

SC 88924

IN THE SUPREME COURT OF MISSOURI

**CLAY COUNTY REALTY COMPANY AND
EDITH INVESTMENT COMPANY**

Appellants,

vs.

CITY OF GLADSTONE, MISSOURI,

Respondent.

**Appeal from the Circuit Court of Clay County, Missouri
The Honorable A. Rex Gabbert**

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT¹

Plaintiffs Clay County Realty Company and Edith Investment Company filed suit for damages against defendant City of Gladstone, Missouri on October 20, 2005. I LF 1. The circuit court granted summary judgment by docket entry dated July 16, 2006 (II LF 254 (A2)), which plaintiffs moved to set aside or clarify by motion filed July 27, 2006 (II LF 255).

On September 20, 2006, the circuit court denied plaintiffs' motion to set aside the summary judgment. II LF 276. Plaintiffs filed their notice of appeal on September 29, 2006. II LF 277. Following notice from the court of appeals questioning the existence of a judgment in the form specified by Rule 74.01(a), the circuit court reiterated its decision in a judgment filed November 2, 2006. II LF 286 (A3).

In an opinion filed September 11, 2007, the Missouri Court of Appeals, Western District, reversed summary judgment and remanded to the circuit court to dismiss the action for lack of jurisdiction; the court of appeals then denied an application for transfer on October 30, 2007. On December 18, 2007, this Court granted appellants' application for transfer and now has jurisdiction pursuant to Rule 83 and Mo. Const. Art. V, § 10.

¹ The two-volume legal file will be abbreviated "LF" and cited by volume and page number (*e.g.*, II LF 254). Items contained in the appendix to this brief will be cited parenthetically by page number, *e.g.*, (A2).

STATEMENT OF FACTS

A. Background²

Plaintiffs Clay County Realty Company and Edith Investment Company (collectively “CCR”) own the Gladstone Plaza Shopping Center located in the defendant City of Gladstone, Missouri, consisting of three retail buildings (the “Property”). I LF 7-8. By ordinance passed May 12, 2003, Gladstone declared the Property blighted and in need of redevelopment pursuant to Chapter 353 R.S.Mo. I LF 8. A year later in May 2004, Gladstone entered into a memorandum of understanding with WCP Gladstone Plaza (“WCP”) as redeveloper, but 15 months later in August 2005, Gladstone declared the memorandum no longer in effect and withdrew its designation of WCP as redeveloper of the Property. I LF 8. Also in August 2005, Gladstone began soliciting proposals for a tax increment financing (“TIF”) plan for the Property pursuant to R.S.Mo. 99.800 *et seq.* I LF 8. In October 2005, Gladstone adopted another ordinance designating the Property as blighted and approving a TIF plan, which provides for the use of eminent domain for economic development. I LF 10. Although it adopted a TIF plan, Gladstone failed to approve and adopt a TIF project, which would trigger time limitations regarding effective dates for development and acquisition within the TIF area. I LF 11.

² This summary is based on the first amended petition (I LF 7-14), which Gladstone accepted as true for purposes of its motion. I LF 20, 22.

Following adoption of the first ordinance in May 2003, the tenant and business occupancy rate in the Property dropped substantially and has continued to drop. I LF 9. Substantial portions of the buildings are unoccupied and produce no lease or rent payments to CCR; nevertheless, CCR has ongoing business and operating costs for the entire Property, including insurance, taxes, utilities, repairs, maintenance and general upkeep. I LF 9.

Gladstone has failed to enforce plan timetables for acquisition and redevelopment of the Property, has failed to have an adequately capitalized redeveloper in place, has failed and refused to proceed with actual redevelopment, and has harassed CCR with repeated building inspections and multiple notices of Code violations. I LF 9. Gladstone has actively discouraged tenants and prospective tenants from entering into new leases and/or renewing their leases with customary terms and conditions. I LF 10. Gladstone has failed and refused to take any steps to proceed with effective redevelopment of the Property, which was declared blighted in 2003, or to enforce its ordinance or memorandum of understanding against WCP to whom Gladstone had delegated redevelopment powers. I LF 9. These actions by Gladstone have been taken to destroy CCR's peaceful enjoyment of the Property and CCR's ability to attract and keep tenants and earn a reasonable rate of return on the Property. I LF 9-10.

These actions by Gladstone have resulted in a significant diminution in value of the Property, such that Gladstone has taken the property for public use or purpose but has failed or refused to pay CCR just compensation. I LF 10. Gladstone's actions

have reduced the value of the Property by more than \$5 million and have caused consequential damages after the date of Gladstone's *de facto* taking of not less than \$1.5 million. I LF 10. Such damages are continuing. I LF 10.

B. Procedural history

CCR filed suit on October 20, 2005 and filed the First Amended Petition on November 7, 2005. I LF 1; I LF 7. Gladstone filed its Answer on November 22, 2005. I LF 15. As discovery was getting underway (*see* I LF 2-3), Gladstone on March 15, 2006 filed a Motion for Judgment on the Pleadings or in the Alternative, Summary Judgment. I LF 19-32. For purposes of its motion, Gladstone twice admitted that “[t]he facts pled by the Plaintiffs . . . are to be taken as uncontroverted facts for the purpose of this pending motion” I LF 22. *See also* I LF 20 (for purposes of motion for summary judgment, facts from CCR’s petition “are to be taken as uncontroverted material facts”). Gladstone offered no other evidentiary support for its motion. I LF 20-22. Because Gladstone had already accepted CCR’s facts, CCR’s response did not controvert or supplement the facts; instead, CCR presented legal arguments and authority for denying Gladstone’s motion. I LF 33-39.

In its reply, Gladstone then set forth additional facts and for the first time went outside the pleadings by offering an affidavit and other items totaling 185 pages. I LF 40 to II LF 231. In its sur-reply, CCR responded to each additional fact asserted by Gladstone, arguing that many of these new “facts” were merely self-serving legal conclusions and were not properly supported in the record. II LF 232-42.

Gladstone then served a 2-page motion to strike plaintiffs' responses to Gladstone's motion, arguing that CCR had failed to comply with Rule 74.04 in referencing no specific discovery, exhibits, or affidavits. II LF 243-44. In response, CCR argued that it was unclear what Gladstone sought to strike and that, in any event, Gladstone had improperly expanded the grounds for its dispositive motion on reply. II LF 246-51.

On July 16, 2006, the circuit court ruled in a docket entry as follows:

Upon review of pleadings and argument, Ct. grants Defendant's Motion to Strike P's Responses to D's Motion for Summary Judgment; Ct further finds that there is no genuine issue as to any material fact and that Defendant is entitled to summary judgment as a matter of law; Ct. hereby grants D's alternative motion for S.J. Clerk to send notice to attys of record. ARG

II LF 254 (A2). There is no indication in the docket entry or elsewhere in the record that the court made any ruling on Gladstone's motion for judgment on the pleadings. *See* I LF 1-6; II LF 279-82, 286.

