SC No. 88475

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel.
CITY OF BLUE SPRINGS, MISSOURI,

Relator,

vs.

THE HONORABLE W. STEPHEN NIXON,
Circuit Court Judge,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Sixteenth Judicial Circuit
The Honorable W. Stephen Nixon
No. 04CV212577

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This action is a Petition for Writ of Prohibition requesting the Supreme Court direct the Circuit Court to refrain from further proceedings and enter summary judgment in favor of Blue Springs.

Blue Springs approved a proposed plat submitted to the City by Damar Development, Inc. ("Damar") and Markirk Construction ("Markirk"), and these entities proceeded to develop a residential subdivision, subsequently selling a lot to the Stevens. After purchasing their lot, the Stevens claimed they were damaged because excessive rain water flowed through their back yard when it rained. Is Blue Springs liable to the Stevens for voting to allow Damar and Markirk to develop their own private property at a time when the Stevens had no property interest in their lot?

Blue Springs is not liable to the Stevens and summary judgment for Blue Springs is appropriate because Blue Springs has sovereign immunity from the Stevens' negligence claim pursuant to Missouri Statute 537.600 and long standing case law. In addition to immunity from the negligence claim, Blue Springs also has sovereign immunity from the Stevens' claims for inverse condemnation and equitable relief. These related claims are barred because they are based solely on Blue Springs' governmental act of approving a plat. That governmental action is all Blue Springs has done as Blue Springs did not construct the subdivision. Further, Blue Springs does not maintain any drainage system that contributes water to the Stevens' back yard. The water damage the Stevens complain about simply results from rain water falling on about one dozen of the Stevens' uphill neighbors and running through the Stevens' back yard.

Accordingly, this case involves the construction of the sovereign immunity law of the State of Missouri.

STATEMENT OF FACTS

The only Blue Springs' act that could have possibly caused harm to the Stevens was the City's vote to approve a plat. The vote approving the final plat of a proposed subdivision on previously undeveloped property took place on October 18, 1999.[1] On that date the Blue Springs' City Council voted to approve the final plat submitted to it by the property developer and owner. The property owner at that time was Damar and the property developer was Markirk.[2] Following plat approval, Damar and Markirk proceeded to construct a residential subdivision on this previously unimproved property.[3]

As Damar and Markirk developed this new residential subdivision they began to sell individual lots. One of these lots was purchased by Mr. and Mrs. Stevens in June of 2000.[4] The Stevens chose to purchase a lot that happened to be located on the slope of a hill.[5] Uphill from the Stevens' lot were approximately a dozen other lots that now belong to their neighbors.

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[1] Relator's Appendix at 48 and 193.

[2] Relator's Appendix at 48 and 187 and 192.

[3] Relator's Appendix at 48 and 184-185.

[4] Relator's Appendix at 6, Petition at ¶ 34 and Relator's Appendix at 97, Shawn Stevens' deposition at 44:4-9.

[5] Relator's Appendix at 99, Shawn Stevens' deposition at 54:12-21.

At some point, while constructing a house on the lot, the Stevens began to notice that rain water would run through their back yard.[6] They observed that during a rain storm the rain would fall from the sky and in to the back yards of their neighbors. After the rain hit the ground it would then run downhill from one back yard to the next. Eventually, the rain water that had fallen on the back yards of their uphill neighbors would run through the Stevens' back yard. After proceeding through the Stevens' back yard the rain water would continue to run downhill to the next neighbor. This is the Stevens' alleged damage. The rain water has never entered the Stevens' house,[7] even though they lowered the elevation of their back yard by constructing their house with a walkout basement, against the advice of their independent builder.[8]

Mr. and Mrs. Stevens have now sued the City of Blue Springs because rain water flows through their back yard. Mr. and Mrs. Stevens filed this lawsuit even though the rain water never touched any Blue Springs' property before entering the Stevens' back yard. For example, this rain water did not hit a Blue Springs' street before entering the Stevens' property. Likewise, this rain water did not hit a Blue Springs' sidewalk before entering the Stevens' property. Most importantly, this rain water never hit a storm drainage system built or maintained by Blue Springs.[9] In fact, this water never enters a

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[6] Relator's Appendix at 58, Jennifer Stevens' deposition at 12:8-15.

[7] Relator's Appendix at 110, Shawn Stevens' deposition at 97:3-8.

[8] Relator's Appendix at 190.

