

**NO. 88580**

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**IN THE  
SUPREME COURT OF MISSOURI**

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**DONNA J. COLLIER,**

**Respondent,**

**v.**

**CITY OF OAK GROVE, MISSOURI,**

**Appellant.**

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**Appeal from the Circuit Court of Jackson County, Missouri  
Sixteenth Judicial Circuit  
The Honorable Michael Manners  
No. 03CV223403**

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**SUBSTITUTE RESPONDENT'S BRIEF**

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## **STATEMENT OF FACTS**

Although Appellant's Brief spent nearly fourteen (14) pages setting forth a "Statement of Facts", most of those fourteen pages contained arguments and conclusions. In order to comply with Rule 84.04, Respondent offers the following statement of relevant facts:

### **BACKUPS**

Respondent Donna J. Collier purchased her home in Oak Grove, Missouri in September of 1972. (Tr. 318:6). After living in the house for some time, Ms. Collier finished the basement in her home, which was used as a family room. It contained a sofa, a television and a fireplace. (Tr. 330:1-17). Prior to 1992, Respondent had not had any problems with water coming into her basement from any source. (Tr. 330:24). Beginning in March of 1992, she began to suffer a series of recurrent backups of raw sewage into her home after heavy rains. The first backup was in March of 1992 when a mixture of "black, slimy, watery" stuff backed up into the basement area from a floor drain contained in the basement family room. (Tr. 332:11-14). The smell of the raw sewage was sickening and actually made her physically sick. (Tr. 333:23). The backup in March of 1992 also contained actual raw sewage. (Tr. 334:1). After the March 1992 backup, Respondent rented a commercial carpet cleaner and cleaned up the sewage as soon as possible. (Tr. 335:8-10). Ms. Collier received compensation from the

City of Oak Grove for damages that were suffered from the 1992 back up. (Tr. 417:7).

After the backup in March of 1992, Respondent suffered raw sewage backups into her basement family room in June of 1993 (Tr. 337:9); June of 1995 (Tr. 340:2-4); June of 1999 (Tr. 341:16); June of 2001 (Tr. 345:18); May of 2002 (Tr. 350); April of 2003 (Tr. 379:23); early March of 2004 (Tr. 384:15-21); March 26, 2004 (Tr. 386:8-12); July of 2004 and August of 2004 (Tr. 380:10). The backup in May of 2002 was the worst of all of the backups and damaged the entire basement. (Tr. 350:25-351:8). In total, Respondent suffered thirteen (13) backups from 1992 to the time of trial. (Tr. 380:6-10). Eventually, because of significant mold damage and health problems, Respondent moved out of her home in September of 2004. (Tr. 401:25 and Tr. 455).

After each of the backups in question, Respondent talked to numerous city employees and each time she was told that the backup was not the city's problem. (Tr. 350:11). In fact, after the backup incident in 2001, representatives from the city actually came to her home and observed the damage. (Tr. 347:11-14). Also, Ms. Collier sent a certified letter to the City of Oak Grove on December 27, 2001 again informing the Appellant she had suffered a number of backups from 1992 to the date of the letter. (Tr. 348: 19-23).

Several city representatives testified that the City of Oak Grove was aware that it had problems with its sewer system. David Silverstein, an engineer

employed by the city, testified that the City of Oak Grove was aware of problems with its sewer system as early as 1998. (Tr. 207:2-15). Former Mayor James Dent testified that he was mayor from April of 2000 to May of 2004. (Tr. 178:20-21). He was aware of the problems with the sewer system and in fact wrote a letter on behalf of the city to its citizens on October 4, 2004 explaining the issues at hand. (Tr. 180:8-25). Charles Nebgen was the Supervisor of Public Works for the City of Oak Grove from March of 1996 through September of 2002. (Tr. 69:8-13). Mr. Nebgen testified that he noticed problems with the sewer system in Oak Grove from the very first day he got on the job. (Tr. 70:15-19). While Mr. Nebgen was director of public works, a voter information brochure was put out and such brochure included a statement that “many areas of Oak Grove are potentially subject to sewer backup and overflow.” (Tr. 75:9-23). Mr. Nebgen testified that this was in fact the case and that it was still the case at the time of trial. (Tr. 76:1-4). Mr. Nebgen further testified that, although the City of Oak Grove had spent a considerable amount of time and money discussing and studying the problems with its sewer system, it had made little tangible progress toward a solution. (Tr. 78:11-21). Finally, Mr. Nebgen testified that he was frustrated with this not only as the Supervisor of Public Works, but also as a citizen of Oak Grove. (Tr. 79:5-11). Mr. Nebgen did everything he could as the Supervisor of Public Works to convince the Board of Alderman of Oak Grove that something needed to be

done, but nothing was really done to correct the problems with the sewer. (Tr. 80:9-17).

