

**NO. SC 84342**

**IN THE MISSOURI SUPREME COURT**

**STATE OF MISSOURI ex rel. MISSOURI DIVISION OF**

**MOTOR CARRIER AND RAILROAD SAFETY,**

**RELATOR,**

**vs.**

**THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE,**

**RESPONDENT.**

*Original Proceeding in Prohibition Against the Circuit Court of Clay County,*

*Missouri, the Honorable David W. Russell, Circuit Judge*

**BRIEF OF RESPONDENT**

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**BRIEF OF RESPONDENT**

**STATEMENT OF FACTS**

Because there are several parties involved herein, Respondent will hereinafter also refer to Relator as “MCRS”, to the Plaintiffs Joe Wyant and Elizabeth Roe as Plaintiffs, to the Defendant City of Excelsior Springs as the “City”, and to the Defendant I & M Rail Link as the “Railroad”. References to Relator’s exhibits will be abbreviated as “R.Ex.”, to the Petition for Writ of Prohibition as “Writ”, to Respondent’s Answer to Relator’s Writ as “Answer”, and to Relator’s brief as “R.Br.”.

When reviewing the facts herein, the Court should be mindful that the issue involving sovereign immunity is narrow. There are four elements to establishing a waiver of sovereign immunity: “(1) a dangerous condition of the property; (2) that the plaintiff’s injuries were a direct result of the

dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of the type of harm suffered by plaintiff; and (4) that the dangerous condition was negligently created by a public employee or that the public entity had actual or constructive notice of the dangerous condition”. *Summit by Boyd v. Roberts*, 903 S.W.2d 631, 635(Mo.App. W.D. 1995). In addition, there is a “threshold question” about whether or not the dangerous condition involves “a public entity’s property”. *Id.* at 634 & 635.

As reflected in its brief and Writ, Relator has admitted that a dangerous condition existed at the railroad crossing and that the dangerous condition proximately caused the injury. Relator does not challenge the sufficiency of the petition as to the elements of foreseeability and notice, but these elements are supported by the pleadings, particularly Paragraph 13. See, R.Ex. B. Although Relator’s arguments have evolved since the filing of its motion to dismiss, Relator appears to be raising two issues: one, whether or not a railroad crossing is public entity property of the MCRS (Writ, Suggestions In Support); and two, even if deemed public entity property, “[i]ntangible acts concerning property, such as a failure to supervise or monitor it or to warn of its dangerous condition, do not create a dangerous condition”. (R.Br. 11).

As reflected in Plaintiffs’ petition for damages, Plaintiffs have alleged that the City has a duty to maintain and keep in a reasonably safe condition both the roadway (McCleary Road) and the railroad crossing because McCleary Road is a city street and because McCleary Road intersects the railroad crossing within the city limits. See, R.Ex. B, Paragraphs 2 and 4. Plaintiffs also allege that the Railroad has a duty to construct and maintain good and sufficient crossings and crosswalks where its railroad crosses public roads, highways, and streets and a duty to construct and maintain said crossings in compliance with the rules and regulations of MCRS and of the City because it owns, leases or

otherwise controls the McCleary Road crossing. See, R.Ex. Paragraph 4. As to Relator, Plaintiffs alleged as follows:

That the Defendant, Missouri Division of Motor Carrier and Railroad Safety (Division) is a state public entity created pursuant to various laws of the State of Missouri, including Chapter 622, RSMo, to exercise regulatory and supervisory powers, duties and functions relating to transportation activities within the State of Missouri, including but not limited to railroad corporations under Chapters 388 and 389, RSMo. Among other things, the Division has the exclusive power and duty to recommend, regulate, establish, and enforce minimum standards pertaining to the construction, maintenance, alteration, and abolition of public and private railway grade crossing, including but not limited to the installation, operation, maintenance, apportionment of expenses, and use of warning devices at railway grade crossings. The Division also had a duty to require Defendant I & M Rail Link and/or Defendant City to construct and maintain a good and sufficient crossing at McCleary Road and/or to warn of any dangerous conditions.

(R.Ex. B, Paragraph 5).

Plaintiffs also identified Relator's alleged negligence:

- a. Failing to require the Defendant City and/or the Defendant I & M Rail Link to maintain the railroad crossing in a reasonably safe condition or in a good and sufficient condition.
- b. Failing to require the Defendant City and/or the Defendant I & M Rail Link to construct the crossing and approach grades in

a reasonably safe condition.

