billiard center and access to the center attracted patrons.<sup>38</sup>

The court also recognized that a business could have two purposes.<sup>39</sup> The fact that the majority of Spudich's sales were from food, beverages, equipment, and repair did not preclude the billiard center from being a place of amusement and entertainment.<sup>40</sup> The court noted that if a place "provides something edifying or educational in addition to enjoyment . . . it is no less a place of amusement."<sup>41</sup>

However, the court in *Spudich* noted that each case should be considered based on its own specific facts.<sup>42</sup> These factors were not exhaustive,<sup>43</sup> and other factors could be considered to determine whether a place should be deemed a place of amusement and subject to sales tax under section

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30. See *Spudich*, 745 S.W.2d at 682.

31. *Id.* at 681 n.1.

32. *Id.*

33. *Id.*

34. *Id.*

35. See *id.*

36. *Id.* at 679.

37. *Id.* at 679, 681.

38. *Id.* at 681.

39. *Id.* at 680.

40. *Id.* at 680–81.

41. *Id.*

42. *Id.* at 681 n.1.

43. *Id.*

144.020.1(2); however, the court did not comment on these other factors and did not allude to why it limited its analysis to the above three factors.<sup>44</sup>

### B. The Primary Purpose Test

In 1998, the Supreme Court of Missouri applied the primary purpose test, instead of the de minimis test, to determine the applicability of section 144.020.1(2).<sup>45</sup> Under the primary purpose test, section 144.020.1(2) turned on the primary purpose of the facility involved: “[i]f the primary purpose of a facility is to facilitate diversion or entertainment, then the facility is a place of recreation and is subject to assessment of sales tax under section 144.020.1(2).”<sup>46</sup>

In *Columbia Athletic Club v. Director of Revenue*, the court applied the primary purpose test and held that a physical fitness center membership was not subject to sales tax.<sup>47</sup> Although the Columbia Athletic Club offered activities such as aerobics, strength training, and nutrition/weight control services, it did not offer facilities for tennis, racquetball, basketball, or swimming.<sup>48</sup> The court held that because the center’s primary purpose was to facilitate exercise to provide health benefits, it was not considered a place of “amusement, entertainment, or recreation,” and Columbia Athletic Club therefore was not liable for sales tax.<sup>49</sup>

The Supreme Court of Missouri did not mention the de minimis test in *Columbia Athletic Club*, and did not indicate its reason for using the primary purpose test instead.<sup>50</sup> However, its lack of mentioning of the de minimis test was not due to oversight, as the court cited to *Spudich* in the context of applying the common dictionary definition of “recreation” and recognizing that a facility may have a dual nature.<sup>51</sup>

44. *See id.*

45. *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 810 (Mo. 1998) (en banc), *overruled by* *Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

46. *Id.*

47. *Id.* at 811.

48. *Id.* at 810–11. The court recognized that some aspects of the fitness center, such as the background music, televisions in the cardiovascular section, hot tubs, and saunas, may be viewed as entertaining activities. *Id.* at 811. However, because the primary purpose was clearly to improve health through physical exercise, the diverting and entertaining aspects did not convert the entire fitness center into a place of recreation subject to sales tax. *Id.*

49. *Id.* at 809.

50. *See id.* at 806–11.

51. *See, e.g., id.* at 809–10 (“This [c]ourt has previously recognized that a facility may have a dual nature in that it provides both recreational and non-recreational benefits.”) (citing *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 680–81 (Mo. 1988) (en banc)).

Chief Justice William Duane Benton wrote a dissenting opinion in which he noted: “[i]n *Spudich*, this Court determined that a business is a place of amusement, entertainment or recreation if those activities comprise more than a de minimis portion of the business activities of the location.”<sup>52</sup> However, Chief Justice Benton noted that, although the de minimis test was the correct test to apply in these cases, “this [c]ourt need not reexamine or apply the de minimis test [in this case] because the Director and [Columbia Athletic Club] agree that all or none of the membership fees are subject to tax.”<sup>53</sup> According to Chief Justice Benton, because exercise is considered recreation, Columbia Athletic Club is a place of recreation.<sup>54</sup>

*Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, a Supreme Court of Missouri case decided in 1999, also applied the primary purpose test set forth in *Columbia Athletic Club*.<sup>55</sup> The Kanakuk-Kanakomo Kamps included activities such as soccer, gymnastics, water ziplining, swimming, wall climbing, and juggling.<sup>56</sup> Kanakuk did not dispute that the games and sports offered at its facilities were commonly viewed as recreational, but it asserted that the camps were not recreational because their primary purpose was “training, instruction and lessons in sports activities.”<sup>57</sup> However, the Supreme Court of Missouri concluded that, although each of the activities at Kanakuk “[was] designed to teach Christian principles in addition to improving athletic skills,” there was no prevailing educational purpose.<sup>58</sup> The court relied on the fact that promotional literature did not suggest that extensive time was spent on instruction.<sup>59</sup> Subsequently, the court held these camps to be places of “recreation, games and athletic events” subject to sales tax.<sup>60</sup>

*Kanakuk-Kanakomo Kamps, Inc.* differs from *Columbia Athletic Club* in one important aspect.<sup>61</sup> Unlike in *Columbia Athletic Club*, where the court found “virtually no evidence to refute [taxpayer’s] proof that the primary focus of the facility was not recreational,” in *Kanakuk-Kanakomo Kamps, Inc.*, substantial evidence established that the camps were places of recreation.<sup>62</sup> Therefore, *Kanakuk-Kanakomo Kamps, Inc.* was not overruled when *Columbia Athletic Club* was overruled because under practically any test, Kanakuk would be

52. *Id.* at 816 (Benton, C.J., dissenting).

53. *Id.* (italics omitted).

54. *Id.*

55. *Kanakuk-Kanakomo Kamps, Inc. v. Dir. of Revenue*, 8 S.W.3d 94, 97 (Mo. 1999) (en banc).

56. *Id.* at 96.

57. *Id.* at 97.

58. *Id.* at 96.

59. *Id.* at 97.

60. *Id.* at 95.

61. *Id.* at 98.

62. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 810 (Mo. 1998) (en banc), *overruled by* *Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc)).



held to be a place of recreation. *Kanakuk-Kanakomo Kamps, Inc.* not only sheds light on the issue of summer camps in the context of tax law, but it also proves that *Columbia Athletic Club* is not an anomaly. It shows that *Columbia Athletic Club* was at one point followed as precedent.

### C. The Reinstated De Minimis Test

The Supreme Court of Missouri overruled the primary purpose test in 2001 and reinstated the de minimis test.<sup>63</sup> The de minimis test has since been applied.<sup>64</sup> Rather than considering whether the primary purpose of a business is amusement, entertainment, or recreation, courts must now determine whether the amusement or recreational activities “comprise more than a de minimis portion of the business activities.”<sup>65</sup> If so, it is considered a place of amusement or recreation under section 144.020.1(2).<sup>66</sup>

Wilson’s Total Fitness Center in *Wilson’s Total Fitness Center, Inc. v. Director of Revenue* offered, among other activities, strength, cardiovascular, and aerobic training; nutrition and weight control; massages; swimming, basketball, volleyball, racquetball, and tennis; and personal training by certified fitness instructors.<sup>67</sup> Wilson’s argued that the primary purpose of its facilities was to improve health and fitness through exercise and, thus, it should not be liable for sales tax.<sup>68</sup> The Director of Revenue argued that the primary purpose of Wilson’s activities was recreation and, therefore, Wilson’s should be liable for sales tax.<sup>69</sup> The Supreme Court of Missouri held that Wilson’s activities were recreational for purposes of section 144.020.1(2) and therefore imposed sales taxes on the center.<sup>70</sup> The court overruled the primary purpose test from *Columbia Athletic Club* because the “fine line between exercise that is primarily focused on health benefits and exercise that is primarily focused on recreation simply cannot be distinguished in a meaningful and consistent manner.”<sup>71</sup> It applied the de minimis test and held that exercise – both in this case and in

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63. See *Wilson’s Total Fitness Ctr.*, 38 S.W.3d at 426; see also Michael Jaudes *Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 609 (Mo. 2008) (en banc) (applying the reinstated de minimis test and noting a probable difference in outcome under the primary purpose test); *Bolivar Road News, Inc. v. Dir. of Revenue*, 13 S.W.3d 297, 300 (Mo. 2000) (en banc) (applying the de minimus test based on regulatory guidance from the Director of Revenue).

64. See *generally Fitness Edge*, 248 S.W.3d at 607–09 (applying de minimis test).

65. *Id.* at 609 (italics omitted) (quoting *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 682 (Mo. 1988) (en banc)).

66. *Id.*

67. *Wilson’s Total Fitness Ctr.*, 38 S.W.3d at 425.

68. *Id.* at 425–26.

69. *Id.* at 426.

70. *Id.*

71. *Id.* (internal quotation marks omitted) (quoting *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 810 (Mo. 1998) (en banc), *overruled by Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc)).

general – was of dual nature and subject to sales tax.<sup>72</sup> In reaching this conclusion, the court established that amusement or recreation was inextricably intertwined with education.<sup>73</sup>

In *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, the Supreme Court of Missouri cited to *Wilson's* and noted that *Wilson's* rejected the “primary purpose” test.<sup>74</sup> The court in *Fitness Edge* mentioned that the *Wilson's* court’s reason for rejecting the primary purpose test was that the distinction made in *Columbia Athletic Club* between exercise primarily focused on health benefits and exercise primarily focused on recreation was “unworkable in fact” because the facilities could not be “distinguished in a meaningful and consistent manner.”<sup>75</sup> Accordingly, the court in *Fitness Edge* followed *Wilson's* approach and applied the de minimis test.<sup>76</sup>

The court in *Fitness Edge* noted that “a location in which amusement or recreational activities comprise more than a de minimis portion of the business activities occurring at that location is considered a place of amusement or recreation.”<sup>77</sup> The court refused to distinguish a workout facility where clients’ workouts were mainly with personal trainers from a facility in which clients engaged in self-directed exercise because the distinction could not be made in a meaningful and consistent manner.<sup>78</sup> The court found that *Fitness Edge's* clients’ use of its exercise equipment and other amenities was more than de minimis; thus, the fitness center was subject to sales tax under section 144.020.1(2).<sup>79</sup>

In *Bolivar Road News, Inc. v. Director of Revenue*, a business sold books and videos but also allowed customers to pay for and watch adult entertainment videos at the business location.<sup>80</sup> Although the purpose of the video viewing was to allow Bolivar’s customers to preview the video before purchasing it, the Supreme Court of Missouri held that allowing customers to enter booths to view portions of the videos was an “amusement activity.”<sup>81</sup> Further, because this activity comprised more than a de minimis portion of Bolivar’s business activities, Bolivar was subject to sales tax under section 144.020.1(2).<sup>82</sup>

72. *Id.*

73. *Id.*

74. See *Michael Jaudes Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 609 (Mo. 2008) (en banc).

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks and italics omitted) (quoting *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 682 (Mo. 1988) (en banc)).

78. *Id.* at 610.

79. *Id.*

80. *Bolivar Rd. News, Inc. v. Dir. of Revenue*, 13 S.W.3d 297, 299 (Mo. 2000) (en banc).

81. *Id.* at 301.

82. *Id.* at 302.