[9] Relator's Appendix at 50 and 102-103, Shawn Stevens' deposition at 64:10-67:2.

storm drainage system. Instead, the only owners of the property this rain water flowed over before reaching the Stevens' back yard were the one dozen individual lot owners who were the Stevens' uphill neighbors.[10]

Thus, there is absolutely no Blue Springs' property involved in this lawsuit. Accordingly, there is no Blue Springs' property that could be in a defective and dangerous condition. And it is essential for the Stevens to demonstrate a defect in public property creating a dangerous condition in order to state an exception to sovereign immunity. There is certainly no Blue Springs' property being operated in a proprietary fashion, since there is simply no Blue Springs' property involved.

Thus, the issues are three fold: (1) is Blue Springs liable for the rain; (2) is Blue Springs liable for allowing Damar and Markirk to develop their own private property as they saw fit at a time when the Stevens had no ownership interest whatsoever; and (3) is Blue Springs liable for the Stevens' decision to purchase a lot located downhill from their neighbors?

POINTS RELIED ON

I. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in

[10] Relator's Appendix at 65, Jennifer Stevens' deposition at 38:18-39:20.

that Blue Springs does not own any property contributing to the alleged rain water damage.

537.600 R.S.Mo.

Bettinger v. Springfield, 158 S.W.3d 814 (Mo. App. S.D. 2005)

Ressell v. Scott County, 927 S.W.2d 518 (Mo. App. E.D. 1996)

II. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that Blue Springs has not waived sovereign immunity by purchasing insurance and this issue was never raised by the Stevens in the summary judgment briefing.

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

State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621 (Mo. *banc* 1990)

III. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that the Stevens' claim is for property damage only and the exclusive remedy for property damage caused by a public entity is inverse condemnation.

Byrom v. Little Blue Valley Sewer Dist., 16 S.W.3d 573 (Mo. 2000)

Heins Implement v. Hwy. & Transp. Com'n., 859 S.W.2d 681 (Mo. *banc* 1993)

IV. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because Blue Springs took no affirmative act to inversely condemn the Stevens' property in that voting to approve a plat submitted by a private property owner is not an affirmative act that inversely condemns a subsequent purchaser's property rights.

Missouri Constitution, Article I, Section 26

State ex rel. State Hwy. Com'n. v. Swink, 537 S.W.2d 556, 558 (Mo. *banc* 1976)

V. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because the Stevens had no property interest that could be taken in that the vote to approve the plat pre-dated any property interests the Stevens had and thus they had no property that could be inversely condemned.

Barr v. Kamo Elec. Corp., Inc., 648 S.W.2d 616 (Mo. App. W.D. 1983)

Rose v. Riverside, 827 S.W.2d 737 (Mo. App. W.D. 1992)

Crede v. City of Oak Grove, 979 S.W.2d 529 (Mo. App. W.D. 1998)

VI. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the claim for equitable relief because a city has the right to condemn property subject only to paying for the value of the property taken in that an individual citizen cannot compel a public entity to condemn the property of other citizens instead.

George Ward Builders, Inc. v. City of Lee's Summit, 157 S.W.3d 644 (Mo. App. W.D. 2004)

Manzer v. Sanchez, 985 S.W.2d 936, 940 (Mo. App. E.D. 1999)

ARGUMENT

I. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that Blue Springs does not own any property contributing to the alleged rain water damage.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993).

B. Argument

The Stevens' position is epitomized in the Affidavit of Shawn Stevens. There, Mr. Stevens states, "The City of Blue Springs has physically taken my property by approving and authorizing construction of the subdivision with surface water runoff routed through my yard and the backyards of my neighbors in an excessive amount."[11] The act of "approving and authorizing construction" is the governmental action taken by every city in Missouri when it approves a plat. The Stevens would have every city in Missouri be responsible for guaranteeing that every time a private developer builds a subdivision that subsequent lot purchasers would never have an "excessive amount" of rain water pass

[11] Relator's Appendix at 220, Affidavit of Shawn Stevens at ¶ 3 (emphasis added).

through their back yard. This is an impossible burden to place on a city because a city cannot refuse to approve a plat because some people might think too much rain water runs through their back yard.

One of the fundamental flaws in the Stevens' position is that they owned no property right at the time of the alleged action. This is because Blue Springs' act in voting to approve the final plat took place on October 18, 1999. But the Stevens did not purchase their lot until June of 2000. Thus, if approving the plat truly took someone's property then the property that was taken could not belong to the Stevens. The irony is that if Blue Springs' act to approve the plat were a taking, then it would have to be a taking from Damar and Markirk – the very entities that submitted the plat and asked Blue Springs to approve it.