Keith Coggin was a Public Works employee hired by the City of Oak Grove to perform routine maintenance on the city's sewer lines. (Tr. 245:19-20). Mr. Coggin was responsible for videotaping and conducting routine maintenance on the sewer system. While conducting such videotaping, he discovered that the city's sewer main line was cracked and deformed sixty (60) feet north of Respondent's house. (Tr. 260:10-15). In fact, the deformation of the sewer line kept him from putting the camera through the main line. (Tr. 264:16-21).

Gerald Menafee, a consulting engineer with Norton & Schmitt of Kansas City, Missouri testified on behalf of Respondent. Mr. Menafee was the former City Engineer for the City of Gladstone, Missouri and was responsible for overseeing the maintenance of the sewer system for Gladstone, Missouri. (Tr. 757:23-758:23). Mr. Menafee testified that he believed that the City of Oak Grove's sewer system was designed in such a way to handle dry weather flows, but was not designed to meet the requirements of "wet weather events." (Tr. 762:9-15). Essentially, he believed that the city had a serious problem with infiltration and inflow. Inflow is the situation in which people hook their sump pumps and down spouts into the sewer system. Infiltration is when rainwater and other sources of water get into the sewer system through breaks and cracks in the pipes. (Tr. 762:19-763:10). Sewer systems must be designed to take into

account a certain amount of inflow and infiltration. (Tr. 763:11-16). The city would have a duty to inspect the system and determine if any cracks or collapses occur in the sewer system. (Tr. 770:20). Mr. Menafee went on to testify that his review demonstrated that the sewage coming into the home of Respondent Donna Collier was from the city's sewer system. (Tr. 778:21-779:6). Finally, Mr. Menafee testified that, in his expert opinion, the sewage was coming into Respondent's home because of the city's failure to properly maintain its sewer system. (Tr. 789:16).

### **DAMAGES TESTIMONY**

Respondent purchased her home in September of 1972 and testified, in her opinion, her home had a value of between \$90,000.00 and \$100,000.00, without any sewer damage. (Tr. 467:11-18). Respondent further testified, because of the numerous disclosures she would have to give regarding the house, she would not be able to find a willing buyer for her home and it was therefore worthless. (Tr. 468:2-469:9). The disclosures would include the fact that there was mold growing in her basement, which had been discovered as early as 2001. (Tr. 350:1-5). The mold had grown worse over time and Respondent's expert, Glen Beckingham, testified that the mold counts were so elevated during his testing in 2003 and 2005 that the home was not liveable. (Tr. 645:3). In order to make the home liveable, it would be necessary to tear all of the damaged areas out, clean all of the drywall, all of the wood paneled walls,

studs and base plates and have the home retested for mold elevations. (Tr. 645:11-18 and Tr. 648:1-9). The cost for the testing alone would be in the neighborhood of \$1,500.00 to \$2,000.00. (Tr. 647:10-22).

Besides damage done to the real property of Respondent, she also suffered extensive damage to her personal property. Respondent offered Exhibit 41, which included damages to part of her personal property through 2002, and she estimated the damage to that property was approximately \$10,000.00 (Tr. 408:25). [Appendix A1 to A3] Respondent suffered additional backups after May 8, 2002 and Respondent further testified that there were numerous items that would have to be cleaned, thrown out or otherwise destroyed. (Tr. 409). Unfortunately, because of the significant mold accumulation, Respondent was told that items such as photographs, books, etc. will have to be destroyed. (Tr. 401:5-17). Ms. Collier testified it was like all of the pictures and books had burned up and now had no value. (Tr. 401:17). Also, there was testimony regarding repairs that would be needed and additional testing that would need to be done in order that she could move back in to her property. (Tr. 647). The time which Respondent would be forced to be away from her home was uncertain. (Ms. Collier has still not been able to move back into her home at this time). She had been forced to leave her home and all of her possessions and live out of her car. (Tr. 412: 23-25).