The court in *Bolivar* referenced the three-factor analysis set forth in *Spudich*.<sup>83</sup> The court noted that “[t]he manner in which Bolivar held itself out to the public is [a] factor to consider in determining whether Bolivar operated places of amusement.”<sup>84</sup> The court found that Bolivar held itself out to the public as an arcade, which is a place of amusement.<sup>85</sup> The “arcade” referred to in *Bolivar* was merely the area where customers went to view forty-five second portions of adult videos.<sup>86</sup> The court further stated that “the amount of revenue generated by an amusement activity and the pervasiveness of the activity are relevant in ascertaining the role the amusement activity at issue here played in Bolivar’s business enterprises.”<sup>87</sup> Approximately forty-six percent of Bolivar’s business revenues were from the arcade.<sup>88</sup> Finally, the court found that Bolivar devoted a portion of each business location exclusively to the arcade area and advertised the arcade portion of the business.<sup>89</sup> These factors led to the conclusion that the viewing of portions of the adult videos constituted an amusement activity.<sup>90</sup>

In 2004, the Supreme Court of Missouri further explored the scope of section 144.020.1(2) in *Surrey’s on the Plaza, Inc. v. Director of Revenue*.<sup>91</sup> Surrey’s operated horse-drawn carriages on the Country Club Plaza of Kansas City, a downtown business district that offers shopping, dining, entertainment, and cultural events.<sup>92</sup> Prior to being audited, Surrey’s did not charge a sales tax for carriage rides.<sup>93</sup> The Director of Revenue assessed sales tax charges against Surrey’s, but Surrey’s challenged this assessment.<sup>94</sup> First, Surrey’s asserted that it was not a “place of amusement” because the rides followed several routes on public streets.<sup>95</sup> It further asserted that the tours educated customers and therefore should not be taxable.<sup>96</sup> However, the court ruled against Surrey’s on both grounds.<sup>97</sup>

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83. *Id.* at 301.

84. *Id.*

85. *Id.*

86. *Id.* at 299.

87. *Id.* at 301.

88. *Id.*

89. *Id.*

90. *Id.* at 302.

91. *Surrey’s on the Plaza, Inc. v. Dir. of Revenue*, 128 S.W.3d 508 (Mo. 2004) (en banc).

92. *Surrey’s*, 128 S.W.3d at 509; see COUNTRY CLUB PLAZA, <https://countryclub-plaza.com> (last visited Sept. 22, 2017).

93. *Surrey’s*, 128 S.W.3d at 509. Surrey’s operates pursuant to a city ordinance and has a permit to provide tours on fixed routes, previously approved by a city official. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 510.

97. *Id.*

The court held that because Surrey's "control[led] the location of amusement and entertainment by directing the carriage through the Plaza . . . . The horse-drawn carriages [were] places of amusement [for purposes of] section 144.020.1(2)."<sup>98</sup> Additionally, it concluded that an educational tour was still taxable if it provided an aspect of amusement and entertainment.<sup>99</sup> Surrey's advertised the business as being amusing and entertaining.<sup>100</sup> The court found that Surrey's also "collected fees for 'amusing' and 'entertaining' carriage rides in a place it controlled."<sup>101</sup> Therefore, despite mentioning neither the de minimis test nor the primary purpose test, the court determined that sales tax should be charged and collected under section 144.020.1(2).<sup>102</sup>

#### D. Historical Durability of Section 144.020.1(2)

At the time *Miss Dianna's School of Dance* was being decided, section 144.020.1(2) had not changed for years, although there had been one attempt to do so. In 2014, the Missouri legislature passed legislation that would exempt from taxes fees paid to participate in entertainment, recreation, games, and athletic events.<sup>103</sup> Under House Bill 1179,<sup>104</sup> people would not be charged a sales tax when they paid to participate in an activity but would be charged when they paid to watch an activity.<sup>105</sup> The Senate later approved its own version, but Governor Nixon vetoed the provision in June of 2014.<sup>106</sup> However, in 2016, after the court's decision in *Miss Dianna's School of Dance*, the Senate again introduced another bill to amend section 144.020.<sup>107</sup> This amendment included a provision excluding "places of instruction" from the four percent sales tax imposed under section 144.020.<sup>108</sup> Although Governor Nixon vetoed this bill, the Missouri General Assembly overrode the Governor's veto on September

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The court did not cite to *Spudich*, but it did apply the de minimis test. *See id.* at 509–10. Surrey's did not object to the de minimis test. *See id.*

103. *Mo. House Passes Bill Exempting Sales Tax at Gyms*, YAHOO! FIN. (Apr. 11, 2014), <https://finance.yahoo.com/news/mo-house-passes-bill-exempting-141439748.html>.

104. House members passed the bill 123 to 26. *Id.*

105. For example, sales tax would not be charged when a person enrolls in dance lessons but would be imposed when a person purchases a ticket to watch the dancers perform. Dance classes would qualify for that exemption.

106. MO. SENATE, JOURNAL OF THE SENATE 2 (2014), <http://www.senate.mo.gov/14info/Journals/VDay0109101-105.pdf>

107. *SB 1025*, MO. SENATE, [http://www.senate.mo.gov/16info/BTS\\_Web/Actions.aspx?SessionType=R&BillID=26536215](http://www.senate.mo.gov/16info/BTS_Web/Actions.aspx?SessionType=R&BillID=26536215) (last visited Sept. 22, 2017).

108. *See id.*

14, 2016.<sup>109</sup> This amendment to section 144.020 became effective on October 14, 2016.<sup>110</sup>

#### IV. INSTANT DECISION

The court in *Miss Dianna's School of Dance* split four to three in its decision.<sup>111</sup> Judge Zel M. Fischer wrote the majority opinion, which Chief Justice Patricia Breckenridge, Judge Paul C. Wilson, and Judge Mary R. Russell joined.<sup>112</sup> Judge George W. Draper III dissented, and Judge Laura Denvir Stith and Judge Richard B. Teitelman joined in Judge Draper's dissenting opinion.<sup>113</sup>

##### A. Majority Opinion

The Supreme Court of Missouri held that there are two elements in finding a transaction taxable under section 144.020.1(2).<sup>114</sup> First, there must be a fee or charge.<sup>115</sup> Second, the fee or charge must be paid to a place of “amusement, entertainment, or recreation.”<sup>116</sup> Because none of the three descriptive terms – “amusement,” “entertainment,” and “recreation” – are defined by statute for the purposes of section 144.020.1(2), the court applied the plain and ordinary meaning of the words.<sup>117</sup> Amusement means “pleasurable diversion;”<sup>118</sup> entertainment is “the act of diverting, amusing, or causing someone's time to pass agreeably;”<sup>119</sup> and recreation is interpreted as “a means of getting diversion or entertainment.”<sup>120</sup> From these definitions, the court concluded that a “place of amusement, entertainment or recreation” is one that provides diversion.<sup>121</sup>

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109. *Id.*; MO. REV. STAT. § 144.020.1(2) (2016) (“A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events, except amounts paid for any instructional class . . . .”)