On July 27, 2006, CCR moved to set aside the docket entry granting summary judgment and striking CCR's responses; alternatively, CCR requested that the lower court clarify its decision to indicate whether it had been based on the court's assessment of substantive legal arguments or procedural compliance. II LF 255-64. CCR argued that Gladstone's motion was merely one for judgment on the pleadings because Gladstone had accepted CCR's allegations as true and offered no evidence

outside the pleadings. II LF 260 n.1. CCR further argued that even if Gladstone's motion were construed as one for summary judgment, it was defective because it failed to demonstrate a right to judgment as a matter of law and therefore failed to shift any burden to CCR as nonmovant. II LF 259-62. Moreover, CCR argued that Gladstone violated the procedural rules governing summary judgment when, for the first time on reply, it changed its legal and factual approach and submitted extrinsic evidence only after CCR's one opportunity to file its own statement of additional material facts had passed. II LF 259-62, 270-75.

By docket entry dated September 20, 2006, the circuit court denied CCR's motion to set aside summary judgment and provided no clarification as to its rationale. II LF 276. This decision was set forth in a judgment in compliance with Rule 74.01 filed November 2, 2006. II LF 286 (A3). CCR filed its notice of appeal on September 29, 2006. II LF 277-85. *See* Mo. Sup. Ct. R. 81.05(b).

POINTS RELIED ON

- I. The circuit court erred in granting Gladstone's motions for summary judgment and to strike CCR's responses because Gladstone failed to establish a right to judgment in its initial motion papers and Gladstone improperly offered new facts for the first time in reply in that (a) Gladstone admitted CCR's alleged facts showing aggravated delay and untoward activity by Gladstone with respect to CCR's property such that the facts stood uncontroverted after CCR's initial response, (b) the City then changed its theory on reply by attempting for the first time to controvert such allegations with extrinsic evidence, and (c) CCR was thereby deprived of its one and only opportunity under Rule 74.04(c) to affirmatively set forth the evidence supporting CCR's allegations in its own statement of additional material facts.**

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993)

E.O. Dorsch Electric Co. v. Plaza Construction Co.,

413 S.W.2d 167 (Mo. 1967)

Frazier v. Riggle, 844 S.W.2d 71 (Mo. App. 1992)

Cross v. Drury Inns, Inc., 32 S.W.3d 632 (Mo. App. 2000)

Mo. Sup. Ct. R. 74.04(c) (A5)

- II. The circuit court erred in granting summary judgment because Gladstone failed to establish a right to judgment as a matter of law in that there were**

genuine issues of material fact created by Gladstone’s self-contradiction as to whether Gladstone had engaged in aggravated delay and untoward activity with respect to CCR’s property so as to support a cause of action for damages under Missouri law.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993)

Land Clearance for Redevelopment Authority v. Morrison,

457 S.W.2d 185 (Mo. banc 1970)

State ex rel. Washington University Medical Center Redevelopment

Corp. v. Gaertner, 626 S.W.2d 373 (Mo. banc 1982)

Roth v. State Highway Comm’n, 688 S.W.2d 775 (Mo. App. 1984)

Mo. Const. Art. I, § 26 (A4)

III. The circuit court erred in granting summary judgment because any federal exhaustion requirement for an inverse condemnation claim was inapplicable as a matter of law in that CCR brought this suit in a Missouri court and asserted claims cognizable there.

Roth v. State Highway Comm’n, 688 S.W.2d 775 (Mo. App. 1984)

Stafford v. Muster, 582 S.W.2d 670 (Mo. banc 1979)

Mo. Const. Art. I, § 26 (A4)

IV. Notwithstanding the opinion of the court of appeals to the contrary, the circuit court had jurisdiction and this matter is ripe because an injured person has a constitutionally mandated remedy via an action for damages,

and because a claim for pre-condemnation damages against a municipality is actionable even though the full extent of damages may be unknown and could be affected by subsequent municipal action, in that CCR alleged it had already sustained damages resulting from Gladstone's wrongful conduct.

Dixon v. Shafton, 649 S.W.2d 435 (Mo. banc 1983)

Davis v. Laclede Gas, 603 S.W.2d 554 (Mo. banc 1980)

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Mo. Const. Art. I, § 14 (A9)

ARGUMENT

Introduction

The circuit court granted summary judgment without explanation and declined CCR's request to clarify its rationale. Whether analyzed in terms of procedural requirements or substantive legal principles, the decision below was erroneous and should be reversed for any one or more of the following reasons.

First, the circuit court erred in granting summary judgment because Gladstone failed to adhere to the procedural standards for summary judgment under Missouri law by failing to establish a right to judgment in its initial motion papers and by offering a new theory and new facts in reply. For purposes of its motion, Gladstone accepted as uncontroverted the facts alleged by CCR, and CCR responded to the motion on that basis. The court erroneously permitted Gladstone to change its theory for summary judgment on reply, after the initial motion and response had been filed and only after CCR's one opportunity under Rule 74.04(c)(2) to file its own statement of additional facts had passed. The court also erroneously granted Gladstone's request to strike CCR's responses, even though Gladstone had failed to establish a right to judgment as a matter of law and therefore had failed to impose on CCR any obligation to respond. Because summary judgment procedures must be strictly followed to assure fairness and due process, the judgment should be reversed to restore CCR's right to pursue its cause of action.

Second, even if there had been no such procedural error, summary judgment was improper because Gladstone's own submissions raised a genuine dispute of

material fact under the substantive legal standards governing CCR's claims. There were genuine issues of material fact as to whether Gladstone engaged in "aggravated delay" and "untoward activity" with respect to CCR's property so as to support CCR's cause of action under Missouri law. CCR pleaded such facts in its first amended petition, and the summary judgment record contained Gladstone's admission that CCR's pleaded facts were uncontroverted. Even though Gladstone later tried to dispute those facts, CCR was entitled to have this contradictory record viewed in the light most favorable to CCR as the nonmovant, and Gladstone's admission therefore defeated its motion for summary judgment.

Third, to whatever extent the lower court may have relied on Gladstone's alterative argument asserting a federal exhaustion requirement for actions alleging inverse condemnation claims, the court erred because this action was filed in state court and included state and federal claims cognizable there. Whatever exhaustion requirement may exist in federal court is inapplicable in this forum.

Finally, although the circuit court committed reversible error for both procedural and substantive reasons, it had jurisdiction and will have jurisdiction on remand for the continued prosecution of this action by CCR. As explained in Point IV of this substitute brief, the court of appeals incorrectly applied the concept of ripeness to deprive CCR of the right to pursue a claim for the damages it has already sustained—regardless of whether those damages are also continuing by reason of Gladstone's continued wrongdoing. CCR has a well recognized and constitutionally

protected remedy for damages in the circumstances presented here, as confirmed by decisions from this Court.