While the personal injuries suffered by Respondent are not a direct issue on appeal because that verdict was paid by Appellant, the damages caused by the extensive mold issues do affect the value of the home and the property therein. There was extensive evidence regarding the personal injuries suffered by Respondent Donna Collier. Henry J. Kanarek, M.D. testified as an expert witness on behalf of Respondent and testified that he was a specialist in allergy, asthma and immunology. [Appendix A4 to A19]. Dr. Kanarek treated Donna Collier on several occasions. These sinus infections and other health problems were associated with difficulty breathing and a feeling that she was fatigued. She also suffered from some memory loss and difficulty in concentration. [Appendix A8]. Dr. Kanarek testified that he determined the cause of her illness was the exposure to mold remaining in the basement of her house. [Appendix A9]. Dr. Kanarek further advised her that she should move out of her house. [Appendix A9]. Dr. Kanarek again saw Respondent approximately three (3) months after she moved out of the home, and she was much better since moving out of her home. [Appendix A10]. Dr. Kanarek finally testified that Respondent Donna Collier was basically homeless at the time of trial and that she could not return to her home until the source of the water problem was taken care of, a complete remediation was done and after retesting of the home to make sure there was no further mold in the home. [Appendix A12].

## **JURY VERDICT AND COURT'S JUDGMENT**

The claims of Respondent were submitted in two packages of instructions; one for her claim for inverse condemnation and another for claims for personal injuries. (L.F. 80 -95). After hearing all of the evidence, the jury returned a verdict on both of Respondent's claims in favor of Respondent Donna Collier and against the Appellant, the City of Oak Grove, Missouri. (Tr. 104:5-104:6). The jury found for Respondent Donna Collier on her claim for inverse condemnation against the City of Oak Grove and awarded damages in the amount of \$200,000.00. (Tr. 104:5-104:6). Before the jury was given the instructions from the Court, counsel for Respondent informed the court orally that the Respondent intended to seek prejudgment interest pursuant to applicable case law. (Tr. 985). At that point, both parties agreed that the matter of prejudgment interest **would be decided by the court, not by the jury.** (Tr. 985, 986). After the verdict was rendered, but before the Court entered any judgment, Respondent filed a written Motion for an Award of Prejudgment Interest. Although the Appellant made a statement on the record about objecting to prejudgment interest, no Suggestions in Opposition were filed to this request for prejudgment interest. (See Legal File). The Court entered Judgment accordingly and eventually signed an Amended Judgment on March 17, 2005 granting judgment in favor of Respondent for the total amount of \$399,528.76. (L.F. 121).

## **I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION**

**FOR REMITTITUR BECAUSE THE VERDICT WAS CLEARLY SUPPORTED BY THE EVIDENCE AND DID NOT EXCEED FAIR AND REASONABLE COMPENSATION ALLOWED BY LAW.**

**A. Standard of Review**

Appellant is correct in stating that this Court does not weigh the evidence presented at trial, but, rather, viewing only the evidence that supports the verdict, determines if the verdict is “responsive to evidence on the issue of damages.” Heins Implement v. Mo. Highway Transportation Commission, 859 S.W. 2d 681, 692 (Mo. banc 1993). Put another way, the standard of review has been stated as follows:

In reviewing whether or not a verdict is excessive, this court must consider only the evidence which supports the verdict, and exclude that which disaffirms it. We may not weigh the evidence in a jury tried case. This Court determines only if there is sufficient evidence to support the verdict, and a jury’s verdict will not be set aside unless there is a **complete absence of evidence to support it.**

Missouri Department of Transportation, ex rel. v. Safeco, 97 S.W.3d 21, 40 (Mo. App.

2002). (citations omitted) (emphasis added)

Appellant’s argument regarding Point I discusses ONLY the evidence that disaffirms the verdict, which must be excluded by this court, and completely

ignores any of the evidence that supported the verdict. As shown below, the evidence clearly supported the verdict returned by the jury.

