

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 REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

REPLY ARGUMENT 4

I. Gladstone’s Improper Summary Judgment Reply 5

 A. Erroneous redefinition of claims 6

 B. Erroneous redefinition of admitted facts 9

 C. Noncompliance with summary judgment standards 11

 D. Erroneous ruling on motion to strike 15

II. Genuine Issues of Material Fact on CCR’s Claims 17

III. Federal Exhaustion Requirement Inapplicable 20

IV. No Support for the Court of Appeals on Ripeness 21

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

<i>CIS Communications, L.L.C. v. County of Jefferson</i> , 177 S.W.3d 848 (Mo. App. 2005).....	21
<i>City of Harrisonville v. Public Water Supply Dist.</i> , 129 S.W.3d 37 (Mo. App. 2004).....	14
<i>Cross v. Drury Inns, Inc.</i> , 32 S.W.3d 632 (Mo. App. 2000)	14
<i>E.O. Dorsch Electric Co. v. Plaza Construction Co.</i> , 413 S.W.2d 167 (Mo. 1967).....	17
<i>Firestone v. VanHolt</i> , 186 S.W.3d 319 (Mo. App. 2005).....	6, 12
<i>Frazier v. Riggle</i> , 844 S.W.2d 71 (Mo. App. 1992)	6, 10
<i>Hamer v. State Highway Comm’n</i> , 304 S.W.2d 869 (Mo. 1957)	8
<i>ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.</i> , 854 S.W.2d 371 (Mo. banc 1993).....	4, 11, 17, 20
<i>Kitsmiller Construction Co. v. Wynn Construction, Inc.</i> , 126 S.W.3d 795 (Mo. App. 2004).....	11
<i>Memco, Inc. v. Chronister</i> , 27 S.W.3d 871 (Mo. App. 2000)	7
<i>Roth v. State Highway Comm’n</i> , 688 S.W.2d 775 (Mo. App. 1984).....	8, 19
<i>Stafford v. Muster</i> , 582 S.W.2d 670 (Mo. banc 1979).....	8
<i>State ex rel. Malone v. Mummert</i> , 889 S.W.2d 822 (Mo. banc 1994)	6
<i>State ex rel. Nixon v. American Tobacco Co.</i> , 34 S.W.3d 122 (Mo. banc 2000).....	10

Taggart v. Maryland Casualty Co., WD67762, 2008 WL 65493 (Mo. App. 2008)..... 13, 14, 15

Thomas v. City of Kansas City, 92 S.W.3d 92 (Mo. App. 2002)..... 6, 7

Tierney v. Planned Industrial Expansion Authority, 742 S.W.2d 146 (Mo. banc 1987) 8

Whelan v. Missouri Public Service, 163 S.W.3d 459 (Mo. App. 2005)..... 16

Yates v. Rexton, Inc., 267 F.3d 793 (8th Cir. 2001)..... 15

Statutes

42 U.S.C. § 1983 passim

Rules

Rule 74.04(c)..... 11, 12, 13, 16

REPLY ARGUMENT

The City of Gladstone opens its brief by attacking the statement of facts by Clay County Realty Company and Edith Investment Company (collectively “CCR”). Gladstone then repeats verbatim its own statements of fact presented to the circuit court, describing them as “the *best* Statement of Facts for this Court.” Gladstone Brief at 2 (emphasis added). Gladstone thereby violates fundamental precepts of appellate review of summary judgments, namely the “adage that the record is viewed in the light most favorable to the non-movant” and “the rule that the non-movant is given the benefit of all reasonable inferences.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. banc 1993) (internal quotations omitted). Gladstone never acknowledges these basic principles in its statement of the standard of review (Gladstone Brief at 9) or elsewhere in its argument.

After reciting its preferred version of the facts, Gladstone then claims they “were not factually disputed” by CCR—an assertion notably devoid of any record citation. Gladstone Brief at 6. In reality, when Gladstone changed its position in reply and for the first time began attempting to controvert the allegations of the petition based on extrinsic evidence, CCR filed a sur-reply disputing Gladstone’s purported facts and inferences and highlighting their numerous deficiencies. II LF 232-36. Among the more obvious defects, Gladstone made assertions without citing anything in the record (¶ 22, I LF 41; II LF 233-34), repeatedly made general references to materials that did not support Gladstone’s specific assertions

(¶¶ 24, 27, 28, 29, I LF 41-42; II LF 234-36), and relied on third-party hearsay from unauthenticated correspondence to somehow establish what Gladstone “believes.” ¶ 26, I LF 42; II LF 228-29; II LF 235. Overriding all of these defects, however, was the procedural impropriety of Gladstone offering a statement of additional facts in reply on summary judgment when no facts remained in dispute after CCR’s response. *See* CCR Brief at 19-32; *see also* section I, *infra*.