- c. Failing to make or enforce reasonable rules and regulations and minimum standards pertaining to the maintenance and/or construction of the railroad crossing.
- d. Failing to alter or abolish the railroad crossing, at grade or otherwise, to remedy the dangerous condition of the crossing and roadway of McCleary Road.
- e. Failing to require the Defendant City and/or the Defendant I & M Rail Link to warn of the dangerous condition of the railroad crossing.

(R.Ex. B, Paragraph 13).

And, Plaintiff further alleged that MCRS “knew or by using ordinary care could have known of such dangerous conditions in time to remedy, remove, barricade, or warn of such conditions”. Id.

**POINTS RELIED ON**

**POINT ONE**

**Respondent did not err when it denied the MCRS's motion to dismiss because the McCleary railroad crossing as well as all railroad crossings in Missouri are the public entity property of the MCRS in that the Missouri legislature has placed the jurisdiction and control of railroad crossings in the MCRS, in that the Missouri legislature has created and imposed a duty upon MCRS to ensure that railroad crossings are safe for use by the public, and in that the Missouri legislature has granted MCRS the exclusive power to require railroad corporations to construct and maintain safe crossings.**

*Alexander v. State*, 756 S.W.2d 539(Mo.banc 1988).

*Summitt by Boyd v. Roberts*, 903 S.W.2d 631(Mo.App. W.D. 1995).

*Tillison v. Boyer*, 939 S.W.2d 471(Mo.App. E.D. 1996).

*Martin v. Missouri Highway and Transportation Dept.*, 981 S.W.2d 577

(Mo.App. W.D. 1998).

MO.REV.STAT. Section 389.610(1996).

MO.REV.STAT. Section 537.600(1989).

MO.REV.STAT. Section 622.090(2000).

MO.REV.STAT. Section 622.240(1996).

MO.REV.STAT. Section 622.250(1996).

MO.REV.STAT. Section 622.260(1996).

### **POINT TWO**

**Respondent did not err when it denied the MCRS's motion to dismiss because Plaintiffs state a cause of action establishing that the McCleary railroad crossing is the public entity property of the MCRS in that Plaintiffs refer to and invoke the statutory authority placing railroads under the jurisdiction and control of MCRS, in that Plaintiffs identify the duties of MCRS to enforce safety standards as to railroad crossing, and in that Plaintiffs allege that MCRS failed to enforce the safety standards and/or failed to require the City or the Railroad to construct or maintain the crossing and approach grades in a reasonably safe condition and/or failed to require the City or the Railroad to warn of the dangerous condition.**

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303(Mo.banc 1993).

*Ritterbusch v. Holt*, 789 S.W.2d 491(Mo.banc 1990).

*Bowman v. McDonald's Corp.*, 916 S.W.2d 270(Mo.App. W.D. 1995).

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**ARGUMENT**

**POINT ONE**

**Respondent did not err when it denied the MCRS's motion to dismiss because the McCleary railroad crossing as well as all railroad crossings in Missouri are the public entity property of the MCRS in that the Missouri legislature has placed the jurisdiction and control of railroad crossings in the MCRS, in that the Missouri legislature has created and imposed a duty upon MCRS to ensure that railroad crossings are safe for use by the public, and in that the Missouri legislature has granted MCRS the exclusive power to require railroad corporations to construct and maintain safe crossings.**

**Standard of Review**

Because the issues herein involve the waiver of sovereign immunity under MOREV.STAT. Section 537.600 and a construction of that statute, this Court will employ a strict construction standard, but in doing so, the Court will also consider the words in the subject statute and related statutes in their plain and ordinary meaning to ascertain the intent of the legislature. Convoluted and constrictive interpretations should not be adopted. See, e.g., James v. Farrington, 844 S.W.2d 517, 520(Mo.App. W.D. 1992); Dorlan v. City of Springfield, 843 S.W.2d 934, 938(Mo.App. S.D. 1992); Alexander v. State, 756 S.W.2d 539, 542(Mo.banc 1988).

### **Public Entity Property**

As reflected in Section 537.600.1(2), the injury must be “caused by the condition of a public entity’s property . . .”. The term “public entity’s property” is not defined by statute, but it has been addressed in at least five cases – namely, Dorlan v. City of Springfield, 843 S.W.2d 934(Mo.App. S.D. 1992); James v. Farrington, 844 S.W.2d 517(Mo.App. W.D. 1992); Summitt by Boyd v. Roberts, 903 S.W.2d 631(Mo.App. W.D. 1995); Tillison v. Boyer, 939 S.W.2d 471(Mo.App. E.D. 1996); Martin v. Missouri Highway and Transportation Dept, 981 S.W.2d 577(Mo.App. W.D. 1998).