110. § 144.020.

111. *Miss Dianna's Sch. of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405, 405, 410 (2016) (en banc).

112. *Id.*

113. *Id.* at 410.

114. *Id.* at 407–08.

115. *Id.* (citing *Michael Jaudes Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 609 (Mo. 2008) (en banc)).

116. *Id.* (citing *Fitness Edge*, 248 S.W.3d at 609).

117. *Id.* at 408.

118. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 74 (1993)).

119. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 118, at 757).

120. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 118, at 1899).

121. *Id.*

The School argued that it was not a place of “recreation, amusement, or entertainment” for purposes of section 144.020.1(2) and raised two issues before the Supreme Court of Missouri.<sup>122</sup> First, the court considered whether to apply the de minimis test or the primary purpose test in determining whether a business is considered a place of “amusement, entertainment, or recreation.”<sup>123</sup> Second, because the court chose to apply the de minimis test, the court then considered whether amusement, entertainment, and recreation made up more than a de minimis component of the business.<sup>124</sup>

The instant decision mainly hinged on the test utilized when determining whether a business is considered a place of “amusement, entertainment, or recreation.”<sup>125</sup> The court could have either continued the trend of the most recent cases and applied the de minimis test, or it could have rejected the de minimis test and reinstated the primary purpose test set forth in *Columbia Athletic Club*.<sup>126</sup> The School argued that its purpose was to teach students how to dance – not to amuse, entertain, or provide recreation to students.<sup>127</sup> Although this would be relevant to the primary purpose test, the court noted that the primary purpose test was rejected in 2001 and instead chose to apply the de minimis test.<sup>128</sup> As a result, the court found the School liable for \$23,984.92 in past taxes.<sup>129</sup>

In applying the de minimis test set forth in *Spudich*, the court considered (1) whether the manner in which the place holds itself out to the public infers that it is a place of amusement, entertainment or recreation; (2) whether the amount of revenue generated by amusement or recreational activities at the place is significant; and (3) how pervasive the amusement and recreational activities are.<sup>130</sup>

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122. *Id.* at 408–09.

123. *Id.*

124. *Id.* at 409.

125. *See id.* at 408; MO. REV. STAT. § 144.020.1(2) (2016).

126. *See Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 809–10 (Mo. 1998) (en banc), *overruled by Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

127. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 408.

128. *Id.*

129. *Id.* at 407, 410.

130. *Id.* at 408 (citing *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681 n.1 (Mo. 1988) (en banc)).

The School portrayed itself as providing fun and enjoyment.<sup>131</sup> Its website and promotional materials emphasized the fun and enjoyment the participants have when attending the school of dance.<sup>132</sup> Further, it used the enjoyable aspect of the classes to its advantage in advertising.<sup>133</sup>

Next, the Administrative Hearing Commission found<sup>134</sup> that the fees for dance classes amounted to nearly two thirds of the School's gross income for 2010 to 2011.<sup>135</sup> Consequently, nearly two thirds of the School's income was generated by amusement or recreational activities.<sup>136</sup> Therefore, the court held that under the second factor of the de minimis test, the activities in question should be taxed under section 144.020.1(1).<sup>137</sup>

Lastly, the court found that the dance classes were the most pervasive of the School's business activities.<sup>138</sup> Just as in *Fitness Edge* where the court refused to distinguish between self-directed exercise and personal trainers,<sup>139</sup> the court in this case did not distinguish between an instructional dance studio and a self-directed dance studio.<sup>140</sup> The School only offers dance classes.<sup>141</sup> Therefore, the dance classes are the most pervasive of the School's business activities and exceed the threshold for this aspect of the de minimis test.<sup>142</sup>

Additionally, in applying the test from *Wilson's Total Fitness*, the court noted that the School's argument that the classes are intended to be educational does not in itself prove that it is not a place of recreation and enjoyment.<sup>143</sup> Rather, the enjoyment and recreation can be intertwined with the educational aspect of the dancing.<sup>144</sup> Because the primary purpose test has been rejected

131. The School's website described itself as "[a] Dance studio focused on performance quality in a fun and family friendly atmosphere." *Id.* at 406.

132. The School's promotional materials included class descriptions such as "a fun dance & tumbling class," "a fun way to develop your dance and acting skills," and a class "full of energy, fun, and structure." *Id.*

133. Advertisements trying to persuade people to join the School included one that stated that participants "will be amazed at how fun and athletic tap exercises can be," and one that encouraged people to "[t]ake a little 'Me Time' and have some fun with us!" *Id.*

134. Pursuant to the proper standard of review, the Supreme Court of Missouri defers to the Commissions' findings of fact. *Id.* at 407.

135. *Id.* at 409.

136. *Id.*

137. *Id.*; see MO. REV. STAT. § 144.020.1(2) (2016).

138. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 409.

139. See *Michael Jaudes Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 610 (Mo. 2008) (en banc).

140. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 409.

141. See *id.* at 406.

142. *Id.* at 409.

143. *Id.* (citing *Wilson's Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424, 426 (Mo. 2001) (en banc)).