Further, after the vote approving the plat, the physical geography of the subdivision was not concealed from the Stevens in any way. Thus, the Stevens were free to take account of the lot's geography in determining the price they would pay for the lot. For example, the Stevens chose their own home builder who was independent from the subdivision's owner and developer. That home builder, Ed Rockwell, told the Stevens exactly what to expect if they built on this lot. Mr. Rockwell stated in his affidavit:

> In particular, prior to beginning construction, I informed Mr. and Mrs. Stevens that with a home built with a walkout basement Mr. and Mrs. Stevens would be more likely to experience water problems in their backyard. In particular, the walkout basement plan would cause water to flow closer to the residence and alter the path and course that water would

> take across their back yard and make it less suitable for their use and they would have to alter the natural flow of rain water across the rear yard.[12]

Not only was the physical geography not hidden from the Stevens, it was expressly considered by them. Mr. Rockwell explained how the Stevens were fully aware of what they were buying:

> Mr. and Mrs. Stevens told me that they were aware of the risks and they were willing to proceed any way with the walkout basement floor plan against my advice because of an agreement Mr. Stevens had with the developer to jointly work on the rear yard drainage.[13]

The Stevens do not claim the physical geography was hidden from them. Quite to the contrary, Mr. Stevens claims he spoke with Markirk before construction and, "I was told any problem with surface water would be corrected."[14] Notably, the Stevens also have claims against Damar and Markirk for misrepresentation.[15] But while the Stevens may have a misrepresentation claim against Damar and Markirk about who might improve the drainage, the Stevens cannot bring a claim against Blue Springs for inverse condemnation for a condition that they were aware of prior to purchasing the property.

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[12] Relator's Appendix at 190, Affidavit of Ed Rockwell at ¶ 10.

[13] Relator's Appendix at 190, Affidavit of Ed Rockwell at ¶ 11.

[14] Relator's Appendix at 220, Affidavit of Shawn Stevens at ¶ 5.

[15] Relator's Appendix at 9, Petition at Count I.

Although they knew the lay of the land when they bought their property, the Stevens could not identify any Blue Springs' property that drains in to their back yard. For example, Mr. Stevens testified at his deposition that he is unaware of any streets, sidewalks or structures owned by Blue Springs that deposit water in to the Stevens' back yard.[16] Mrs. Stevens testified to the same thing.[17] In fact, Mrs. Stevens agreed "there's no storm drain or anything like that … that is in existence out there somewhere that this water is flowing through."[18]

Despite the complete absence of any storm drain or other Blue Springs' property that contributes to the rain water, the Stevens still contend Blue Springs is somehow operating a drainage system.[19] While the Stevens may have alleged that fact in their Petition,[20] they have come forward with absolutely nothing to support this theory. Even if the Stevens were correct that Blue Springs accepted dedication of the infrastructure improvements,[21] there was never any infrastructure such as a storm drain constructed in the Stevens' back yard or in the back yards of their neighbors. As the Stevens admit, all that is uphill from them are other back yards. The Stevens cannot point to any

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[16] Relator's Appendix at 50 and 102-03.

[17] Relator's Appendix at 50 and 64-65.

[18] Relator's Appendix at 65.

[19] Respondent's Written Return at 3.

[20] Respondent's Written Return at 3.

[21] Respondent's Written Return at 4.

Blue Springs' street, sidewalk or other structure that this rain water flows through or over. Instead, it is gravity that is the cause of their alleged problem.

When Blue Springs pointed out these uncontroverted facts in its summary judgment motion, the Stevens purportedly controverted them without pointing to any evidence whatsoever. But this Court does not need to blindly assume there is any question about these facts. The only factual support the Plaintiffs pointed to for the proposition that Blue Springs somehow contributes to the rain flow is that some water may flow off of lots in the earlier Seventeenth Plat.[22] But as that testimony makes clear, any such rainwater is only that water that never makes it to a Blue Springs' street. Thus, there remains no evidence that Blue Springs has constructed or maintained any storm drainage system that contributes to the Stevens' alleged damage.

The Stevens' mantra in responding to the summary judgment motion was, "Blue Springs approved a plan which allowed surface water to drain through their back yard."[23] Again, the approval was the vote to approve Damar and Markirk's plat. This is a far cry from Blue Springs constructing or maintaining a storm drain. And the "surface water" being referred to is rain water. The appellate courts of Missouri have held, "Generally stated, surface water is water running across land that emanates from natural sources such as rain or melting snow." *Bettinger v. Springfield*, 158 S.W.3d 814, 818 n.2 (Mo. App. S.D. 2005) *citing Happy v. Kenton*, 362 Mo. 1156, 247 S.W.2d 698, 700-01

[22] Relator's Appendix at 211 and 224.

[23] Relator's Appendix at 212, ¶ 35.