In Dorlan, the injury occurred as a result of a fall which was caused by a dangerous defect in a sidewalk. The “City” owned the sidewalk. 843 S.W.2d at 937. A second defendant, the Regents, owned property adjacent to the sidewalk, having a possibility of a reverter of ownership to the sidewalk if the City abandoned the property. Id. at 937 & 938. In rejecting this type of “ownership” as being

within the definition of public entity's property, the Dorlan Court recognized that the "public entity must control the property in order to take appropriate action" and that the "Regents have no right or obligation to control or maintain the sidewalk regardless of their reversionary property interests". Id. at 938 & 939.

In James, the defendant public entity did not own the premises, but instead leased and actually occupied the premises. The plaintiff alleged that her injuries occurred as a result of a fall which was caused by a dangerous and defective wooden step. She also alleged that the defendant failed to remedy, remove, or warn of the dangerous condition. 844 S.W.2d at 518 & 519. The defendant asserted that the definition of "public entity property" should be "narrowly construed to include only that property which is *owned* by a public entity, regardless of the control it may exert over such property". Id. at 520. (Emphasis in original). The James Court rejected this assertion based upon the dictionary definition of property, the common law of premises liability, and the restatements of torts involving premises liability, ruling that "[u]nder the facts of the present case, a definition of the term 'public entity's property' *includes* the exclusive control and possession of " the premises. Id. (Emphasis ours).

In the Summitt case, the injury occurred on a state highway which the plaintiff alleged to be in a dangerous condition because of a failure to "locate proper signs, including, but not limited to, school crossing signs, flashers, reduce speed limit signs and pedestrian crosswalk areas painted on the pavement". 903 S.W.2d at 633 & 634. The plaintiff named as defendants the "MHTC", the "City", and the "School District". In recognizing that the MHTC was potentially liable, the Summitt Court noted that the highway was the "public entity property" of MHTC because various Missouri statutes placed the jurisdiction and control of highways under the MHTC, including the construction and

maintenance of the highway system, general supervision and control, and the “authority to place danger signals and warning signs”. *Id.* at 635. In recognizing that the highway was not the public entity property of the City or the School District, the *Summitt* Court stated that “[n]either the School District nor the City had exclusive control or possession of the property at issue, AA Highway, the MHTC does”. *Id.* In other words, neither the City nor the School District had any statutory authority or actual ability to control the property. *Id.*, also discussing the *Crofton* and *James* cases.

In *Tillison*, a dead tree was located near the public entity’s property line, but was on private property. 939 S.W.2d at 472. Apparently, the tree fell, striking the plaintiff while she was walking on the public entity’s property. The plaintiff asserted that the public entity was “liable in its failure to warn since it has prior knowledge that parts of the dead tree had previously fallen onto its property”. *Id.* The *Tillison* Court rejected plaintiff’s assertions because “there are no facts alleged in the Tillisons’ petition to show the hospital had control over the dead tree”. *Id.* In so concluding, the *Tillison* Court cited the *Dorlan* and *James* cases for their analyses of the definition of public entity’s property, joining the other districts “in recognizing the term ‘of the property’ *includes* having exclusive control and possession of the property”. *Id.* at 473. (Emphasis ours). The *Tillison* Court also noted that the petition did not “allege that the tree was hanging over or leaning over onto the hospital’s property”. *Id.*

In *Martin*, a tree was located 24½ feet from the roadbed of the highway. After examining various statutes involving MHTC’s jurisdiction and control of the highway system, its responsibility to establish rights of way, and its responsibility to remove obstructions, including trees, the *Martin* Court recognized that “MHTC has control over the surface of the entire right-of-way to the extent necessary for highway purposes to the exclusion of any owner of the fee and is responsible for any cutting or mowing of vegetation growing in the right-of-way necessary for the safety of drivers”. 981 S.W.2d at

580 & 581. The *Martin* Court also concluded that “the facts of the case at bar establish that MHTC assumed a duty to create safe ‘clear zones’ for motorists”. *Id.* at 580.

Thus, the definition of public entity’s property includes premises owned by the public entity, possessed by the public entity, under the statutory jurisdiction and control of a public entity, or under some other type of control which would create a duty upon the public entity to remedy the dangerous condition.