**B. Jury's Verdict was Clearly Supported by the Evidence**

There was substantial evidence presented related to the diminution in value of the home due to the recurrent sewer backups suffered by Respondent. The evidence was that Respondent had endured nearly thirteen (13) years of sewer backups as a result of sewage being dumped into her home by the City of Oak Grove sewer system. There was extensive testimony from the Respondent, her neighbor Gary Payne, and her close friend Otavia Carter. All of these individuals testified regarding the disgusting backups that occurred during all of the occasions over the last thirteen (13) years. Otavia Carter described finding raw feces in the backups and described the backups as "smelling like a bathroom that had not ever been flushed." (Tr. 503). Ms. Carter went on to describe the extreme distress that Respondent had gone through over these years and that she began to start to forget things and was having a lot of breathing difficulties. (Tr. 507). The problems with Respondent's home were so severe that she eventually had to move out of her home on September 17, 2004. (Tr. 455). She has not lived there since.

Donna Collier testified that her home was worth anywhere from \$90,000.00 to \$100,000.00 without and prior to any sewer backups. (Tr. 467). Donna Collier further testified, in her opinion, that the house was **now worthless** because she

would have a very difficult time selling the home due to all of the problems she has had with sewage and mold. (Tr. 467, 468). The jury also heard testimony about the numerous disclosures that would have to be made regarding the sewage problems associated with the home. (Tr. 740, 741, 742, 743, 744). Included in those disclosures would be that the home had endured sewer backups for the last thirteen (13) years in which raw sewage was coming into the home, touching the walls, carpet and floors. (Tr. 743). Also included would be a disclosure that mold had developed to such an extent that both an industrial hygienist and a doctor informed the homeowner that she needed to move out of her home. (Tr. 743). Finally, the expert appraiser retained by the Appellant testified that Respondent would be required to disclose that she had been forced to file suit regarding the property and litigate the matter all the way to a jury trial in Jackson County, Missouri. (Tr. 742).

Obviously, the thirteen (13) years of sewer backups caused an incredible blight to Ms. Collier's home. She testified that she believed the home was worthless and all of the evidence supported such a conclusion. It is apparent that the jury believed Ms. Collier and determined that her home was in fact worthless because of the extensive damage done by the sewage backups. The jury is always free to believe or disbelieve any part of the evidence, which would include Ms. Collier's testimony as to the difference in value of the property. J. B. Contracting, Inc. v. Bierman, 147 S.W.3d 814, 818 (Mo. App. 2004).

Beyond real property damages, there were additional types of damages allowed under the instruction given to the jury which could easily have brought the verdict to the amount of \$200,000.00. First of all, most of Respondent's personal property had been lost or needed to be destroyed because of the extensive damage done to her home. For example, Exhibit 41 was offered by Appellant to show a **partial** list of the personal property she had lost as a result of the sewer backups. [Appendix A 1-3]. Respondent testified that this was only a partial list and included amounts damaged only up through May of 2002. Donna Collier testified that these amounts were likely in excess of what was listed and testified that there were probably additional items that totaled approximately \$10,000.00. (Tr. 408) Therefore, this was not the total amount of the personal property lost. Respondent suffered additional backups after May 8, 2002 and Respondent further testified that there are numerous items that will have to be cleaned, thrown out or otherwise destroyed. (Tr. 409). Also, there were damages testified to regarding repairs that would be needed to the property and additional testing that would need to be done in order that she could move back in to her property. (Tr. 647). Unfortunately, because of the significant mold accumulation, Respondent has been told that items such as photographs, books, etc. will have to be destroyed. (Tr. 401:5-17). Ms. Collier testified it was like all of the pictures and books had **burned up**. (Tr. 401:17). As this Court is aware, the jury is given wide discretion in assessing amounts for damages to personal

property, even when the property owner is not sure of the value of such property. Fletcher v. City of Independence, 708 S.W.2d 158, 176 (Mo. App. 1986). Flanigan v. City of Springfield, 360 S.W.2d 700, 705 (Mo. App. 1962). Therefore, absent a specific showing of passion or prejudice by the jury, this Court should not interfere with such jury verdict “unless it is so egregiously excessive as to offend all sense of right.” Anderson v. Childers, 686 S.W.2d 38, 40 (Mo. App. 1985). Clearly the amounts the jury may have assessed to personal property were not so egregiously excessive to offend any sense of right and, if anything, were probably conservative.