(Mo. 1952); *Walther v. Cape Girardeau*, 166 Mo. App. 467, 149 S.W. 36, 38 (Mo. App. 1912). In Missouri, there is a "well established general rule that governmental entities are not liable in inverse condemnation when the damage is the result of natural forces." *Bettinger*, 158 S.W.3d at 820 (plaintiffs' property was not inversely condemned when surface water run-off escaped city's public drainage system); *Ressell v. Scott County*, 927 S.W.2d 518, 521 (Mo. App. E.D. 1996)("Where, as here, the asserted damage is the result of a force of nature, it is the natural force and not a government act that destroys the plaintiff's property interest." *Ressell* also summarizes a number of cases explaining the general proposition that a public entity has no duty to make improvements to prevent natural flooding or water damage. *Id.* Thus, Blue Springs cannot be liable for rain water damage to Plaintiffs' property.

Given that Blue Springs is not operating a storm drainage system then it is obvious there is no merit to the Stevens' arguments that Blue Springs is engaged in a proprietary function. The Court need look no further than the testimony of Mr. and Mrs. Stevens to see that Blue Springs is not operating or maintaining any property that contributes to the rain water that passes through the Stevens' back yard.

> Q. Are you aware of anybody who has any control over the amount of water that flows onto your lot?
>
> A. I don't, to my knowledge, know who's responsible or controls that specifically, the water flows over my lot.[24]

[24] Relator's Appendix at 102, Shawn Stevens' deposition at 63:13-18.

* * * * *

Q. What drainage systems are there around you that the City of Blue Springs has installed?

A. I don't know.[25]

* * * * *

Q. The water that we're talking about is rainfall, correct?

A. Correct.

Q. And that's when you have the problem with water in your back yard, correct?

A. Correct.

Q. And it's only when it rains that you have this problem, correct?

A. Correct.

Q. And the water that falls during these rainfalls is falling on the roofs and yards of your neighbors, correct?

A. Yes.

Q. And then it's running through your yard, correct?

A. Yes.

Q. And what drainage system, if any, is there between the yard of your neighbor's and your yard?

[Objection]

[25] Relator's Appendix at 64, Jennifer Stevens' deposition at 34:11-14.

A. I don't know that there is one.

Q. So there's no storm drain or anything like that that you could point me to that is in existence out there somewhere that this water is flowing through?

A. Correct.[26]

In order for Blue Springs to be operating a drainage system as part of a proprietary function, the Stevens would need to at least show Blue Springs built or maintained a storm drain that affects their property – and Blue Springs never has.

II. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that Blue Springs has not waived sovereign immunity by purchasing insurance and this issue was never raised by the Stevens in the summary judgment briefing.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993).

[26] Relator's Appendix at 65, Jennifer Stevens' deposition at 38:18-39:20.

B. Argument

1. Blue Springs did not waive sovereign immunity by purchasing insurance.

No insurance policy was included among the five pages of exhibits the Stevens attached to their Opposition to Blue Springs' summary judgment motion. The first time the Stevens raised this issue was in Respondent's Written Return to the Preliminary Writ of Prohibition. There, for the first time, the Stevens contended that Blue Springs waived sovereign immunity by purchasing insurance.[27] But, for some reason, the Stevens did not attach any portion of this insurance policy to Respondent's Written Return. Even though the undersigned counsel had provided it to them at their request while Respondents' Written Return was being prepared.[28] Instead, the Stevens only attached Blue Springs' interrogatory responses referencing the existence of a policy.

If the Stevens had attached the applicable policy language, which Blue Springs now provides,[29] it would have been obvious that sovereign immunity had not been waived. This is because the Missouri Supreme Court has already held that the language in the policy at issue does not operate to waive sovereign immunity. The pertinent language reads as follows:

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[27] Respondent's Written Return at 2.

[28] Relator's Appendix at 248.

[29] Relator's Appendix at 242-243.

1.08 This Coverage Document or any amendment to it is not intended to, nor does it waive, nor shall it be construed as waiving in any way whatsoever, any sovereign immunity or official immunity provided to the **Member entities** or their officials, officers or **employees** by the Constitution of the State of Missouri or by any federal, state or local law, ordinance or custom. The terms "sovereign immunity" and "official immunity" shall be given the broadest interpretation allowed by law.

Missouri Statute 537.610.1 provides sovereign immunity is waived "only for the purposes covered by such policy … ." Based upon this, the Missouri Supreme Court has previously ruled that the type of exclusionary language quoted above bars any claim that such an insurance policy waives otherwise applicable sovereign immunity. *State ex rel. Board of Trustees v. Russell*, 843 S.W.2d 353, 360 (Mo. *banc* 1992); *State ex rel. Cass Medical Center v. Mason*, 796 S.W.2d 621 (Mo. *banc* 1990). Therefore, as the Missouri Supreme Court has previously noted, such an insurance policy "did not constitute a waiver of sovereign immunity … ." *Russell*, 843 S.W.2d at 360.