With regard to railroad crossings, numerous statutes place these crossings under the jurisdiction and control of MCRS. For example, Section 389.610.1 bars the construction of railroad crossings “without first having secured the permission of ” MCRS. Section 389.610.3 requires the MCRS to “*make and enforce* reasonable rules pertaining to the construction and maintenance of *all* public grade crossings.” (Emphasis ours). Section 389.610.4 grants MCRS the “*exclusive* power to *determine and prescribe* the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and warning devices of each crossing of a public road, street or highway by a railroad”. (Emphasis ours). And, Section 389.610.5 grants the MCRS the “*exclusive* power to alter or abolish” unsafe crossings. Section 622.090(1) extends the “jurisdiction, supervision, powers, and duties of ” MCRS to all railroads within the state. Section 622.250 grants MCRS the “general supervision of all common carriers” which includes railroads. *See*, Section 622.100(1). MCRS also has the power to investigate, inquire, and require railroads to “maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passenger, customers, and the public”. *See*, Sections 622.240.1 and 622.260.1. In addition, the Court should note that in *Leathers v. Missouri Highway and Transportation Commission*, 961 S.W.2d 631(Mo.App.

W.D. 1995), the Court of Appeals recognized that Section 389.640, now Section 389.610, “conferred upon the PSC [now MCRS] the *exclusive* right to determine whether to permit [railroad] intersections and, if authorized, to specify where, when, and in what manner the intersection should be constructed” as well as the “*exclusive jurisdiction* over the establishment, installation, operation, maintenance and apportionment of expense and protection of such crossings”. *Id.* at 85. (Emphasis ours).

Thus, MCRS has jurisdiction and control over all railroad crossings in Missouri, including the exclusive right to require the City and the Railroad to correct dangerous conditions at railroad crossings and to take actual possession and control of a railroad crossings to the exclusion of the City or Railroad.

Another reason for declaring all railroads to be the public entity property of the MCRS is that various statutes also create and impose a duty upon MCRS to ensure that railroad crossings are safe for use by the public. For example, Section 389.610.3 not only requires MCRS to make, but also to enforce, rules involving the construction and maintenance of all public crossings. Throughout Section 389.610 as well as Sections 622.240, 622.250, and 622.260, the safety of railroad crossings is emphasized, and the legislature has placed such matters under the exclusive jurisdiction and control of MCRS, requiring it to supervise, inspect, investigate, keep informed, and act on its own motion or complaint of others. Even Relator’s name reflects its purpose – Division of Motor Carrier and Railroad Safety. Finally, as recognized by the *Leathers* Court, the legislature has determined that public safety interests are better served by allowing the PSC [now MCRS] to assume jurisdiction over railroad crossings in an effort to avoid injury to the public *before* it occurs”. 961 S.W.2d at 85 & 86.

The Court should also consider a third reason for declaring all railroad crossings to be the public entity property of the MCRS – specifically, that the legislature has granted MCRS substantial powers to enforce safety standards and punish violators. Contrary to Relator’s intimations that the enforcement

process is cumbersome (R.Br. 16-18), the informal and formal procedures for commencing actions and obtaining injunctive relief, the rights of inspection and access to documents and things, the favorable burden of proof, and the penalties for violations as reflected in Sections 622.240 to 620.550 undoubtedly enable the MCRS to effectively deal with any railroad company's opposition to correcting an alleged dangerous condition at a railroad crossing. In addition, for purposes of tort liability, even a simple written notice of the alleged dangerous condition from the MCRS to the railroad company, see, Section 622.260.2, would potentially shift any and all responsibility on the part of MCRS to the railroad because the railroad has a continuing duty to "construct and maintain good and sufficient crossings", see, Section 389.610.2, and because the MCRS could effectively argue that the written notice is just the first step in a potentially lengthy process if the railroad company does not respond in a timely and/or reasonable manner or resists corrective action.

Thus, when determining whether or not certain premises are a public entity's property, if there is an absence of ownership or actual possession, the courts should consider the public entity's nature and extent of jurisdiction and control, the duty to protect the public, and the ability to require the owner or possessor to remedy dangerous conditions. In light of these three factors, MCRS is not merely a regulatory agency as Relator asserts, but also an enforcement agency with a duty to safeguard the public from dangerous railroad crossings. Clearly, railroad crossings are the public entity property of MCRS.