144. *Id.*

and the de minimis test is now applied, the amusement and recreational activities must only make up more than a de minimis portion of the business in order to be taxable under section 144.020.1(2).<sup>145</sup>

After considering each of the three factors set forth in *Spudich* and comparing the School's case to other cases that have applied the de minimis test, the Supreme Court of Missouri concluded that the dance classes provided by the School are taxable under section 144.020.1(2).<sup>146</sup> Amusement or recreational activities comprise more than a de minimis portion of the School's business activities.<sup>147</sup> Therefore, the Commission's decision was affirmed and the School owed \$23,984.93 in unpaid taxes.<sup>148</sup>

### B. Dissenting Opinion

In his dissenting opinion, Judge Draper argued that the School was not a place of recreation under the sales tax law for several reasons.<sup>149</sup> Consequently, he would have reversed the Administrative Hearing Commission's decision.<sup>150</sup>

The majority opinion stated that the decision as to whether amusement activities comprise more than a de minimis portion of the business should be determined on a case-by-case basis, using the factors set forth in *Spudich*.<sup>151</sup> However, Judge Draper asserted that the majority did not conduct a complete analysis because it considered only the three factors specifically set forth in *Spudich*, even though the *Spudich* court noted that these factors are not an exhaustive list.<sup>152</sup> According to the dissent, limiting its consideration to these three factors prevented the court from fully analyzing the School's case and correctly determining that the School is a place of recreation for purposes of section 144.020.1(2).<sup>153</sup>

Judge Draper argued that it is necessary to define "amusement activity" and then determine whether such activity took place at the School.<sup>154</sup> Judge Draper disagreed with the majority opinion, which implied that any kind of dancing is an "amusement activity," no matter the educational value.<sup>155</sup> Even though a participant may enjoy the endeavor, the determination of whether an

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145. *Id.* at 408–09; see MO. REV. STAT. § 144.020.1(2) (2016).

146. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 409.

147. *Id.*

148. *Id.* at 407, 410.

149. *Id.* at 410 (Draper, J., dissenting).

150. *Id.* at 411.

151. *Id.* at 410.

152. *Id.* (citing *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681 n.1 (Mo. 1988) (en banc)).

153. *Id.*

154. *Id.*

155. *Id.*



activity is “amusing” should be viewed in light of the specific facts of the case at hand.<sup>156</sup>

Judge Draper noted that unlike the businesses in *Bolivar* and *Wilson’s Total Fitness Center, Inc.*, the School holds itself out to the public as a school that instructs participants on techniques of dancing.<sup>157</sup> The School does not have a participant-directed portion of its business, and participants are at the school only when they are enrolled in a class.<sup>158</sup> Although the dance classes may be marketed as “fun,” Judge Draper concluded that the “entertaining,” “amusing,” or “recreational” components of the business were de minimis.<sup>159</sup> Therefore, he would not classify the School as a “place of recreation” under section 144.020.1(2) and would reverse the decision of the Administrative Hearing Commission.<sup>160</sup>

## V. COMMENT

Unlike federal statutes, Missouri statutes have no legislative history. As a result, Missouri courts have struggled to ascertain the meaning of “amusement, entertainment, or recreation” within the context of section 144.020.1(2). Missouri legislators attempted to amend the Missouri sales tax statute in 2014 to exempt fees paid to participate in entertainment, recreation, games, and athletic events; however, Governor Nixon vetoed that amendment.<sup>161</sup> Consequently, this statute has created a conflict among all three branches of Missouri government.

Less than three weeks after *Miss Dianna’s School of Dance* was decided, the Missouri Senate introduced a bill exempting places of instruction from the scope of section 144.020.1(2).<sup>162</sup> The bill amended section 144.020.1(2) of the Missouri Revised Statutes to state: “A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events, *except* amounts paid for any instructional class.”<sup>163</sup> The bill passed in both the House and the Senate and was delivered to Governor Nixon on May 25, 2016.<sup>164</sup> But about one month later, Governor Nixon vetoed this bill, as well.<sup>165</sup> He provided a rebuke of the repeal, suggesting that it was a thinly-veiled attempt to chip away at the Missouri sales tax and further damage the

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156. *Id.*

157. *Id.* at 411.

158. Judge Draper contrasted this with athletic and fitness clubs where patrons can get personal training or self-direct their workouts. *Id.*

159. *Id.*

160. *Id.*

161. MO. SENATE, *supra* note 106, at 2.

162. SB 1025, *supra* note 107.

163. MO. SENATE, SENATE BILL NO. 1025 at 7 (2016), <http://www.senate.mo.gov/16info/pdf-bill/tat/SB1025.pdf>; MO. REV. STAT. § 144.020.1(2) (2016).

164. SB 1025, *supra* note 107.

165. *Id.*

state's economy.<sup>166</sup> Both houses overrode the governor's veto on September 14, 2016, and it became law thirty days later, on October 14, 2016.<sup>167</sup>

Although the statute's repeal seemingly ended the debate with respect to the School, the statute raises more questions and leaves taxpayers with more uncertainty. This Part begins by exploring the history of the statutory amendment to section 144.020.1(2). It then examines the ambiguities remaining after the statute's amendment in October of 2016. Finally, this Part evaluates the repercussions of the amendment on future taxpayers.

#### A. *The Conflict Between the Legislative and Executive Branches*

In Governor Nixon's explanation of his veto of the amendment to section 144.020.1(2), he noted that there is Supreme Court of Missouri precedent analyzing the scope of section 144.020.<sup>168</sup> He stated that Senate Bill No. 1025 was an attempt to undermine the law by creating a loophole for entities such as dance studios and gyms.<sup>169</sup> Further, Nixon noted that the legislature was really attempting to "chip away at an area of law that has consistently been applied by the Missouri Supreme Court and diligently followed by the department of revenue over the course of previous and current administrations."<sup>170</sup> Governor Nixon rejected the argument that the provision was necessary to clarify a confusing area of the law, noting that "[e]arlier this year, the Missouri Supreme Court . . . made it clear that activities that constitute amusement or recreation are subject to the tax under existing law even if there is an instructional component."<sup>171</sup> This comment was in reference to *Miss Dianna's School of Dance*.

Governor Nixon also stated that the bill's "unaccounted-for budgetary impact is unsound fiscal policy."<sup>172</sup> He predicted that the statutory amendment, which excluded places of instruction from the scope of section 144.020, would reduce state revenue by \$8 million in 2017.<sup>173</sup> Unfortunately, the budget for 2017 failed to account for this decrease in revenue.<sup>174</sup> Finally, Governor Nixon noted that Senate Bill No. 1025's definition of an instructional class was vague and would likely generate even more litigation and open the floodgates for businesses to urge the legislature to expand this exemption even further.<sup>175</sup> As Governor Nixon predicted, the statutory amendment created even more uncertainty in the application of section 144.020.