Appellant’s argument also omits the fact that the jury instructions further allowed damages for the loss of use of the property during the time reasonably necessary for the property to be repaired or replaced. (L.F. 90). According to all of the testimony, both from experts and lay witnesses, the amount of time needed to repair the property or correct the problem with the city’s sewer system was uncertain. Therefore, the time of lost use is uncertain and the jury would be free to award such amounts as necessary to compensate Ms. Collier for such loss. Missouri courts have consistently held that there is no precise formula or bright line test to determine compensatory damages. Moore v. Weeks, 85 S.W.2d 709, 716 (Mo. App. 2002). In fact, this is clearly a case in which the damages awarded are not “a mere matter of computation”. This Court put it best in stating the following:

[An award] will not be interfered with, unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or it appears to have been based upon an oversight or mistake or upon a consideration of elements not within the scope of the action. The court should merely consider whether the verdict is fair and reasonable and in the exercise of sound discretion, under all of the circumstances of the case, and it will be so presumed, unless the verdict is so excessive or so outrageous, with reference to those circumstance, as to demonstrate that the jury [has] acted against the rules of the law or [has] suffered their passions, prejudices, or perverse disregard of justice to mislead them.

McCracken v. Swift & Company, 265 S.W. 91, 93 (Mo. 1924).

As to Appellant's contentions that the damages were excessive, it must be noted that Appellant is making many arguments in this Court for the very first time and such arguments should be ignored. It should also be noted that a review of the transcript would demonstrate that not one exhibit regarding damages was entered over the objection of the Appellant. There was also **no objection** made to the substance of **any** of the instructions, including the damages instruction. Appellant cannot now object to damages that were awarded that fell within the instruction given by the trial court, **and not objected to by the Appellant.** There

was no disagreement here as to the types of damages recoverable in this action.

“If the [parties] disagree as to the proper elements of and proper measure of damages, any questions raised should be settled by the Court either at the instruction conference or by its ruling on objections made during the course of the argument.” Crawford v. Smith, 470 S.W.2d 529, 533 (Mo. banc 1971). There was no attempt by Appellant to have any issues resolved by the trial court because, at the time, Appellant apparently had no objection to the types of damages being sought by Respondent.

Further, the verdict was not the result of any evidence presented that invoked some prejudice or passion on the part of the jury. In fact, when you consider that Respondent suffered through raw sewage backing up into her house for nearly thirteen (13) years, the award was extremely reasonable. This award included amounts for the damage suffered to her real property, loss of use of the property allowed under the instructions, and the personal property destroyed by the sewage being deposited into her home. Appellant does not seem to recognize this and would like this Court to take the approach that this was a “partial taking” and nothing more. However, constitutional just compensation does not necessarily mean just the area directly affected by the backups (the basement), but, rather, “just compensation . . . generally speaking, is the fair market value of the land actually taken, and the consequential damages, if any, to the remainder of the land caused by the taking.” State

ex rel. Missouri Highway and Transportation Comm'n. v. Horine, 776 S.W.2d 6, 10 (Mo. banc 1989). (emphasis added).

In summary, the assessment of damages in any jury tried case is primarily a function for the jury. Messina v. Prayther, 42 S.W.3d 753, 760 (Mo. App. 2001).

An appellate court should exercise its power to interfere with the judgment of the jury and trial court with hesitation and only when the verdict is manifestly unjust.

Alcorn v. Union Pacific R.R. Co., 50 S.W.3d 226, 249 (Mo. banc 2001). As discussed above, in determining whether a verdict is manifestly unjust, the appellate court must view the evidence in the light most favorable to the verdict and must remember that a jury is in the best position to make a determination as to what amount will fairly and reasonably compensate a plaintiff for her damages.