Although the issues herein should end with a determination that railroad crossings are the public entity property of MCRS, Relator raises another issue in Part B of its argument (R.Br. 19-22) which seems to involve an assertion that even if certain premises are a public entity's property, the public entity's failure to perform "intangible acts", such as "a failure to supervise or a failure to warn, does not create a dangerous condition". (R.Br. 20 & 21). Relator basically relies upon four cases: *Tyler*,

Necker, Tillison, and O'Dell. (R.Br. 19-22). Respondent respectfully submits that these cases do not support Relator's propositions. In fact, the Necker and Tillison cases clearly reject such a notion.

The Tyler case is readily distinguishable because the Tyler Court's ultimate holding was based on its conclusion that the premises was not the public entity property of the Housing Authority:

The property in question in the case at bar *was owned by* a Mr. and Mrs. White. *It was not public property* and the only negligence alleged against the housing authority was in its failure to supervise, control and inspect the property of the Whites' enrolled in the Section 8 Existing Housing Program.

781 S.W.2d at 113. (Emphasis ours).

Whether or not this holding would be the same under the "enlightened approach" reflected in Respondent's arguments hereinbefore is unknown since the determination of public entity property should depend upon the concrete facts of each case being analyzed in light of Respondent's proposed three-part test. However, all of the Courts of Appeals have rejected the arguments that the definition of public entity's property is limited to ownership.

In Necker, the Court of Appeals simply recognized well-settled law that for the property or premises "to be dangerous, there must be some defect, *physical* in nature." 938 S.W.2d at 655. (Emphasis ours). Absent a physical defect, "physical deficiency", or "physical threat", there is no duty to "intangibly act", such as to supervise or warn. Id. However, if there is a physical defect, a physical deficiency, or physical threat which creates a dangerous condition, the public entity has a duty to act, whether tangibly or intangibly. Id.

In Tillison, the issue involved whether or not a “non-physical condition can be dangerous because its existence poses a physical threat”. 939 S.W.2d at 473. The Tillison Court rejected this notion, although it did recognize that the dead tree could have been a physical dangerous condition if the tree had been owned by the public entity, located on the public entity’s property, “hanging over or leaning over onto the” public entity’s property, or otherwise under the public entity’s control. Id. at 473 & 474.

In O’Dell, the plaintiff appears to have identified a physical defect in the public entity’s property – namely, a wet ceiling tile located under a leaking steam pipe which collapsed because of the weight of the water. 21 S.W.3d at 56. The O’Dell Court’s reliance on the Necker case for the proposition that “intangible acts such as inadequate supervision . . . do not create a dangerous condition”, id. at 58,, is at first confusing, but is explained by the O’Dell Court’s conclusion that the plaintiff “only argues that MDOC’s failure to inspect the pipes created the dangerous condition on the property of FCC”. Id. (Emphasis ours). The O’Dell Court also declared that “[b]ecause appellant has not alleged any other facts of negligence on the part of MDOC or its employees other than failure to inspect the pipes, her claim does not meet each and every element of the ‘dangerous condition’ exception”. Id. Apparently, the allegations were closer to a situation involving “a public entity’s property, in some remote way, presaged the commission of a tort by another party.” See, Alexander, 756 S.W.2d at 542, discussing Kanagwa. Had the plaintiff alleged that MDOC knew or could have known of the physical condition of the ceiling tile but failed to remove the tile, then there should have been sufficient ultimate facts because the tile would have been the public entity property of MDOC, there would have been a duty of care to protect the visitors in the room, and MDOC would have had the ability to remedy the dangerous condition. The Court should also note that the O’Dell Court

further ruled that the plaintiff failed to prove the “fourth element” of waiver – that is, actual or constructive knowledge of the dangerous condition.

This Court should also note that the *Necker* and *Tillison*, cases actually involve the “first element” of establishing a waiver of sovereign immunity – namely, a dangerous condition of the property. Both cases affirm well settled law that the dangerous condition must be of a physical nature before there is any duty to act, whether tangibly or intangibly. For the purposes herein, Relator has admitted that a dangerous condition existed in the McCleary railroad crossing. (Writ, Paragraph 2). The defect or deficiency in the railroad crossing is physical – “including but not limited to broken asphalt, potholes, uneven and rough surfaces, loose gravel, broken and loose railroad ties, and uneven railroad tracks, combined with a steep downhill slope south of the crossing”. (R.Ex. B, Paragraph 7; R.Br. 6). Based on these allegations, Plaintiffs further alleged that “there was an absence of sufficient warning signs or devices to notify the public of these dangerous conditions”. (R.Ex. B, Paragraph 7). Clearly, “the condition here was dangerous because its existence, without intervention by third parties, posed a physical threat to” Plaintiff’s son. *Alexander*, 756 S.W.2d at 542. Thus, Relator had a duty to tangibly and/or intangibly act.