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166. MO. SENATE, JOURNAL OF THE SENATE 2 (2016), <http://www.senate.mo.gov/16info/pdf-jrnl/VDAY01.pdf>.

167. *SB 1025*, *supra* note 107; *see* § 144.020.

168. MO. SENATE, *supra* note 166, at 2.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

This legislative enactment was clearly in response to the court's decision in *Miss Dianna's School of Dance*. The quick legislative response proves the uncertainty in section 144.020 and its application. Further, the response proves how important this statute is and how its application could affect the state of Missouri.

*B. Remaining Ambiguities in the Language and Interpretation of the Law*

Missouri sales tax law remains unclear. Although *Spudich* promulgated factors to be considered to determine whether a place is one of "amusement, entertainment, or recreation," these factors are not exhaustive. Additionally, the scope of what constitutes "entertainment" is unknown. Finally, the enactment to improve the Missouri sales tax statute has made this area of law even more ambiguous.

1. Other Factors to be Considered to Determine Whether a Place is One of "Amusement, Entertainment, or Recreation"

Although the court in *Miss Dianna's School of Dance* applied the three specific factors set forth in *Spudich* to ascertain whether a place is one of "amusement, entertainment or recreation," it did not determine the scope of the de minimis test, nor did it add appreciably to the scope and understanding of the factors.<sup>176</sup> Therefore, it is difficult to predict the effect that this case may have on future courts seeking to interpret the statute. As Judge Draper noted in his dissent, the court considered only the three factors specifically set forth in *Spudich*, even though the court in *Spudich* noted that those factors were not exhaustive.<sup>177</sup> However, the court in *Spudich* provided no guidance as to what other factors may be considered, and *Miss Dianna's School of Dance* did not provide any insight as to why it limited its analysis to merely these three factors in the *Spudich* case. Therefore, even if future courts adhere to the de minimis test, the outcomes could still be inconclusive.

Future courts may consider other factors, such as the correlation between the amusing, entertaining, or recreational aspects of the business and the amount of business the company draws in. For example, if only five percent of the company's business would decimate if the amusing, entertaining, or recreational aspects of the business were eliminated, this would show that this aspect is a de minimis portion of the business. If, however, ninety percent of the business's customers would no longer support the business if the amusing, entertaining, or recreational aspect were eliminated, this would show that the amusement, entertainment, or recreational aspect was more than de minimis.

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176. See *Miss Dianna's Sch. of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405, 408 (Mo. 2016) (en banc); *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681 n.1 (Mo. 1988) (en banc).

177. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 410 (Draper, J., dissenting).

Another possible factor that courts may consider is how the business holds itself out to its customers through advertising. In *Surrey's on the Plaza*, Surrey's advertised the business as being amusing and entertaining and was ultimately found to have "collected fees for 'amusing' and 'entertaining' carriage rides in a place it controlled."<sup>178</sup> Therefore, the court determined sales tax should be charged and collected under section 144.020.1(2).<sup>179</sup> Similarly, the School advertised its dance instruction as fun and entertaining.<sup>180</sup> Although the Supreme Court of Missouri did not explicitly state that advertising was a factor in determining the scope of the statute, these two cases seem to add an additional factor in determining whether a business is one of "amusement, recreation, or entertainment" for purposes of section 144.020.

Moreover, *Surrey's on the Plaza* is notable because it illustrates the lack of clarity with respect to the test used to ascertain the scope of section 144.020.1(2). The case also highlights the shortcomings of the law. While the court in *Miss Dianna's School of Dance* used the *Spudich* test as the basis of its decision, the court in *Surrey's on the Plaza* litigated the same issue and did not mention the *Spudich* test.<sup>181</sup> This seems troublesome and reinforces the notion that section 144.020.1(2) is broad with little guidance from case law or statutes.

The indefiniteness of section 144.020 raises concern because it leaves courts free to expand the statute to include a variety of businesses, and it gives businesses no direction. A standard must be set forth to ensure all businesses are treated fairly and equally with respect to sales tax imposition. It is likely that courts will be inconsistent in their application of the rules, which will result in unequal treatment of businesses.

## 2. The Scope of Entertainment

The broad definition of entertainment is specifically troublesome when determining whether summer day camps should be subject to sales tax. During the school year, school-age children attend school all day, which is generally not considered a place of "recreation or amusement." However, the issue of whether various day camps during the summer are considered places of "amusement, entertainment, or recreation" under section 144.020.1(2) is likely to arise. For many children, summer day camps are a place to continue their education while their parents work. Although some day camps are focused primarily on providing fun for children, other day camps are intended to be educational, such as foreign language or math-based camps. Despite the educational nature of these camps, the instructors are likely to add an entertainment element to keep children interested.

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178. *Surrey's on the Plaza, Inc. v. Dir. of Revenue*, 128 S.W.3d 508, 510 (Mo. 2004) (en banc).

179. *Id.*

180. *Miss Dianna's Sch. of Dance*, 478 S.W.3d at 406.

181. *Id.* at 408; see *Surrey's*, 128 S.W.3d at 509–10.

In *Kanakuk-Kanakomo Kamps, Inc.*, the Supreme Court of Missouri addressed this issue and upheld a sales tax for a summer camp.<sup>182</sup> Although this case was decided using the primary purpose test set forth in *Columbia Athletic Club*, it sheds light on this issue in the context of summer day camps.<sup>183</sup> The camps that Kanakuk offers include activities such as soccer, gymnastics, water ziplining, swimming, wall climbing, and juggling.<sup>184</sup> Although each of the activities at Kanakuk “is designed to teach Christian principles in addition to improving athletic skills,” there were no prevailing educational activities.<sup>185</sup>

Further, *Kanakuk-Kanakomo Kamps, Inc.* does not solve the issue of whether camps geared toward education – such as foreign language and math camps – will be found to be places of amusement or entertainment under section 144.020.1(2). If courts follow *Kanakuk-Kanakomo Kamps, Inc.*, they will look to whether recreation is the primary focus of the camp. However, the court in *Miss Dianna’s School of Dance* determined that in order to designate a place as one of amusement, entertainment, or recreation, it must only be shown that a de minimis portion of business stems from those aspects.<sup>186</sup>