Standard of Review for All Points

“The propriety of summary judgment is purely an issue of law.” *Firestone v. VanHolt*, 186 S.W.3d 319, 323 (Mo. App. 2005) (internal quotation omitted).

Therefore, appellate “review is essentially *de novo*.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

Because the trial court’s decision rests on the record submitted and the law, “an appellate court need not defer to the trial court’s order granting summary judgment.” *Firestone*, 186 S.W.3d at 323 (quoting *ITT Commercial Finance*).

“The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” *ITT Commercial Finance*, 854 S.W.2d at 376. “When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.” *Id.*; accord *Firestone*, 186 S.W.3d at 323 (nonmovant also receives the benefit of all reasonable inferences from the record).

I. The circuit court erred in granting Gladstone’s motions for summary judgment and to strike CCR’s responses because Gladstone failed to establish a right to judgment in its initial motion papers and Gladstone improperly offered new facts for the first time in reply in that (a) Gladstone admitted CCR’s alleged facts showing aggravated delay and

untoward activity by Gladstone with respect to CCR’s property such that the facts stood uncontroverted after CCR’s initial response, (b) the City then changed its theory on reply by attempting for the first time to controvert such allegations with extrinsic evidence, and (c) CCR was thereby deprived of its one and only opportunity under Rule 74.04(c) to affirmatively set forth the evidence supporting CCR’s allegations in its own statement of additional material facts.

A. Summary Judgment Requirements and Procedures

“The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993); *accord Pyle v. Layton*, 189 S.W.3d 679, 682 (Mo. App. 2006); *Collins v. Mo. Bar Plan*, 157 S.W.3d 726, 731 (Mo. App. 2005). A party seeking summary judgment must marshal the evidence and authorities showing a right to judgment as a matter of law as part of its initial submission; if the movant fails to do so, the nonmovant has no obligation to respond. *ITT Commercial Finance*, 854 S.W.2d at 381; *E.O. Dorsch Electric Co. v. Plaza Construction Co.*, 413 S.W.2d 167, 173 (Mo. 1967). “When, *and only when*, the movant has made the prima facie showing required by Rule 74.04(c), Rule 74.04(e) [*see* current Rule 74.04(c)(2)] places burdens on the nonmovant.” *ITT Commercial Finance*, 854 S.W.2d at 381 (emphasis added). Significantly, *ITT Commercial Finance* favorably cites *E.O. Dorsch Electric* for the proposition that summary judgment was “improper, despite nonmovant’s failure to file counter-

affidavits and create a material issue of fact, because movant had not established a right to judgment as a matter of law.” 854 S.W.2d at 380. *Accord D’Arcy & Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 30 n.3 (Mo. App. 2004) (trial court erred in placing any burden on nonmovant where movant did not establish a right to summary judgment as a matter of law).

A movant for summary judgment gets no second chance to alter or supplement facts that stand uncontroverted by the nonmovant; if the movant wishes to change or add to the theory supporting summary judgment, the movant should withdraw the original motion and file a new or amended motion. *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 636-37 (Mo. App. 2000) (summary judgment reversed and remanded where additional pleadings and record materials “did not come into the summary judgment record as part of the initial motion or response and thus were not authorized by Rule 74.04(c)”; *Sloss v. Gerstner*, 98 S.W.3d 893, 898 (Mo. App. 2003) (“no case has sanctioned the filing of materials raising new factual issues, grounds, or arguments” in a summary judgment reply); *see also Hanna v. Darr*, 154 S.W.3d 2 (Mo. App. 2004) (reversing summary judgment improperly entered based on a motion in limine).³

³ As discussed below, the current version of Rule 74.04(c) is even more explicit in this regard and only permits a movant to later submit additional factual material if—unlike this case—the nonmovant’s “response sets forth additional material facts that remain in dispute.” Rule 74.04(c)(3). *See also* Rule 74.04(c)(4)

“A defending party is not entitled to full summary judgment, unless he alleges undisputed facts demonstrating that the plaintiff cannot recover on any theory pled.” *Firestone v. VanHolt*, 186 S.W.3d 319, 324 (Mo. App. 2005) (internal quotation omitted); accord *Allen v. Midwest Institute of Body Work & Somatic Therapy, L.L.C.*, 197 S.W.3d 615, 619 (Mo. App. 2006) (movant not entitled to full summary judgment unless motion successfully challenges all theories in plaintiff’s case); *Hagen v. McDonald’s Corp.*, 231 S.W.3d 858 (Mo. App. 2007) (reversing summary judgment where motion failed to challenge or address one of plaintiff’s theories for relief). Nor is a defendant entitled to summary judgment based on a motion that fails to address the cause of action as pleaded by the plaintiff. *Frazier v. Riggle*, 844 S.W.2d 71, 73 (Mo. App. 1992).

The defendant in *Frazier* obtained summary judgment based on the plaintiff’s deposition testimony; however, the facts allegedly admitted by the plaintiff were immaterial to the cause of action as pleaded. The court reversed summary judgment even though the plaintiff had filed no response in opposition to the motion. “Our initial focus is not upon what plaintiff failed to do in response to defendant’s summary judgment motion, but rather upon the sufficiency of the supporting evidence defendant filed to sustain his burden of establishing the absence of any genuine issue of material fact.” 844 S.W.2d at 73. Despite the general rule that a party may not rely

(nonmovant’s ability to file a sur-reply arises only “if movant files a statement of additional material facts pursuant to Rule 74.04(c)(3)”).

solely upon the allegations of the pleadings in resisting summary judgment, “those allegations not controverted by the affidavits and other supporting documents of the movant may be considered as admitted by the moving party.” *Id.* at 73-74 (internal quotation omitted).

Rule 74.04 (A5) was amended in 2003 to reinforce these longstanding requirements with more detailed procedural steps for summary judgment. *See generally Hart v. Kupper Parker Communications, Inc.*, 114 S.W.3d 342, 349 n.4 (Mo. App. 2003) (noting that amended rule “now provides specific guidelines for replies and sur-replies”). Rule 74.04(c)(1) first requires a movant to set forth “with particularity in separately numbered paragraphs” a statement of uncontroverted material facts which, together with the applicable law, establishes a right to judgment as a matter of law. Rule 74.04(c)(1). “The purpose of this particularity rule is to provide notice to the opposing party and the court as to the specific basis on which the movant claims it is entitled to summary judgment.” *Kitsmiller Construction Co. v. Wynn Construction, Inc.*, 126 S.W.3d 795, 796 (Mo. App. 2004).

A nonmovant responding under Rule 74.04(c)(2) may allow the movant’s facts to stand uncontroverted, or the nonmovant may controvert them by response to movant’s statement or by presenting a statement of additional material facts that remain in dispute. Significantly, this is a nonmovant’s one and only opportunity to affirmatively set forth its own evidence through a statement of additional material facts, so it is critical that a movant’s initial submission include every fact upon which the movant relies in claiming a right to judgment as a matter of law.