The trial court and the jurors have the superior vantage point to view the evidence, observe the witnesses, and evaluate their credibility. Ruzicka v. Rider Student Transp. Ser., Inc., 145 S.W.3d 1, 18 (Mo. App. 2004). The jury in this case listened to five (5) days worth of evidence and numerous arguments on the part of Respondent and the Appellant. They thoughtfully arrived at their award of \$200,000.00 for property damages and this Court should allow such verdict to stand. This is especially true because the verdict not only was awarded by the jury but had the approval of an experienced trial court as evidenced by its overruling a Motion for New Trial and Request for Remittitur. Howe v. ALD

Services, Inc., 941 S.W.2d 645, 651 (Mo. App. 1997). For all of these reasons, the amount of the verdict should not be disturbed.

**II. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S REQUEST FOR PREJUDGMENT INTEREST BECAUSE A LANDOWNER HAS THE RIGHT, AS A MATTER OF LAW, TO PREJUDGMENT INTEREST IN AN INVERSE CONDEMNATION CASE AND THE PARTIES HAD STIPULATED THAT THE COURT WOULD ASSESS THE APPLICABLE PREJUDGMENT INTEREST, RATHER THAN HAVE THE JURY ASSESS THE AMOUNT AS PART OF ITS VERDICT**

Respondent must first point out that Appellant's arguments regarding the issue of prejudgment interest are extremely confusing and difficult to follow. Furthermore, they are arguments that have not been made at any level during the pendency of this case. Respondent will therefore address the appropriateness of the interest award and not attempt to respond to all of Appellant's new arguments.

**A. Constitutional Law and History of Prejudgment Interest**

Respondent's property claims were submitted to the jury under an inverse condemnation theory. Such theory has a constitutional context in that both the United States Constitution and the Missouri State Constitution provide that no citizen shall have their property taken by governmental entity without just compensation. Article One, Section 26 Missouri Constitution. Obviously, just

compensation cannot occur without an award of prejudgment interest from the date the property is taken by the condemning authority. Otherwise, there would be less than adequate compensation for the value of the property taken or damaged by the condemning property.

There is a long history in support of prejudgment interest awards in Missouri case law in cases in which property is taken or damaged by a governmental entity. This history has mostly been found in condemnation proceedings, which by their very nature, involve nearly identical constitutional issues as do inverse condemnation claims. In fact, Missouri courts dealt with this issue many times prior to any legislative action regarding prejudgment interest. Many courts found that, despite any statutory requirement for prejudgment interest, it was appropriate in order to fully compensate the damaged party. In fact, prior to the enactment of a specific statute on the issue, the payment or award of interest in condemnation cases was extensively litigated. For example, the case of Arkansas-Missouri Power Company v. Hamlin, 288 S.W.2d 14 (Mo. App. 1956), provides an extensive review of the case law and reasoning of the courts in the area of interest on condemnation awards. The Hamlin court held that the landowner was entitled to such interest. The court reasoned that interest in condemnation cases is not interest *eo inmine*, but is a :

means of measuring the value of the deprivation of the use of the property, and because it is a part and element of the just

compensation required by constitutional provisions, which are self-enforcing, entirely independent of statute; for when no other method is at hand to determine the landowner's loss for the interim, its allowance for the just compensation is held necessary to preserve the constitutionality of statutory procedures which do not of themselves provide a way for compensating the owner for the period he is kept out of owner's possession without full payment.

Arkansas-Missouri Power Company v. Hamlin, 288 S.W.2d at 17.

**B. Other Jurisdictions Have Consistently Awarded Prejudgment Interest**

**-Required by Constitution**

It has also long been held by other jurisdictions, throughout this country, that a landowner is generally entitled to interest in property cases. 11 S.C. Juris. Damages § 8 (a) (1992). In fact, the United States Supreme Court has said that, in order for a landowner to be compensated fully, the government must:

put the owners in as good a position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking.

Phelps v. United States, 274 U.S. 341, 344, 71 L.Ed 1083, 47 S.Ct. 611 (1927).

The purpose of awarding interest is to compensate the landowner for the delay in monetary payment that occurred after the property has been taken. The addition

of prejudgment interest is designed to pay the landowner for the time value of money that should have been received at the time of the taking and is an element of just compensation. South Carolina Dep't. of Transp. v. Faulkenberry, 337 S.C. 140, 149, 522 S.E.2d 822, 826 (Ct. App. 1999).