### 3. The Statutory Amendment

The legislative amendment to section 144.020, which amends section 144.020.1(2) to state that “[a] tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events, except amounts paid for any instructional class,” does not solve this issue of ambiguity.<sup>187</sup> Courts must still distinguish between places of “amusement, entertainment, or recreation” and places of instruction. For example, with respect to summer camps, the court must still determine whether each specific summer camp is a place of “amusement, entertainment, or recreation” or whether it is a place of instruction and therefore not liable for sales tax under section 144.020. The legislature did not state what amount of the business must be dedicated to instruction for this exception to apply.<sup>188</sup> Therefore, just as courts must decide which test to apply when determining whether a business is a place of amusement, entertainment, or recreation, they must now decide which test to apply to determine whether a business is a place of instruction under section 144.020. The court could decide that if any portion of the business is attributed to instruction, the business is deemed a place of instruction. Alternatively, the court

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182. *Kanakuk-Kanakomo Kamps, Inc. v. Dir. of Revenue*, 8 S.W.3d 94, 98 (Mo. 1999) (en banc).

183. *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 809–10 (Mo. 1998) (en banc), *overruled by* *Wilson’s Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

184. *Kanakuk*, 8 S.W.3d at 95–96.

185. *Id.* at 96.

186. *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 408.

187. MO. REV. STAT. § 144.020.1(2) (2016).

188. *Id.*

could also apply either the de minimis test or the primary purpose test to determine whether a business is a place of instruction. This brings the court back to the original issues of what test to apply and what factors to consider. Specifically, in determining whether a place is one of amusement, entertainment, or recreation, the court still considers factors such as advertising, the way the business holds itself out to the public, and the revenue derived from amusement or entertainment aspects.

Additionally, if the court finds a business to be a place of instruction, the court must decide how to treat this business for sales tax purposes. Just because the recent amendment states that places of instruction are exempt from the four percent sales tax under section 144.020 does not necessarily mean that one hundred percent of the business's revenue is exempt. For example, if a business is deemed to be instructional, but amusement, entertainment, or recreation make up more than a de minimis portion of the business's activities, the court must determine how much of the business's revenue is exempt from sales tax under the new amendment to section 144.020. The statutory amendment did not address this issue, which is concerning and leaves uncertainty for businesses going forward.<sup>189</sup>

The court has two obvious options in applying section 144.020 to businesses with dual functions. First, the court could distinguish between the two components of the business, break the business's activities into two sections, and tax only the portion of the business derived from the amusement, entertainment, and recreational activities. The instructional portion of the business would be tax-free under the amended section 144.020.

The court's other option is to flip the de minimis test and rule that if more than a de minimis portion of the business is attributable to instructional purposes, then all of the business's revenue will be tax-free. For example, if the court determines that a summer camp with both instructional and entertainment aspects has more than a de minimis portion of the camp devoted to instruction, then it must decide whether to exempt all of the camp's revenue from sales tax or whether to exempt only the portion related to instruction.<sup>190</sup>

Another example of ambiguity arising from the amendment is observed in the context of fitness centers, such as the centers in *Columbia Athletic Club* and *Fitness Edge*. Courts must determine whether a business constitutes a place of instruction and whether to apply a partial tax. If the court applies a partial tax, the court must still decide whether amusement, entertainment, or recreation make up more than a de minimis portion of the business's activities.

One might suspect that the court would break the fitness center's business into two components (one relating to personal training and instruction and one relating to free workouts and sporting activities) and tax the portion of revenues

189. See § 144.020.1.

190. It is important to note that the court could also apply the reverse of the primary purpose test in determining whether a business is a place of recreation. However, this Note will only discuss what would happen if the court applied the reverse of the de minimis test because this is the test currently being applied in Missouri.

attributable to the entertaining or recreational portion. However, because the statute is ambiguous as to this issue, the court could hold that all of the fitness center's revenue is tax-free if more than a de minimis portion of the business is attributable to instruction. The court must distinguish between what is recreational and what is instructional. For example, a group fitness dance class may be advertised as fun and enjoyable, but it also could include an instructional component. It should not be the court's role to determine what portion of a sixty-dollar class is allocated to instruction and what portion is allocated to entertainment.

C. *Repercussions of the Court's Decision in Miss Dianna's School of Dance and the Recent Statutory Amendment*

If courts continue to limit themselves to the three specific factors set forth in *Spudich* when determining the scope of section 144.020, as they have in recent years,<sup>191</sup> businesses may be cautious of how they run their day-to-day affairs due to the fear of potential additional taxes. Further, businesses will be forced to focus on the three specific factors set forth in *Spudich* even if other factors provide insight that the business is not a place of amusement, entertainment, or recreation under the de minimis test. Businesses will need to exercise caution and apply strict judgment when advertising. This is troublesome because it is often beneficial for businesses to provide amusement in an educational environment and to portray themselves in advertisements as entertaining.

For example, if a tutoring company is considering how to run its business, it may initially wish to establish a "fun" learning environment. It may install a go-cart track at each of its facilities to attract customers. Each student would use the go-cart track once after his or her tutoring session. The company could use this to its advantage in promotional materials. Under the court's analysis in *Miss Dianna's School of Dance*, even if the tutoring facility's main purpose is to teach children and the go-cart tracks are just an incentive to make tutoring more fun, the court may find the facility as a place of amusement and entertainment for purposes of section 144.020.1(2). *Miss Dianna's School of Dance* could have the negative implication of discouraging companies from improving their business models.

Although it may appear that the new amendment to section 144.020 resolves this issue, it does not. The court must still determine what is enough to classify the business as a place of instruction. Next, if there is more than a de minimis level of recreational activity, the court may still impose taxes on that portion. Therefore, the factors that the court considers in determining whether a place is one of amusement, entertainment, or recreation are relevant. In addition to the factors set forth in *Spudich*, the court may consider other factors, such as the amount of time spent on tutoring compared to the amount of time

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191. See *Spudich v. Dir. of Revenue*, 745 S.W.2d 677, 681 n.1 (Mo. 1988) (en banc).

spent riding go-carts. The court would then need to delve into how to apportion the facility's revenue between amusement and instruction.