If the nonmovant allows the facts to stand uncontroverted, then the movant may only file a reply memorandum of law pursuant to Rule 74.04(c)(3). The remainder of that subsection of the rule only permits further factual development “if the adverse party’s response sets forth additional material facts that remain in dispute.” In that instance, the movant shall respond to the statement of additional facts and may also file movant’s own statement of additional material facts, in the same manner as allowed to the nonmovant under Rule 74.04(c)(2).

Finally, if and only if there has been additional factual development authorized on reply under Rule 74.04(c)(3), then the nonmovant is to file a sur-reply responding to the movant’s statement of additional facts; however, the nonmovant no longer has the opportunity to file a statement of additional material facts at that point. Rule 74.04(c)(4). The exclusive nature of this procedure is confirmed by Rule 74.04(c)(5), which provides that “[n]o other papers with respect to the motion for summary judgment shall be filed without leave of court.”

B. Analysis

The defective nature of Gladstone’s motion for summary judgment becomes evident upon review of the three analytical models for a defendant’s motion for summary judgment, as explained by this Court in *ITT Commercial Finance*:

a “defending party” may establish a right to judgment by showing (1) facts that negate *any one* of the claimant’s elements facts, (2) that the nonmovant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow

the trier of fact to find the existence of *any one* of the claimant's elements, or (3) that there is no genuine dispute as to the existence of *each* of the facts necessary to support the movant's properly-pleaded affirmative defense.

854 S.W.2d at 381 (emphasis in original). Gladstone did not follow any of these three approaches.

In its initial motion, Gladstone twice accepted as true the facts alleged by CCR. Gladstone first stated:

For the purposes of the Motion for Judgment on the Pleadings and the alternative Motion for Summary Judgment, the facts are taken from the Plaintiffs' First Amended Petition and are to be taken as uncontroverted material facts for the purposes of these motions only and for no other purposes.

I LF 20. Gladstone reiterated its admission in conclusion:

The facts pled by the Plaintiffs, which are to be taken as uncontroverted facts for the purpose of this pending motion, clearly support a finding by the Court that Defendant City is entitled to a judgment on the pleadings or in the alternative to summary judgment.

I LF 22. In conformance with these unqualified admissions, Gladstone nowhere asserted in its initial motion that it was disputing any facts alleged by CCR or that it was offering facts to negate aggravated delay or untoward activity as alleged by CCR.

I LF 19-22. Instead, and consistent with a motion principally styled as one for

judgment on the pleadings, Gladstone asserted purely legal arguments, namely that CCR had failed to state a claim for a taking and had failed to exhaust its state remedies such that its action was not ripe. I LF 27-31. Having accepted as true CCR's pleaded facts, Gladstone in the same motion could not have negated CCR's elements or facts as contemplated by the first analytical model.

Similarly, Gladstone did not follow the second model; instead, Gladstone advanced a purely legal argument and made no assertion that its motion was based on the absence of supporting evidence after an adequate period of discovery. Indeed, Gladstone filed its motion early in the case just as discovery was getting under way.

Gladstone also never argued under the third model that it was basing its motion for summary judgment on any properly-pleaded affirmative defense. Consequently, Gladstone failed to establish a right to judgment as a matter of law under any of the three available methods pursuant to Missouri summary judgment practice.⁴ Thus,

⁴ Gladstone's failure to follow any of the summary judgment models defined in *ITT Commercial Finance* confirms that Gladstone's Motion was only one for judgment on the pleadings (which the trial court did not grant). Courts look to the substance of a motion, not its title, to determine its true nature. *Nangle v. Brockman*, 972 S.W.2d 545, 550 (Mo. App. 1998); *Corley v. Jacobs*, 820 S.W.2d 668, 672 (Mo. App. 1991). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000)

CCR had no obligation to respond to Gladstone’s defective motion for summary judgment.

Nevertheless, CCR responded in kind to Gladstone’s motion, limiting its response to legal arguments and the facts asserted in the petition. CCR pointed to the allegations of “aggravated delay” and “untoward activity” and argued that “accepting as true as well pleaded facts and viewing all reasonable inferences in favor of CCR, as this court is required, Gladstone’s motion must be denied.” I LF 36. As explained in Point II below, the pleaded facts demonstrating “aggravated delay” and “untoward activity” are sufficient to sustain a claim for damages based on *Roth v. State Highway Comm’n*, 688 S.W.2d 775 (Mo. App. 1984), and other Missouri authorities. In that regard, Gladstone admitted that the “facts pled by the Plaintiffs . . . are to be taken as uncontroverted.” I LF 22. Gladstone also accepted those facts by ignoring them: “those allegations not controverted by the affidavits and other supporting documents of the movant may be considered as admitted by the moving party.” *Frazier*, 844 S.W.2d at 73-74. Thus, CCR had no reason to avail itself of its one-time opportunity under Rule 74.04(c)(2) to submit its evidence through a statement of additional

(internal quotation omitted). Because Gladstone necessarily admitted all of the facts alleged in CCR’s First Amended Petition, it was inherently contradictory for Gladstone to later attempt to controvert some of those already-admitted facts. *See* Point II, *infra*.

material facts elaborating on the allegations of the petition, all of which stood uncontested by Gladstone.

For the first time on reply, Gladstone changed the theory of its motion from a legal argument based on uncontroverted allegations in the petition to a fact-based argument disputing CCR's allegations based on an affidavit and a ream of exhibits. I LF 40 to II LF 231. Gladstone attempted to backtrack from its admission of the facts pleaded by CCR and to dispute the allegations of aggravated delay and untoward activity by going outside the pleadings. The rules do not permit such changes on reply. *Sloss*, 98 S.W.3d at 897-98. A movant wishing to redirect its theory for summary judgment must file a new motion. *Cross*, 32 S.W.3d at 636. Moreover, Gladstone could have done so here because it was not subject to any deadline for filing a dispositive motion.

Gladstone's new theory on reply was improper because Rule 74.04(c) terminated factual development of the record when CCR let stand as uncontroverted Gladstone's statement of facts submitted as part of its opening motion. CCR did not—and could not—controvert the facts where Gladstone had already admitted all the allegations in CCR's petition, so there was also no basis to elaborate on these uncontroverted allegations with a statement of additional facts. CCR's allegations of aggravated delay and untoward activity were before Gladstone when it was formulating its motion for summary judgment, and Gladstone chose to skip over those allegations without comment. Merely because CCR pointed out in argument what Gladstone had ignored did not permit Gladstone to reopen and alter its motion with

extrinsic materials controverting what it had previously admitted, so CCR had no obligation to meet these improper and untimely assertions in sur-reply.