Unlike condemnation actions, where interest is now set by statute, the right to prejudgment interest in inverse condemnation actions still stems from the just compensation clauses of the United States and State Constitutions. Vick v. S.C. Dep't. of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). See also Danish Vennerforning and Old Peoples Home v. The State of Nebraska, 205 N.E. 839, 290 N.W.2d 791 (Neb. 1980). (Holding that interest is a matter of strict constitutional right and should run from the date of taking.)

In Sintra, Inc. v. City of Seattle, 96 Wash. App. 757, 761, 980 P.2d 796 (Ct. App. 1999), the court addressed whether prejudgment interest was appropriate within a condemnation setting. In doing so, the court stated that the constitutional mandate for payment of just compensation after private property is taken for public use requires that the property owner be put in the same position monetarily as the owner would have occupied had the property not been taken. The court held that just compensation included prejudgment interest.

The court in Stewart v. City of Key West, 429 So.2d 784, 785 (Ct. App. 1983), stated the following:

The full compensation required by the Constitution in a direct condemnation action is equally required in an inverse condemnation proceeding, (citation omitted) and this constitutional requirement needs no enabling legislation to be effective. ... It is undisputed that Stewart did not have the benefit of his land from the date of taking, nor did he have any compensation until final judgment was entered. In order for Stewart to be made whole, prejudgment interest from the date of taking must be allowed.

Our neighboring state to the west has also decided this issue. The Supreme Court of Kansas held, over twenty-five (25) years ago, that just compensation required the allowance of interest from the date of taking until payment was made in an inverse condemnation case. In Herman v. City of Wichita, 228 Kan. 63, 612 P.2d 588 (Kan. 1980), the court stated the following:

The rule followed in Kansas is the rule generally followed throughout the United States. We have no hesitancy in following the Kansas cases and in holding that, in an inverse condemnation case, just compensation requires an allowance of interest from the date of the taking by the governmental body until payment is made where there is a lapse of time from the date of taking until the time of payment.

The District Court properly allowed interest on the damages awarded prior to the entry of judgment in this case.

Herman, 612 P.2d at 592.

The Herman court examined not only the history of the propriety of such interest in the State of Kansas, but also referred to the fact that numerous other jurisdictions have generally followed such rule in allowing prejudgment interest in inverse condemnation cases. The Herman court was confronted with a claim similar to the one Appellant is making in this case, in that prejudgment interest should not be awarded because an inverse condemnation is an unliquidated claim, until a judgment is rendered, at which time the damages become liquidated. The Supreme Court of Kansas rejected this argument and said that “this court has long recognized the propriety of allowing interest before judgment on damages awarded in inverse condemnation cases.” Herman, 612 P.2d at 591. In fact, close analysis of the Herman opinion reveals that there were similar statutes in place to that in Missouri, allowing for a lower interest rate on eminent domain or condemnation cases. However, the Supreme Court of Kansas held that the statutory rate of interest should be applied because an inverse condemnation case is distinguished from a condemnation appeal taken under the eminent domain procedure act. Therefore, the Supreme Court allowed an even higher rate of interest. In this case, the Respondent requested interest at the rate allowed under the eminent domain statute (six percent) and therefore such amount is completely appropriate and reasonable.

**C. The Trial Court was correct in assessing prejudgment interest because the parties had agreed that Court would assess prejudgment interest, if applicable**

Appellant again presents a very confusing position on the issue of whether the trial court or jury should have assessed prejudgment interest. Page 14 of Appellant's brief makes a vague statement alleging that there is "a strong argument" that the jury should have made the determination as to whether prejudgment interest should be awarded and, if so, the amount. However, it fails to present any arguments to support that position. Perhaps that is because the Appellant realizes it can not do so in good faith because its counsel had unequivocally agreed that the court, not the jury, would assess prejudgment interest. Furthermore, Appellant also must recognize that the judge must decide **whether** such interest would be assessed.