Additionally, this decision may affect how businesses advertise. The court considered the business's advertisements and its website in determining whether it was purported to be a place of "amusement" and "entertainment."<sup>192</sup> However, it is not uncommon for businesses to portray themselves in a positive manner to make patrons more excited about the business. For example, grade school, law school, and work can all be "fun," but this does not categorize those as places of recreation, amusement, or entertainment. Just because a business is described as "fun" does not mean it should be required to pay additional taxes. If this factor continues to be a major part of the analysis, businesses may change the way they advertise. If the School would have advertised differently, the court may have held in favor it is. Two businesses that are operated the exact same way could be classified differently merely because the wordings of their advertisements differ. Nonetheless, the School still describes its youth classes as "fun classes to add variety to your dancer's week" and its "Mom & Me" class as "a fun dance class for both mom and child."<sup>193</sup>

The recent legislative enactment does not solve this issue in the context of advertising. The legislature did not determine if all of a business's revenue would be tax-free when part of the business was related to instructional purposes or if only the portion of revenue attributable to instruction would be tax-free. If the court deems that only the portion relating to instruction is tax-free, a business's advertising will still be affected. For example, if a fitness class is advertised as "fun," the court may still tax the portion of the revenue from the fitness class attributable to "recreation" or "entertainment." Several activities, such as dance or fitness classes, have both an instructional and an entertaining aspect. Therefore, courts must still determine which test to apply and on what activities the tax will be imposed.

Each business has different aspects it focuses on to become successful. All businesses want to ensure that customers enjoy their experiences. Further, even if the business's main goal is to "teach" or "instruct," the business will likely try to make this experience enjoyable. If the primary purpose test set forth in *Columbia Athletic Club* were applied, businesses would be able to have multiple focuses without being punished by way of a sales tax.<sup>194</sup> Under this test, an instructional business could include aspects of recreation and entertainment but would not be subject to the sales tax so long as the primary purpose was instructional.<sup>195</sup> Conversely, under the de minimis test, if a particular business has one main purpose, but focuses on other factors to develop a successful

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192. *Miss Dianna's Sch. of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405, 408 (Mo. 2016) (en banc).

193. *MISS DIANNA'S SCH. DANCE*, *supra* note 2.

194. *Columbia Athletic Club v. Dir. of Revenue*, 961 S.W.2d 806, 809–10 (Mo. 1998) (en banc), *overruled by* *Wilson's Total Fitness Ctr., Inc. v. Dir. of Revenue*, 38 S.W.3d 424 (Mo. 2001) (en banc).

195. *Id.* at 810.



business, the business can still be taxed according to the other factors.<sup>196</sup> As long as the “entertaining” or “amusing” element is not a de minimis portion of the business, the business can be categorized as such for tax purposes.<sup>197</sup> Therefore, a business that offers piano lessons, soccer lessons, swimming lessons, and tutoring may be liable for sales tax if there is an “entertaining” or “amusing” factor that makes up more than a de minimis portion of the business. Under the new statutory amendment, only the portion of revenue attributable to instruction may be tax-exempt.

The amendment may also discourage businesses from making learning enjoyable, which could completely change the nature of the business. Businesses have an incentive to offer the best possible services in order to attract customers, and if they are taxed for making their businesses “amusing” or “entertaining,” the businesses may instead focus entirely on the teaching aspect of their businesses and not on making them fun. Places of instruction would likely suffer financially by not advertising their businesses as entertaining and also by actually deciding not to make their businesses entertaining.

Because the statutory amendment only recently became effective, the Supreme Court of Missouri has not yet addressed these issues. While one cannot determine with certainty how the court will rule on these issues, a prediction can be made. It seems that taxing the amusing, entertaining, or recreation portion of the business would be the more fiscally-responsible option for Missouri. If the entire business is deemed tax-free, the State of Missouri’s revenue would decrease substantially. Rather, if the court breaks the business into two components, the court will achieve its objective of not imposing tax on instructional places, while not losing revenue.

Furthermore, Judge Richard B. Teitelman, who joined in the dissent in *Miss Dianna’s School of Dance*, has since passed away, and Judge W. Brent Powell has joined the Supreme Court of Missouri. This is significant because the decision in *Miss Dianna’s School of Dance* was close – a four to three decision. Therefore, Judge Teitelman’s death and the change in the court’s composition contributes to the existing ambiguity in this area of law, as there is no certainty on how Judge Powell will stand on this issue.

Overall, there is still great uncertainty in the application of section 144.020. The questions raised by *Miss Dianna’s School of Dance* remain unanswered and even more uncertainty arises. This uncertainty will influence how businesses advertise and operate day-to-day. Now, businesses will try to incorporate instruction, wherever possible, in hopes of falling into the exception for places of instruction.

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196. See *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 407–10; see also *Spudich*, 745 S.W.2d at 680–82; *Bolivar Rd. News, Inc. v. Dir. of Revenue*, 13 S.W.3d 297, 301–02 (Mo. 2000) (en banc); *Wilson’s Total Fitness Ctr.*, 38 S.W.3d at 425–26; *Michael Jaudes Fitness Edge, Inc., v. Dir. of Revenue*, 248 S.W.3d 606, 609–10 (Mo. 2008) (en banc).

197. E.g., *Miss Dianna’s Sch. of Dance*, 478 S.W.3d at 409.

## VI. CONCLUSION

The future of the Missouri sales tax, as applied to places of entertainment, amusement, and recreation, remains in doubt. It is possible that the Missouri legislature will continue to chip away at the sales tax as predicted by Governor Nixon when he vetoed Senate Bill No. 1025. Whether such legislative actions will erode Missouri's tax base remains to be seen. In addition, a new legislature and new governor, Governor Eric Greitens, may reverse this trend. What remains certain is that Missouri courts will continue to grapple with the scope of section 144.020, especially in light of the Supreme Court of Missouri's decision in *Miss Dianna's School of Dance* and the ensuing statutory reversal of the decision.