The fundamental flaw in Gladstone’s motion as one for summary judgment was its failure to acknowledge and address at the outset the facts and theories pleaded by CCR, which expressly alleged harassment, interference, undue delay and other untoward acts by Gladstone and its agents. I LF 8-11. *Cf. Frazier*, 844 S.W.2d at 73-74 (reversing summary judgment when movant failed to address the claim as pleaded by plaintiff); *Hagen*, 231 S.W.3d at 860-61 (same). *See also Thomas v. City of Kansas City*, 92 S.W.3d 92, 96 (Mo. App. 2002) (pleadings are to be “liberally construed” as seeking relief “on any possible theory” within the scope of the facts stated). Instead, Gladstone inaccurately declared “[t]here are no such allegations in Plaintiffs’ First Amended Petition” (I LF 30) and misportrayed the claim as based on nothing more than “the mere designation of a property as ‘blighted.’” I LF 27.

Under Gladstone’s view of the rules, a defendant could move for summary judgment by simply pretending the petition does not address some element of the cause of action, but without offering any evidence outside the pleadings on that or any other element of the claim. As soon as the plaintiff responds and points out that the pertinent facts have been alleged from the beginning, Gladstone claims that Rule 74.04 authorizes the movant to start over and fill the gaps in the original motion with a new statement of additional material facts, thereby effectively allowing an amended or second motion for summary judgment—but only after the nonmovant’s one opportunity to file a statement of additional material facts under Rule 74.04(c)(2) has

passed. This lopsided interpretation of the rule to permit such sandbagging cannot be squared with Missouri's longstanding insistence on balance and fair play in summary judgment practice.

Missouri courts have recognized the pivotal role played by the nonmovant's statement of additional facts in cases where the movant has presented an incomplete picture. For example, in *Firestone*, the nonmovant did not directly dispute the facts alleged in the motion for summary judgment; instead, the nonmovant contended there were genuine issues of material fact based on additional facts presented by the nonmovant. 186 S.W.3d at 326. The court reversed summary judgment based on the fact issues created by the nonmovant's statement of additional facts. *Id.*

The error here is particularly evident when considered in the context of the longstanding concern that Missouri courts must exercise "great caution" in passing on a motion for summary judgment "because the procedure implicates the denial of due process by denying an opposing party his day in court." *D'Arcy & Associates*, 129 S.W.3d at 31 (citing *ITT Commercial Finance*). Likewise, an appellate court must "exercise great caution in affirming" a decision granting this "extreme and drastic remedy." *Collins*, 157 S.W.3d at 731; *accord Hagen*, 231 S.W.3d at 861.

Missouri courts have long emphasized that summary judgment procedures must be strictly followed to assure fairness and due process. Here, Gladstone's manipulation of those procedures and delay in revealing the basis for its motion deprived CCR of the opportunity to bring forth its own evidence in its own statement of additional material facts—a procedural device that would have been open to CCR

under Rule 74.04(c)(2) if Gladstone had set forth in its initial motion (or in a new motion) all facts and evidence upon which it relied, as required by Rule 74.04(c)(1).

C. Motion to Strike Plaintiffs' Responses

It follows that the circuit court erred in granting Gladstone's ill-defined and perfunctory motion to strike CCR's responses. II LF 243-44, 254. Having failed to submit a motion for summary judgment establishing its right to judgment as a matter of law, Gladstone had no basis to complain about the sufficiency of a response that CCR was not even obligated to make or the sufficiency of CCR's sur-reply to Gladstone's improper reply. Indeed, neither Gladstone's motion to strike, nor the order granting the motion, was clear as to the scope of relief requested and granted. Gladstone's motion was explicitly captioned as one to strike CCR's "responses" (emphasis added), and the circuit court granted that relief. II LF 243, 254 (A2), 281, 286 (A3). Nevertheless, neither Gladstone nor the circuit court ever identified any deficiency in CCR's initial response to Gladstone's motion, presumably because CCR merely concurred in Gladstone's acceptance of CCR's pleaded facts.

Moreover, since Gladstone purported to combine into one motion a request for judgment on the pleadings as well as a request for summary judgment, CCR was certainly entitled to respond to Gladstone's motion for judgment on the pleadings. Indeed, in responding to Gladstone's motion to strike, CCR pointed out that Gladstone's original motion was in reality only one for judgment on the pleadings. II LF 249 n.1. *See also* note 4, *supra*.

CCR's sur-reply can scarcely be faulted for responding to an improper reply brief by Gladstone. Neither admissions nor denials were required because the factual record had already closed, notwithstanding Gladstone's belated and improper attempt to assert additional facts.

II. The circuit court erred in granting summary judgment because Gladstone failed to establish a right to judgment as a matter of law in that there were genuine issues of material fact created by Gladstone's self-contradiction as to whether Gladstone had engaged in aggravated delay and untoward activity with respect to CCR's property so as to support a cause of action for damages under Missouri law.

A. Legal Standards

The bill of rights of the Missouri Constitution guarantees "[t]hat private property shall not be taken or damaged for public use without just compensation." Mo. Const. Art. I, § 26 (A4). Until just compensation is paid, "the property shall not be disturbed or the proprietary rights of the owner therein divested." *Id.* "This provision is self-enforcing and an action may be brought directly thereunder." *Roth v. State Highway Comm'n*, 688 S.W.2d 775, 777 (Mo. App. 1984) (internal quotations omitted).

Under Missouri law, "the taking of the property occurs when the condemnor pays the commissioners' award into the registry of the court, or if it refuses to make such payment, . . . at the time of trial." *State ex rel. Washington University Medical*

Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 373, 375 (Mo. banc 1982).

The date of taking thus determines the date of valuation in a condemnation action:

The proper rule, when the whole property is being taken, is not to allow the jury to consider enhancements or depreciation brought about by the construction of the improvement for which the property is being taken.

In other words, the value should be determined independent of the proposed improvement.

St. Louis Electric Terminal Ry. v. MacAdaras, 257 Mo. 448, 463, 166 S.W. 307, 310 (1914).

Missouri courts have recognized that this rule valuing property as of the *de jure* taking is ill-suited to the special problems associated with urban redevelopment projects. See, e.g., *State ex rel. Washington University*, 626 S.W.2d at 375-76. The “harsh, cold reality [is] that a grossly premature announcement of condemnation may depreciate the value of property to such an extent that the property owner is unfairly victimized if determination of the market value of his property is limited to the *de jure* date of expropriation.” *Land Clearance for Redevelopment Authority v. Massood*, 526 S.W.2d 354, 358 (Mo. App. 1975). As this Court has explained,

it is not uncommon for a lengthy period of time to elapse between the time when the area is declared blighted by the legislative body and the time when the property is taken for condemnation purposes. Between the time of blighting and the time of taking, the property frequently has substantially deteriorated in value at great loss to the landowner.

State ex rel. Washington University, 626 S.W.2d at 375-76. In the absence of any legislative action to assure compliance with the constitutional mandate of just compensation, Missouri courts have repeatedly recognized that a “landowner’s relief lies in pursuing . . . a separate action” for damages. *Id.* at 378 (collecting cases).