## **POINT TWO**

**Respondent did not err when it denied the MCRS’s motion to dismiss because Plaintiffs state a cause of action establishing that the McCleary railroad crossing is**

**the public entity property of the MCRS in that Plaintiffs refer to and invoke the statutory authority placing railroads under the jurisdiction and control of MCRS, in that Plaintiffs identify the duties of MCRS to enforce safety standards as to railroad crossing, and in that Plaintiffs allege that MCRS failed to enforce the safety standards and/or failed to require the City or the Railroad to construct or maintain the crossing and approach grades in a reasonably safe condition and/or failed to require the City or the Railroad to warn of the dangerous condition.**

**Standard of Review**

Although numerous cases recite the standard of review as to a motion to dismiss for failure to state a cause of action, Respondent submits the following:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512(Mo.banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a

recognized cause of action, or of a cause that might be adopted in that case.

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306[1,2](Mo.banc 1993).

A petition is sufficient to withstand a motion to dismiss for failure to state a claim if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial. [citations omitted]. It is not to be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. [citation omitted].

Ritterbusch v. Holt, 789 S.W.2d 491, 493[1,2](Mo.banc 1990).

“Evidentiary facts supporting ultimate facts are not required to be pled.” Bowman v. McDonald’s Corp., 916 S.W.2d 270, 279[18](Mo.App. W.D. 1995).

In light of these standards, Plaintiffs have sufficiently stated a cause of action. First, Plaintiffs have invoked substantive principles of law entitling them to relief:

That the Defendant, Missouri Division of Motor Carrier and Railroad Safety (Division) is a state public entity created pursuant to various laws of the State of Missouri, including Chapter 622, RSMo, to exercise regulatory and supervisory powers, ***duties and functions*** relating to transportation activities within the State of Missouri, including but not limited to railroad corporations under Chapters 388 and 389, RSMo. Among other things, the Division has the ***exclusive power and duty*** to recommend, regulate, establish, ***and enforce*** minimum standards pertaining to the construction, maintenance, alteration, and abolition of public and private railway grade crossings, including but not limited to the installation, operation, maintenance, apportionment of expenses, and use of warning devices at railway grade crossings. (Emphasis ours). (R.Ex. B, Paragraph 5).

These allegations refer to Chapter 622, RSMo, and track the various provisions of MO.REV.STAT. Section 389.610, which contain the “substantive principles of law”, placing railroads under the jurisdiction and control of the MCRS. Plaintiffs then allege that ultimate fact that the “Division also had a *duty to require* Defendant I & M Rail Link and/or Defendant City to construct and maintain a good and sufficient crossing at McCleary Road and/or to warn of any dangerous conditions”. (Emphasis ours). Plaintiffs further identify Relator’s failures as to various legal duties, setting forth five acts of negligence, including that MCRS failed to enforce the safety standards and/or failed to require the City or the Railroad to construct or maintain the crossing and approach grades in a reasonably safe condition and/or failed to require the City or the Railroad to warn of the dangerous condition. Plaintiffs also allege that Relator “knew or by using ordinary care could have known of such dangerous conditions in time to remedy, remove, barricade, or warn of such conditions”. (R.Ex. B, Paragraph 13).

Contrary to Relator’s assertion that these allegations “are nothing more than allegations that Railroad Safety failed to perform an intangible act with respect to certain property” (R.Br. 22), these allegations put Relator on notice of that which Plaintiffs will attempt to establish at trial, including that railroad crossings are the public entity property of MCRS, that the physical condition of the McCleary crossing was dangerous because of its existence, and that MCRS’s failure to intervene posed a physical threat to members of the public using the crossing and specifically to Plaintiffs’ son.

### **CONCLUSION**

For the reasons stated hereinbefore, Respondent respectfully requests the Court to affirm his ruling, finding that McCleary railroad crossing as well as all railroad crossings in Missouri are the public

entity property of Relator MCRS and that Plaintiffs have stated a cause of action that McCleary railroad crossing is the public entity property of Relator, and for such other relief as this Court deems just.

*Respectfully submitted,*

***BROWN & BROWN***

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***CERTIFICATE OF MAILING***

I hereby certify that two copies of the foregoing Brief of Respondent were mailed this \_\_\_\_ day of August, 2002, to:

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I further certify that the brief complies with Rule 84.06(b) by not exceeding 27,900 words and that it contains 5,317 words.

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