I. Gladstone’s Improper Summary Judgment Reply

In Point I of its opening brief, CCR demonstrated why summary judgment should be reversed 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. CCR Brief at 19-32. In Point II, CCR demonstrated that, even if there was 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 the claims asserted. CCR Brief at 32-40.

Gladstone asserts that it sees no difference between these two points, so its response to CCR’s Point I contains arguments on both the procedural requirements for summary judgment and the substantive principles of inverse condemnation; Gladstone’s abbreviated response to Point II merely cross-references its arguments from Point I. For purposes of this reply, CCR will adhere to its original

organization, with the procedural issues treated in this section and the reply on substantive issues presented in section II, *infra*.

A. Erroneous redefinition of claims

As set forth in CCR’s opening brief, a defendant seeking full summary judgment must demonstrate that the plaintiff cannot recover on any theory pled. CCR Brief at 22 (citing *Firestone v. VanHolt*, 186 S.W.3d 319, 324 (Mo. App. 2005)). Gladstone does not dispute this proposition. Similarly, Gladstone does not dispute that a defendant cannot obtain summary judgment “based on a motion that fails to address the cause of action as pleaded by the plaintiff.” CCR Brief at 22 (citing *Frazier v. Riggle*, 844 S.W.2d 71, 73 (Mo. App. 1992)).

In an apparent effort to circumvent principles it cannot dispute, Gladstone seeks to redefine CCR’s first amended petition as alleging only a claim under 42 U.S.C. § 1983 that “simply relied on Gladstone’s ‘blight’ designation to form the basis of its takings claim.” Gladstone Brief at 10. This remarkably narrow and unrealistic interpretation of the first amended petition disregards well-settled Missouri pleading standards.

It is axiomatic that “pleadings are liberally construed.” *Thomas v. City of Kansas City*, 92 S.W.3d 92, 96 (Mo. App. 2002). “The court must examine the petition to determine whether the allegations provide for relief *on any possible theory*.” *Id.* (emphasis added). In so doing, a court will “impliedly include reasonable inferences fairly deducible from the facts stated.” *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1994) (internal quotation omitted).

“The character of a cause of action is determined from the facts stated in the petition and not by the name given the action.” *Thomas*, 92 S.W.3d at 96.

Missouri courts recognize that “a party can plead alternative causes of action in a petition and may do so in one count.” *Memco, Inc. v. Chronister*, 27 S.W.3d 871, 875 (Mo. App. 2000) (facts stated in count entitled “Conversion” supported multiple causes of action).

On its face, the first amended petition is by no means limited to 42 U.S.C. § 1983; instead, the first amended petition states: “The City’s conduct has violated § 26, Article I of the Constitution of the State of Missouri and has further violated plaintiffs’ rights secured by the Fifth and Fourteenth Amendments to the United States Constitution.” I LF 11. The first amended petition recites the multi-year delay and numerous failures by Gladstone with respect to the Property (which continue to this day) as well as specific facts establishing untoward activity. I LF 8-11. Those include harassment by Gladstone through “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. Moreover, it is alleged 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. The first amended petition alleges that Gladstone’s actions have “substantially impaired or destroyed” CCR’s “peaceful enjoyment of the Property” and have resulted in “a significant diminution of the value of the

Property, and the City has thereby taken the Property for public use or purpose.” I LF 9, 10. “Despite demand, the City has failed and refused to pay plaintiffs just compensation for the Property taken.” I LF 10. The petition then alleges plaintiffs have been damaged in an amount equal to the reduced value of the property and have suffered consequential damages “after the date of the City’s de facto taking of the Property.” I LF 10.

CCR’s explicit reliance on the Missouri Constitution refutes any suggestion that the claim was limited to one under 42 U.S.C. § 1983 because that federal statute requires a “deprivation of rights secured by the Constitution or laws *of the United States.*” *Stafford v. Muster*, 582 S.W.2d 670, 681 (Mo. banc 1979) (emphasis added). Citing Article I, Section 26 of the Missouri Constitution, this Court has stated that an action for inverse condemnation may be maintained “to fulfill the constitutional command that property not be taken without just compensation.” *Tierney v. Planned Industrial Expansion Authority*, 742 S.W.2d 146, 155 (Mo. banc 1987). This 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).