As this Court observed in *State ex rel. Washington University*, the leading case acknowledging the landowner’s cause of action is *Land Clearance for Redevelopment Authority v. Morrison*, 457 S.W.2d 185 (Mo. banc 1970). The *Morrison* court highlighted the distinction between the *in rem* damages available in a condemnation proceeding and the *in personam* damages recoverable by a landowner injured by the activities of an entity with the power of eminent domain. *Id.* at 193-94. While recognizing that there is no constitutional guarantee of “an absolutely perfect system of reimbursement for every owner whose property is adversely affected by activity of a public body,” the court specifically recognized a right to landowner compensation in situations of “*aggravated delay or untoward activity on the part of*” the governmental entity. *Id.* at 198, 199 (emphasis added). *Cf. Tierney v. Planned Industrial Expansion Authority*, 742 S.W.2d 146, 154-55 (Mo. banc 1987) (rejecting damage claims by landowner based merely on public acts and exercise of legislative judgment as distinguishable from actionable claim for inverse condemnation based on interference with owners). In recognizing a right of action in such circumstances, the *Morrison* court looked to cases from other jurisdictions involving abusive governmental action—and inaction—in connection with urban renewal projects, two of which are particularly pertinent.

The *Morrison* court (457 S.W.2d at 194-95) first discussed *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), where the court awarded compensation to the owners of properties which the city had kept under a cloud of imminent condemnation for years. The rental properties lost tenants, suffered vandalism, and eventually had to be demolished. The plaintiffs alleged the city had encouraged “decay and desertion of the area” so as to reduce the city’s acquisition costs using “appraisals based on the lower values of vacant property in a, by this time, blighted area.” *Id.* at 661. In ruling that the plaintiffs were entitled to damages, the court pointed to “substantial evidence that the city actually encouraged and aggravated this deterioration after the commencement of the proceedings through the actions of various city officials.” *Id.* at 662. Among other things, the city discouraged the landowners from making improvements and informed third parties that condemnation would soon commence. The city’s actions and delay, even “if they were not the only causes, substantially contributed to, hastened and aggravated the deterioration and decline in value of the area in general and of plaintiffs’ property in particular.” *Id.*

The *Morrison* court (457 S.W.2d at 195-96) also discussed the decision in *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967), where the court found the complaint stated a cause of action against the City of Cleveland based on abuse of the city’s eminent domain power. Among other things, the plaintiff alleged that the city announced its intention to appropriate various rental properties and began notifying the occupants of that intention even though it lacked the facilities or ability to consummate the appropriation, which it failed to complete. *Id.* at 181-82. *See also id.*

at 184 (recognizing potential for municipal liability where “city officials took ‘calculated action’ to reduce the value of the properties”).

The *Morrison* court discussed several other cases in the same vein, some of which involved landowner recoveries based on as little as a 3-year delay between a city’s announcement of its redevelopment plans and the actual commencement of condemnation proceedings. See *Morrison*, 457 S.W.2d at 196 (discussing *City of Cleveland v. Carcione*, 190 N.E.2d 52 (Ohio App. 1963) and *City of Buffalo v. Strozzi*, 283 N.Y.S.2d 919 (Sup. Ct. 1967)). By contrast, the majority in *Morrison* ultimately concluded no cause of action was available on the facts presented there, which involved governmental delay of only about two years and no evidence of aggravated delay or untoward activity. 457 S.W.2d at 198-99.

The court in *Roth v. State Highway Commission*, 688 S.W.2d 775 (Mo. App. 1984), again recognized “the propriety and viability of such a cause of action” for a landowner subjected to “aggravated delay” or “untoward activity” by a governmental authority with designs on the property. *Id.* at 777. The *Roth* court found sufficient evidence of both forms of governmental wrongdoing. *Id.* at 777-78. In *Roth*, the State Highway Commission announced that it had plans for the defendant’s property and then utilized a variety of methods to keep the property in limbo for years. The plaintiff landowner alleged that he had suffered substantial monetary loss because the state’s actions had deprived him of development opportunities and the resulting profits that could have been realized from the property. The evidence showed the Highway Commission had intervened with third parties to urge action that was

detrimental to the landowner's rights and had also applied coercive pressure in direct dealings with the landowner. *Id.* at 776-78. The court of appeals upheld a decision that the landowner was entitled to a trial on his claims.

B. Analysis

The first amended petition specifically cited Article I, section 26 of the Missouri Constitution, and the facts alleged show aggravated delay and untoward activity, thereby bringing this case squarely within the cause of action recognized in *Morrison, Roth*, and other Missouri cases. Although Gladstone chose to argue the claim is based on nothing more than a “mere designation of a property as ‘blighted’” (I LF 27), the factual basis for aggravated delay and untoward activity was plainly alleged in the petition.

CCR's allegations set forth a chronology showing Gladstone's lethargic pace in pursuing its objectives for the Property. Although Gladstone chose to declare the Property blighted in May 2003, it allowed a year to pass before entering into a memorandum of understanding with a redeveloper for the Property. I LF 8. Some fifteen months later, Gladstone dropped that redeveloper and began soliciting proposals for a tax increment financing (TIF) plan for the Property. I LF 8. Two months later, Gladstone again declared the Property blighted and approved a TIF plan for the Property but specifically declined to approve a bill adopting a TIF Project for the Property, which would have started the clock ticking on certain time limitations regarding the effective dates for development and acquisition within the TIF area. LF 9-11. By the time the circuit court entered summary judgment in this case, well over

three years had elapsed since Gladstone’s first blight designation on the Property, and the fifth anniversary of the Property’s descent into limbo will soon be at hand with no condemnation proceeding commenced and no end in sight. These allegations and circumstances are plainly sufficient to support a claim based on aggravated delay.

The petition also alleges untoward activity by Gladstone and its agents. Most of those allegations appear in paragraph 14 of the first amended petition (I LF 9-10), which Gladstone conspicuously ignored in its motion. *See* I LF 20-22 (summarizing facts from first 13 paragraphs and then skipping to paragraph 18 of the first amended petition). Among other things, the first amended petition alleges that Gladstone “has actively discouraged tenants and prospective tenants from entering into new leases and/or renewing their leases with customary terms and conditions.” I LF 10. Moreover, Gladstone “has harassed plaintiffs by repeated building inspections, delivery of multiple notices of municipal building code and property maintenance violations in order to destroy the plaintiffs’ ability to attract and keep tenants and earn a reasonable rate of return on the Property.” I LF 9.

These allegations state a cause of action under Article I, section 26 of the Missouri Constitution and the principles recognized in *Morrison* and *Roth*.⁵ This may

⁵ In its opinion, the court of appeals found that CCR’s petition failed to state a claim for inverse condemnation but did state a tort claim for damages. The court of appeals opined that *Roth* incorrectly described the claim as one for inverse condemnation (slip op. at 6), but in *Tierney* this Court also characterized the *Roth*

explain why the circuit court chose not to rest its decision on Gladstone’s motion for judgment on the pleadings, which was clearly doomed to failure under the standards governing such motions. *See State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). Instead, the circuit court chose to rest its decision against CCR on Gladstone’s purported motion for summary judgment, but only after first granting Gladstone’s motion to strike CCR’s responses. That decision was reversible error.