As stated above, the parties agreed **before** the matter was submitted to the jury that the issue of prejudgment interest on this inverse condemnation claim **would and should be decided by the trial judge**. (Tr. 985). Prior to the submission of instructions to the jury and prior to closing arguments, counsel for Respondent notified the Court and the Appellant that she intended to seek prejudgment interest on any successful verdict. (Tr. 985). As the transcript indicates, this was after a lengthy discussion in chambers about this issue in

which it was determined that, because there was no case law directly on point regarding this issue, such issue would be decided by the court. At that point, the trial judge very specifically asked whether the Appellant agreed that this was something that the court needed to decide. (Tr. 986). The exchange between the trial judge and Appellant's counsel went as follows:

*THE COURT: Well, it sounds like a question of prejudgment interest is going to be one of law for me, depending on the outcome of the verdict. **Do you agree it's not something that needs to be submitted to the jury? Is that correct, Mr. Majors?***

*MR. MAJORS: **Yes.** We've known about it.*  
*(emphasis added)*

This agreement therefore became a stipulation between the parties that this matter would be submitted to the judge for a ruling. If Appellant had stated otherwise, there obviously would have been further discussions and Respondent would have had the opportunity to submit the case with the issue of prejudgment interest to the jury. Stipulations are "agreements between counsel with respect to business before the court" and "courts are bound to enforce them." Pierson v. Allen, 409 S.W.2d 127, 130 (Mo. 1966). The Pierson Court stated:

Stipulations varying or altering trial procedure, or waiving the benefit of procedural statutes, have been consistently enforced by our courts in absence of any claim of fraud, duress or mistake, . . .

Pierson v. Allen, 409 S.W.2d at 130. The issue of whether the trial court or jury can assess prejudgment interest and add it to the verdict has actually been held to be one of procedure. The Court of Appeals has previously held that Section 523.045 did not accord the parties a new substantive right, but rather was only a “vehicle by which the substantive right was to be enforced and made effective . . . [and] was only procedural in providing a method and mechanics for its attainment.” State ex rel. State Highway Commission v. Ellis, 382 S.W.2d 225, 230 (Mo. App. 1964). Therefore, the issue of whether the court or the jury should decide the issue was the proper subject of an agreement or stipulation between the parties.

The trial court properly recognized this agreement and properly assessed prejudgment interest. In fact, the appellant did not even file a response to respondent’s request for the trial judge to make such assessment and did not **at any time** raise the issue regarding whether or not the jury should have made this assessment. Therefore, there was obviously no fraud, duress or mistake regarding this issue. Respondent would submit that neither party raised this issue earlier on appeal because it was agreed that the judge would make the decision.

Clearly, all of the parties and the trial court had an agreement that this matter would not be submitted to the jury. The reason for this was simple: once the jury decided that the taking began in July of 1993, which the verdict director

and damages instruction required in order to return a verdict for the Plaintiff/Respondent, **then the date of taking would be established.**

Thereafter, the value of the property would be decided because of the damages instruction given to the jury. Thus, there was no need for the jury to calculate the interest to be awarded. At that point, it was simply a matter of calculation and, because parties agreed to submitting this issue to the judge, the “unsatisfying solution” (Court of Appeals Slip Opinion, p. 33) of submitting the matter to the jury was avoided.

### **CONCLUSION**

Based upon all of the foregoing arguments, the jury’s award should not be disturbed and the trial court’s award of prejudgment interest and the judgment itself should be allowed to stand.

Respectfully submitted:

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**CERTIFICATE OF WORD PROCESSING PROGRAM**

The undersigned hereby certifies that this brief was prepared on a computer, using Word Perfect. A diskette containing the full text of the brief in Microsoft Word format is provided herewith, and has been scanned for viruses and is believed to be virus-free.

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\_\_\_\_\_  
Attorney for Respondent

**RESPONDENT'S CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief herein is in compliance with Rule 84.06(b). According to the word count of the word processing system use to prepare the brief, the brief contains 7,024 words.

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Attorney for Respondent

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the foregoing brief, and a computer diskette containing the full text of the brief, were mailed via U.S. Mail, postage prepaid, this 12<sup>th</sup> day of May, 2006 to James H. Ensz and Steven T. Majors, Ensz & Jester, P.C., 2121 City Center Square, 1100 Main Street, Kansas City, Missouri 64105 - Attorney for Appellant.

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Attorney for Respondent

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