More recently, the Missouri Supreme Court reiterated its position that exclusionary language such as that found here does not waive sovereign immunity. *Amick v. Pattonville-Bridgeton Terrace Fire Prot. Dist.*, 91 S.W.3d 603, 605 (Mo. *banc* 2002). In *Amick*, the Missouri Supreme Court examined language from a policy discussed in the prior appellate case of *State ex rel. Ripley County v. Garrett*, 18 S.W.3d 504 (Mo. App. 2000) overruled on other grounds 915 S.W.3d 605. The *Garrett* policy

excluded coverage "for any liability or suit for damages which is barred by the doctrine of sovereign or governmental immunity … ." *Amick*, 91 S.W.3d at 605. The Missouri Supreme Court then noted the *Garrett* "court of appeals correctly determined that this endorsement preserved sovereign immunity … ." *Amick*, 91 S.W.3d at 605. Given the clear precedent discussing nearly identical language, it is obvious that Blue Springs has not waived sovereign immunity by purchasing liability insurance.

2. The Stevens never raised the insurance issue with the Circuit Court in their summary judgment briefing.

The Stevens raise the issue of liability insurance for the first time in Respondent's Written Return to the Preliminary Writ of Prohibition. This issue was never even mentioned in the Stevens' Response to Blue Springs' summary judgment motion. Given that the Stevens did not raise this issue with the Circuit Court then they should not be allowed to raise it at this late date. "An issue that was never presented to or decided by the trial court is not preserved for appellate review." *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. 2000).

III. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that the Stevens' claim is for property damage only and the exclusive remedy for property damage caused by a public entity is inverse condemnation.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993)

B. Argument

1. Inverse condemnation is the exclusive remedy for property damage caused by a public entity.

"When private property is damaged by a nuisance operated by an entity having the power of eminent domain, the proper remedy is an action in inverse condemnation." *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 (Mo. 2000); *Heins Implement v. Hwy. & Transp. Com'n.*, 859 S.W.2d 681, 693 (Mo. *banc* 1993). It is immaterial that the public entity's negligence caused the nuisance. *Heins*, 859 S.W.2d at 693. Thus, the exclusive remedy for property damage caused by a public entity is inverse condemnation.

2. The Stevens' claim is for property damage only and not personal injury.

The Stevens stated unequivocally in their interrogatory responses that "no one has been physically injured."[30] At their depositions, the Stevens stated they have suffered some stress due to money they have spent related to the alleged property damage,

[30] Relator's Appendix at 162.

although neither has seen a doctor because of this.[31] It may be possible that everyone feels some stress whenever they spend money in a way they do not prefer. But this does not transform property damage into a physical injury. This is especially true in light of Missouri Statute 537.600.

The sovereign immunity statute waives immunity only for injuries actually caused by the dangerous condition of public property. The pertinent part of this statute waives sovereign immunity only:

> if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the coarse of his employment created the dangerous condition … .

537.600 R.S.Mo. The requirement of a dangerous condition requires that there actually be a physical injury. After all, there is no reason to ever consider the property dangerous if there has never been a physical injury.

Relator Blue Springs has not found any reported case in Missouri where a plaintiff prevailed on a dangerous condition claim without a showing of physical injury. In fact, Missouri has been reluctant to allow a recovery for any claim without some showing of physical injury. For example, if a plaintiff wants to bring a claim for intentional

[31] Relator's Appendix at 48, 110 and 160-62.

infliction of emotional distress then the plaintiff must prove "that the distress was medically diagnosable or medically significant." *Duncan v. Creve Coeur Fire Prot. Dist.*, 802 S.W.2d 205, 207 (Mo. App. E.D. 1991) *citing Bass v. Nooney Company*, 646 S.W.2d 765 (Mo. *banc* 1983). Here, the Stevens concede they have never been seen by a doctor for their alleged stress.[32]

If the Court were to assume that the diversion of water gives rise to a tort claim then that claim would be the tort of trespass. *Brown v. H & D Duenne Farms, Inc.*, 799 S.W.2d 621, 630 (Mo. App. S.D. 1990)(diversion of water gives rise to a trespass claim). The Missouri Supreme Court has already held that tort claims for property damage caused by the diversion of water are barred by the doctrine of sovereign immunity. *Heins Implement v. Hwy. & Transp. Com'n.*, 859 S.W.2d 681 (Mo. *banc* 1993).