Plaintiffs have already demonstrated in Point I why the circuit court committed reversible procedural error in striking CCR’s responses and granting the motion for summary judgment. Even assuming the circuit court committed no such procedural error, the court nevertheless erred by granting summary judgment when a genuine dispute as to material facts was evident on the face of Gladstone’s own submissions.

This Court has explained a principle of summary judgment practice that is particularly relevant here:

claim as being one for inverse condemnation. *See* 742 S.W.2d at 155 (characterizing petition in *Roth* as alleging a “taking by the acts of agents of the condemning agency, which triggered the right to just compensation”).

In any event, this distinction between inverse condemnation and a tort claim is immaterial to the appropriate result in this case. Summary judgment should be reversed and the case remanded for further proceedings regardless of whether the petition is deemed to state a cause of action under either or both theories.

the phrase “all facts that are not contradicted are taken as true” means, first, that the movant must establish that the material facts are not in genuine dispute; *materials submitted by the movant that are, themselves, inconsistent on the material facts defeat the movant’s prima facie showing.*

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 382 (Mo. banc 1993) (emphasis added). Stated another way, the burden on a nonmovant to create a genuine dispute arises only “*if there is no contradiction and the movant has shown a right to judgment as a matter of law.*” *Id.* (emphasis added). Thus, when a movant’s own submission is inconsistent, “the *prima facie* showing required for summary judgment is defeated.” *Space Planners Architects, Inc. v. Frontier Town-Missouri, Inc.*, 107 S.W.3d 398, 405 (Mo. App. 2003).

In this case, Gladstone’s flip-flop regarding the facts created a self-defeating contradiction. Although Gladstone eventually attempted to dispute CCR’s allegations of aggravated delay and untoward activity, Gladstone also repeatedly and unequivocally admitted those allegations were uncontroverted for purposes of its motion. *See* I LF 20, 22. As always, the circuit court was duty bound to view the record in the light most favorable to CCR as nonmovant, meaning the court had to give CCR the benefit of Gladstone’s admission that CCR’s allegations were to be accepted as true. Under the governing law, therefore, it was error for the court to enter summary judgment on a record containing facts establishing a triable issue on all elements of CCR’s claim.

III. The circuit court erred in granting summary judgment because any federal exhaustion requirement for an inverse condemnation claim was inapplicable as a matter of law in that CCR brought this suit in a Missouri court and asserted claims cognizable there.

Gladstone concluded its motion for judgment on the pleadings or in the alternative for summary judgment with a short argument that federal courts require exhaustion of state remedies before allowing pursuit of an inverse condemnation claim. *See* I LF 30-31. Once again, there is no indication in the record whether the circuit court based its decision on this argument, but in any event, Gladstone was entitled to no relief in the Clay County Circuit Court based on whatever exhaustion doctrine might apply in federal court.

CCR filed its inverse condemnation action in the first instance in Missouri state court. “Inverse condemnation is a cause of action against a governmental agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed.” *Missouri Real Estate & Ins. Agency, Inc. v. St. Louis County*, 959 S.W.2d 847 (Mo. App. 1997). The First Amended Petition seeks relief under both Article I, section 26 of the Missouri Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. I LF 7, 11. The Missouri constitutional provision is self-enforcing and permits a direct action. *Roth v. State Highway Comm’n*, 688 S.W.2d 775, 777 (Mo. App. 1984). Moreover, even though section 1983 is a federal statute, Missouri

state courts have concurrent jurisdiction. *Stafford v. Muster*, 582 S.W.2d 670, 681 (Mo. banc 1979).

Obviously, CCR cannot be faulted for proceeding in state court—that was precisely what the federal courts supposedly prefer. Gladstone’s argument was simply an effort to whipsaw CCR by using a doctrine apparently intended to uphold the concept of federalism and reduce federal dockets to instead deny CCR a state forum as well. Merely because Gladstone wishes to avoid accountability for its actions in any forum does not justify misapplication of a doctrine applicable, if at all, only in federal court.

IV. Notwithstanding the opinion of the court of appeals to the contrary, the circuit court had jurisdiction and this matter is ripe because an injured person has a constitutionally mandated remedy via an action for damages, and because a claim for pre-condemnation damages against a municipality is actionable even though the full extent of damages may be unknown and could be affected by subsequent municipal action, in that CCR alleged it had already sustained damages resulting from Gladstone’s wrongful conduct.

The court of appeals held that CCR’s “petition stated a cause of action in tort for pre-condemnation damages, which it alleged included loss of rental income and increased operating costs for insurance, taxes, utilities, repair, maintenance, and general upkeep.” Slip op. at 6. However, the court of appeals then determined that CCR’s allegation “[t]hat the damages are continuing renders their cause of action not

ripe for adjudication.” Slip op. at 7.⁶ The court of appeals placed CCR’s right to recover those damages in limbo and under Gladstone’s exclusive control: “To maintain a ripe cause of action for pre-condemnation damages, [CCR] either must wait until Gladstone grants an organization or agency the right to redevelop the land and it condemns the lands and officially takes it, or abandons the project.” Slip op. at 7.

This decision enables—even encourages—the tortfeasor to avoid liability for injuries already sustained merely by maintaining the status quo indefinitely, thereby depriving the victim of access to a judicial remedy. Missouri law neither compels, nor permits, a court to decline jurisdiction so as simultaneously to promote the continuation of tortious conduct and preclude judicial redress indefinitely. The

⁶ As support for raising *sua sponte* the question of ripeness with respect to CCR’s claim for damages, the court of appeals cited three cases discussing ripeness. *Levinson v. State*, 104 S.W.3d 409, 411-12 (Mo. banc 2003); *Missouri Soybean Ass’n v. Missouri Clean Water Comm’n*, 102 S.W.3d 10, 26, 31 (Mo. banc 2003); *Local 781 International Ass’n of Firefighters v. City of Independence*, 947 S.W.2d 456, 461 (Mo. App. 1997). Each of the cases was one for declaratory relief. None included a claim for monetary damages, and none held or suggested that a claim for monetary damages could be regarded as not ripe for adjudication.

decision by the court of appeals is contrary to previous decisions by this Court, principles of Missouri tort law, and Article I, Section 14 of the Missouri Constitution.

First, “[i]n many actions the extent of damages may be dependent on uncertain future events.” *Dixon v. Shafton*, 649 S.W.2d 435, 439 (Mo. banc 1983). “Such uncertainties have never been held to preclude the filing of suit The most that is required is that some damages have been sustained, so that the claimants know that they have a claim for some amount.” *Id.* So long as there is notice of a “potentially actionable injury,” the damages are “substantially complete” and suit may be maintained. *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 583 (Mo. banc 2006). “All possible damages do not have to be known, or even knowable, before the statute accrues.” *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997). An accrued claim is by definition a ripe claim because a cause of action accrues “when it is within the claimant’s power to prosecute a suit to successful judgment.” *Linn Reorganized School District No. 2 v. Butler Manufacturing Co.*, 672 S.W.2d 340, 343 (Mo. banc 1984) (internal quotation and emphasis omitted). *See also Polytech, Inc. v. Sedgwick James of Missouri, Inc.*, 937 S.W.2d 309, 311-12 (Mo. App. 1996) (rejecting contention that there was no “justiciable controversy” merely because amount of damages remained to be determined).

Second, in cases where “the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.” *Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556

(Mo. banc 1980). Far from precluding suit by the victims of a continuing tort, Missouri case law makes it clear that victims who fail to act will lose the right to recover damages sustained outside the period of limitations. For example, in *Cacioppo v. Southwestern Bell Telephone Co.*, 550 S.W.2d 919 (Mo. App. 1977), the defendant utility had maintained a continuing trespass on the plaintiff's premises for nearly two decades. The plaintiff sought to recover damages for the entire period on the "theory that she had to wait to seek relief from defendant's near 20-year pattern of misconduct until the source of her troubles, defendant's junction box, was removed in order to have her damages ascertained." *Id.* at 925. The court rejected this argument: "If such were the case, it would seem that if defendant never removed the junction box, plaintiff's cause of action would never accrue." *Id.* at 925. Instead, suit was maintainable, but with damages limited to the five-year period prior to suit. *Id.*

Finally, the Missouri Constitution mandates "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. Art. I, § 14 (A9). This "open courts" provision "applies against all impediments to fair judicial process, be they legislative or judicial in origin." *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. banc 2000) (internal quotation omitted). It "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." *Id.* at 549 (internal quotation and emphasis omitted). *Kilmer* struck down a dram shop law that made the civil remedy for an injured party

“entirely dependent upon whether or not the county prosecutor has prosecuted and obtained a conviction of their alleged wrongdoer.” *Id.* at 550. This Court found the arrangement imposed an arbitrary and unreasonable impediment to the constitutional right to a certain remedy: “The prosecutor’s decision may, of course, be vulnerable to inevitable pressures of local politics or other factors unrelated to the merits” *Id.* at 552. If designating the local prosecutor as gatekeeper to an injured party’s right to seek damages imposes an unconstitutional barrier to judicial access, then the decision here to appoint the tortfeasor as gatekeeper can be no less problematic.

In holding that CCR could not maintain a ripe cause of action for pre-condemnation damages “until Gladstone grants an organization or agency the right to redevelop the land and condemns the lands and officially takes it, or abandons the project,” the court of appeals cited this Court’s decision in *Tierney v. Planned Industrial Expansion Authority*, 742 S.W.2d 146, 155-56 (Mo. banc 1988). Slip op. at 7. However, nothing in *Tierney* precludes litigation of a landowner’s personal tort claim for damages.

The damage claim in *Tierney* (identified therein as Count III) was for “condemnation blight” and was “based on the public acts of the defendants rather than on any interference with the owners.” 742 S.W.2d at 155. *See also id.* at 154-55 (damage claim based on blight recommendation, passage of ordinance, and making of contract pursuant thereto). The *Tierney* damage claim was not one “in which the dominant theme was loss of rental income.” *Id.* at 155. Instead, the damage claim in *Tierney* “must be on a theory that there has been a ‘taking.’ Such actions are

sometimes referred to as actions for ‘inverse condemnation,’ and may be maintained . . . to fulfill the constitutional command that property not be taken without just compensation.” *Id.* Thus, the *Tierney* court apparently construed the damage claim before it as one involving damage to the property itself rather than one involving tortious injury to the personal rights of the owner.

As the court of appeals recognized, this Court has held in other cases that a landowner’s damage claim for lost income and increased expenses are personal damages recoverable in tort. *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373, 377-78 (Mo. banc 1982); *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 39 (Mo. banc 1999). “[T]he claim for damages arises from general common law principles, not from statutory language.” *Id.* By contrast, *Tierney* apparently speaks to a different theory of relief, one involving damage to the property itself and based in the constitutional command that property not be taken without just compensation. To whatever extent *Tierney* may appear anomalous or in contradiction to the prior decision in *Washington University* or the subsequent decision in *Crestwood Commons*, this Court should reexamine and reconcile these precedents.

Even assuming *Tierney* offers any support for the court of appeals’ determination that CCR’s tort claim for damages is not ripe, it was effectively superseded by this Court’s more recent decision in *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002). In *Chesterfield Village*, the landowners originally brought suit against a city for declaratory and injunctive relief

for refusing to rezone the property to allow greater residential density; the landowners prevailed and the property was rezoned. *Id.* at 317. The landowners then brought a second action seeking damages on a theory of temporary taking and inverse condemnation for the city’s failure to rezone the property initially. *Id.*

In holding that the decision in the first action was *res judicata* and precluded the second action, this Court found the “claim for damages could well have been included in the first action for declaratory and injunctive relief.” *Id.* at 320. This Court rejected the landowner’s contention “that it could not have known . . . the full extent of its damages until the City of Chesterfield did in fact rezone the property.” *Id.*

[I]f there was a temporary taking, it was already occurring at the time of the first suit, and damages would have flowed from that point. The fact that Chesterfield Village did not know at that point precisely what its damages would be is of little importance. *An injured party, whether injured in body or property rights, can assert a claim for damages even though the party may not know precisely the nature and extent of the injury.*

Id. (emphasis added). By holding that the landowner must suffer the consequences of *res judicata* for failing to assert its damage claim prior to final municipal action, this Court necessarily found the claim was then ripe—regardless of whether characterized as the taking of property or as tortious injury to the owner’s personal rights.

Consequently, any suggestion in *Tierney* that a court may, or should, turn its back

while landowners suffer indefinite abuse and interference by municipalities is highly questionable and should be overruled or at least clarified because in no Missouri case has a tortfeasor ever been so empowered to continue its tortious ways and thereby seal the courthouse doors to its victim.

CONCLUSION

Appellants Clay County Realty Company and Edith Investment Company request that the judgment be reversed and that the case be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 11,427 words; and
4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

R. Kent Sellers

CERTIFICATE OF SERVICE

On this 7th day of January 2008, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by hand-delivery, addressed to:

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APPENDIX

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| 1. | Docket entry (filed July 16, 2006) (LF 253-54) | A1 |
| 2. | Judgment (filed November 2, 2006) (LF 286) | A3 |
| 3. | Mo. Const. Art. I, § 26 | A4 |
| 4. | Mo. Sup. Ct. R 74.04 | A5 |
| 5. | Mo. Const. Art. I, § 14 | A9 |