The burden is on the Stevens to establish an exception to the general rule of public entity immunity for torts. *Best v. Schoemahl*, 652 S.W.2d 740 (Mo. App. E.D. 1983). Further, the provisions of the statute waiving sovereign immunity for dangerous conditions are to be "strictly construed." *Hale v. City of Jefferson*, 6 S.W.3d 187, 196 (Mo. App. W.D. 1999). Given the complete absence of a physical injury, or even stress that is medically diagnosable or medically significant, the Stevens have completely failed to prove the existence of a dangerous condition.

[32] Relator's Appendix at 110, Shawn Stevens' deposition at 95:23-97:2.

IV. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because Blue Springs took no affirmative act to inversely condemn the Stevens' property in that voting to approve a plat submitted by a private property owner is not an affirmative act that inversely condemns a subsequent purchaser's property rights.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993).

B. Argument

A claim for inverse condemnation is brought pursuant to Missouri Constitution, Article 1, Section 26, which provides that "property shall not be taken or damaged for public use without just compensation." "[T]o recover for a claim of inverse condemnation, a plaintiff must show the government appropriated, without formally condemning, some valuable property right which the landowner has acquired by the legal and proper use of his land." *Ressell v. Scott County*, 927 S.W.2d 518, 520 (Mo. App. E.D. 1996). *See also Roth v. State Highway Commission,* 688 S.W.2d 775, 777 (Mo. App. E.D. 1985), *quoting Hamer v. State Highway Commission,* 304 S.W.2d 869, 871 (Mo. 1957).

Missouri courts have recognized two factual scenarios wherein a claim for inverse condemnation against a government entity will lie:

> One situation is where the authority having condemnation power does not condemn a parcel of property but, nevertheless, through mistake or design, actually appropriates the property to public use, i.e. the highway commission constructs a road over the land, part of which was not taken in the condemnation case. Another situation is where the condemning authority does not actually appropriate the property itself to public use but, as a direct consequence of the improvement, the land which has not been condemned nor taken is damaged.

State ex rel. State Hwy. Com'n. v. Swink, 537 S.W.2d 556 (Mo. 1976). The *Swink* court cited *Wells v. State Hwy. Com'n.*, 503 S.W.2d 689 (Mo. 1973), as an example of the second scenario. In the *Wells* case, the plaintiffs successfully prosecuted an inverse condemnation action based on damage sustained to their lake from an accumulation of silt and mud from a nearby highway construction project. *Wells*, 503 S.W.2d at 689. The *Wells* silt accumulation was determined to be an ongoing problem because the highway commission had caused an exaggerated collection of debris during construction by the highway commission.

Both scenarios in *Swink* require an affirmative action on the part of government. In the present case the Stevens are seeking compensation for a constitutional taking of their property by Blue Springs because Blue Springs permitted the prior property owner to develop its own private property. In essence, the Stevens' complaint is Blue Springs

should have exacted public improvements from Damar and Markirk, and thus Blue Springs should be liable for not doing more. But Missouri courts have declined to expand the list of circumstances that give rise to inverse condemnation actions to include factual scenarios wherein governmental inaction is the basis for the claim. *See Ressell*, 927 S.W.2d at 521.

If Blue Springs had demanded some exaction from Damar and Markirk, such as construction of a drainage ditch through the back yards of every lot, then Blue Springs would risk a lawsuit from the developer and prior owner for inverse condemnation. *See State ex rel. Missouri Hwy. & Transp. Com'n. v. Modern Tractor and Supply Co.*, 839 S.W.2d 642, 653 (Mo. App. S.D. 1992) (exactions may result in inverse condemnation); *State ex rel. Missouri Hwy. & Transp. Com'n. v. Sturmfels Farm*, 795 S.W.2d 581, 586 (Mo. App. E.D. 1990)(requiring dedication of property to local government in exchange for right to develop may constitute inverse condemnation). If the Stevens were allowed to proceed with this lawsuit then every city in Missouri could be subjected to inverse condemnation claims by developers for requiring too many public improvements and to inverse condemnation claims by subsequent purchasers for not having required enough public improvements.

This places every city in an untenable position. The common sense solution is to allow private developers to develop their property as they wish, within reason, and if the resulting development is less than perfect then the market will reflect any imperfections in the price the developer can charge subsequent purchasers. In fact, that is exactly what

happened here. The Stevens perceived the imperfections in the lot and bargained for an alleged promise from Markirk to correct any imperfections in drainage.

In any event, Missouri courts have long held that when damage to property is the result of natural forces, it is the natural force, and not the government or city, who is responsible. Most recently the Missouri Court of Appeals Southern District applied those principles in three companion cases[33] that were consolidated and decided under *Bettinger v. City of Springfield,* 158 S.W.3d 814 (Mo. App. S.D. 2005). In the *Bettinger* case, landowners brought an action for inverse condemnation after their property was damaged by surface water that overflowed from a storm water drainage system. *Id.* The Court of Appeals began its analysis by reviewing the holding of *Thomas v. City of Kansas City,* 92 S.W.3d 92 (Mo. App. W.D. 2002), to determine that even though artificially collected, the water that overflows from a drainage system continues to be treated as surface water for purposes of the court's analysis.

The *Bettinger* court relied heavily on *Ressell v. Scott County,* 927 S.W.2d 518 (Mo. App. E.D. 1996), when the court held that the flooding of the plaintiff's property was not the result of anything the city did or failed to do; it was "simply the result of natural forces." *Id.* at 820. The court in *Resselll* noted that when "the asserted damage is the result of a force of nature, it is that natural force and not a government act that

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[33] *Bettinger v. City of Springfield,* 158 S.W.3d 814 (Mo. App. S.D. 2005); *Cross v. City of Springfield,* 158 S.W.3d 821 (Mo. App. S.D. 2005); *Clutter v. City of Springfield,* 158 S.W.3d 822 (Mo. App. S.D. 2005).

destroys the plaintiff's property interest." *Id.* at 521. The court held "that a plaintiff does not state a claim for inverse condemnation under Article I, Section 26 when the asserted damage is the result of some natural force." *Id.*

The court in *Ressel* cited as persuasive authority the case of *Electro-Jet Tool & Mfg. Co. v. City of Albuquerque,* 114 N.M. 676, 845 P.2d 770 (N.M. 1992). In *Electro-Jet,* the plaintiff claimed the city's operation of drainage ditches caused his property to be flooded. *Electro-Jet,* 114 N.M. at 677, 845 P.2d at 771. The court found that the claim of inverse condemnation was insufficient because the plaintiff failed to allege a specific or deliberate act on the part of the government entity that caused the flooding. *Id.* at 679, 845 P.2d at 773.

The Missouri Constitution, Article 1, Section 26, requires just compensation for private property that **has been taken** or **damaged**. Both terms require an affirmative act on the part of the public entity to "take" or to "damage" private property. Inverse condemnation by excessive rainfall must fail as a matter of law, because no affirmative act on the part of the City is involved.

In the present action the Plaintiffs are seeking compensation for a constitutional taking of their property by the City simply because Blue Springs approved a plat that created lots located on the slope of a hill. But more than this is required in order to constitute inverse condemnation.

The focus of the analysis by the Court must be to determine if the City was somehow responsible for the diversion of the surface water. *Heins Implement v. Hwy. & Transp. Com'n.,* 859 S.W.2d 681, 691 (Mo. *banc* 1993). It cannot be shown that the City

actively or affirmatively diverted the rain water that ultimately led to Plaintiffs' alleged damages. Utilizing the reasonable use rule as outlined in *Heins,* the city incurs liability only if the plaintiff establishes that the city's harmful interference with the flow of surface water is unreasonable. Again, that analysis focuses on an affirmative action being taken by the city by interfering with the flow of surface water. *Id.* at 689. In the present case, no evidence was produced that reflected any affirmative action by the City that interfered with or altered the flow of rain water.

Plaintiffs' case is based entirely on the presumption that because of some omission or failure to act by the City, a constitutional taking occurred on October 18, 1999, when the plat was approved. As previously stated, in order for inverse condemnation, or any constitutional taking, to occur a public entity must take some affirmative action to deprive the owner of his land or property rights. Merely alleging a diminution in value is not enough. Merely alleging a destruction of property is not enough. The United States Supreme Court, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980), addressed that very point when it held, "Not every destruction or injury to property by governmental action amounts to a taking in a constitutional sense." *Id.* at 83. Here, Blue Springs took no action to destroy or injure anyone's property.

No such affirmative act exists. Blue Springs asks this Court to find the Plaintiffs did not establish a claim for inverse condemnation under Article I, Section 26 of the Missouri Constitution, and the trial court erred in denying Defendant's Motion for Summary Judgment.

V. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because the Stevens had no property interest that could be taken in that the vote to approve the plat pre-dated any property interests the Stevens had and thus they had no property that could be inversely condemned.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993).

B. Argument

Even if this Court would find a question of fact as to whether Blue Springs' actions or inactions constituted inverse condemnation, the Plaintiffs lack standing to assert such a claim against Blue Springs. The Stevens did not purchase their lot until after Blue Springs gave approval to the plat for development of the subdivision. Therefore, any alleged inverse condemnation on the part of the City took place *before* the Plaintiffs acquired a property interest. Because the alleged taking took place prior to the Plaintiffs having any ownership in the property, they do not have standing to bring an inverse condemnation claim against Blue Springs. *Barr v. Kamo Elec. Corp., Inc.*, 648 S.W.2d 616, 619 (Mo. App. W.D. 1983). A subsequent purchaser cannot recover for inverse condemnation when the ordinance in question was passed by the City prior to the

plaintiff's purchase of the property. *Rose v. Riverside*, 827 S.W.2d 737, 739 (Mo. App. W.D. 1992). As the court explained in *Rose*, "any damage suffered as a result of a taking would have been suffered by [the prior landowner] at the time the ordinance was passed in 1977 and the damage claim would not pass to the appellants as grantees of the land. *Id.* at 738-39. *See also Crede v. City of Oak Grove*, 979 S.W.2d 529, 534 (Mo. App. W.D. 1998)(holding that any damage suffered as a result of a taking would not pass to subsequent grantees of the land.) Thus, the Stevens clearly lack standing.

VI. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the claim for equitable relief because a city has the right to condemn property subject only to paying for the value of the property taken in that an individual citizen cannot compel a public entity to condemn the property of other citizens instead.

A. Standard of Review

The Missouri Supreme Court applies a *de novo* standard of review to summary judgment motions. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. *banc* 1993).

B. Argument

Blue Springs has not taken Plaintiffs' property. But if the Court should conclude Blue Springs has taken Plaintiffs' property, then the Court cannot enter an injunction to

enjoin that taking.[34] Instead, Plaintiffs' sole remedy would be to seek compensation for the alleged lost property right. *George Ward Builders, Inc. v. City of Lee's Summit*, 157 S.W.3d 644, 646 (Mo. App. W.D. 2004)("exclusive and proper remedy for damage to private property caused by a nuisance maintained by a public entity having the power of eminent domain is an action in inverse condemnation"). *See Heins*, 859 S.W.2d 681, 691 (case properly "tried and submitted as an inverse condemnation claim"); *Byrom*, 16 S.W.3d 573, 577 ("proper remedy is an action in inverse condemnation"). Thus, a remedy at law clearly exists.

If the Court were to compel Blue Springs to take some action to prevent rain water from crossing the Stevens' property then Blue Springs would be forced to condemn someone's property in order to do so. This is because all of the rain water is falling on and running across private property. Missouri does not allow a property owner the privilege of choosing someone else to have their property condemned. If Blue Springs has taken some property right of the Stevens by diverting rain water on to their property, which Blue Springs denies, then the Stevens' only remedy is to seek the value of that property right. But the Stevens cannot enjoin a taking.

"To state a claim for injunctive relief, plaintiff must plead he has no adequate remedy at law." *Manzer v. Sanchez*, 985 S.W.2d 936, 940 (Mo. App. E.D. 1999). Here, there is clearly a remedy at law, inverse condemnation, if Blue Springs has damaged Plaintiffs' property. In fact, that is the "exclusive" remedy. Thus, summary judgment should be granted on the equitable claim.

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[34] See Relator's Appendix at 21, Plaintiff's Petition at Count VIII.

CONCLUSION

Relator Blue Springs seeks an order prohibiting the Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment. Blue Springs is entitled to such an order on the negligence claim because Blue Springs has sovereign immunity. In fact, Blue Springs has not constructed or maintained any property that contributes to the alleged damage. Instead, Blue Springs' only act was to vote to approve a plat. The Stevens' only claim is for property damage and the exclusive remedy for property damage caused by a city is inverse condemnation. Blue Springs is also entitled to summary judgment on the inverse condemnation claim because it has taken no affirmative act to condemn the Stevens' property and the Stevens had no property interest at the time Blue Springs voted to approve the plat. Finally, Blue Springs is entitled to summary judgment on the equitable claim because the Stevens' exclusive remedy for property damage caused by a city is inverse condemnation.

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that Relator's Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of Relator's Brief and Appendix Index in Word/PDF format is provided herewith, and has been scanned for viruses and is believed to be virus-free.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06(b). According to the word count of the word processing system used to prepare the Brief, the Brief contains 8,409 words.

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IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel.
CITY OF BLUE SPRINGS, MISSOURI,

Relator,

vs.

THE HONORABLE W. STEPHEN NIXON,
Circuit Court Judge,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Sixteenth Judicial Circuit
The Honorable W. Stephen Nixon
No. 04CV212577

APPENDIX TO RELATOR'S BRIEF

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