Contrary to Gladstone’s assertions that no taking occurred, CCR has unquestionably alleged “an invasion or an appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation must directly and specially affect the landowner to his injury.” *Hamer v. State Highway Comm’n*, 304 S.W.2d 869, 871 (Mo. 1957).

CCR's allegation of specific facts showing harassment, interference and procrastination by Gladstone demolish Gladstone's effort to label CCR's position as somehow "manufactured." Gladstone Brief at 11. Moreover, as the court of appeals recognized (but Gladstone ignores), CCR's petition also stated a cause of action in tort for pre-condemnation damages. Slip op. at 5-6. Thus, Gladstone's attempt to redefine and limit CCR's claim to one under 42 U.S.C. § 1983 is wholly untenable.

B. Erroneous redefinition of admitted facts

Just as it seeks to narrowly redefine CCR's claims, Gladstone seeks to narrowly redefine the facts it admitted for purposes of its Motion for Judgment on the Pleadings or in the Alternative, Summary Judgment. Once again, Gladstone's effort at redefinition fails for multiple reasons, most of which Gladstone ignores in its brief. Without ever quoting or analyzing what it actually said in its motion, or the legal effect of that motion, Gladstone merely asserts in conclusory fashion that it "did not, for purposes of the Motion for Summary Judgment, admit all facts contained in CCR's First Amended Petition." Gladstone Brief at 7. The record and the law negate Gladstone's effort to retract its admission of CCR's facts for several reasons.

First, in concluding its motion, Gladstone asserted without any limitation whatsoever 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. Gladstone makes no attempt to explain away this language, which speaks for itself. Despite

Gladstone's resort to pejorative labels (Gladstone Brief at 2 and 12), it is not "patently disingenuous" for CCR to quote and rely on what Gladstone said.

Second, as CCR demonstrated in its opening brief, under Missouri summary judgment standards, allegations in a pleading "not controverted by the affidavits and other supporting documents of the movant may be considered as admitted by the moving party." CCR Brief at 23 (quoting *Frazier*, 844 S.W.2d at 73-74). Gladstone simply ignores *Frazier*, which is squarely on point. Therefore, *by standing silent in its motion on the allegations showing aggravated delay and untoward activity, Gladstone admitted them for purposes of its motion.*

Finally, Gladstone chose to file a single motion seeking both judgment on the pleadings and summary judgment. By reason of its decision to seek judgment on the pleadings, Gladstone necessarily was bound by the governing standard: "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) (internal quotation omitted; emphasis added). Gladstone was the master of its unitary motion, choosing the relief sought and the words employed. If Gladstone did not want to admit all the facts, it should have avoided moving for judgment on the pleadings, delineated precisely those facts which it disputed and disclosed the evidentiary basis for any such dispute, but its motion did none of this. At a bare minimum, Gladstone's ambiguity and self-contradiction raised a

genuine issue as to the material facts and defeated its prima facie showing. *ITT Commercial Finance Corp.*, 854 S.W.2d at 382; CCR Brief at 39-40.

C. Noncompliance with summary judgment standards

Gladstone does not and cannot dispute several bedrock propositions previously advanced by CCR in support of its contention that Gladstone failed to establish a right to judgment in its initial motion papers and improperly offered new facts for the first time in reply.

First, the purpose of the particularity requirement imposed on a summary judgment movant under Rule 74.04(c)(1) “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) (emphasis added). Nowhere in its initial motion did the City ever give notice that it was seeking judgment either because the facts negated, or CCR could not produce sufficient evidence of, aggravated delay and untoward activity.¹ Instead, Gladstone’s motion asserted it “is entitled to a judgment because the mere declaration of blight having been issued with reference to the Plaintiffs’ property is not a taking under Missouri law and is

¹ Although Gladstone cites the three analytical models for a defendant’s summary judgment motion (Gladstone Brief at 9), Gladstone never explains how its motion fit within any of those three models. It did not. *See* CCR Brief at 24-27.

therefore not a taking which would give rise to a § 1983 cause of action under either the Missouri or the United States Constitution.” I LF 20.² By framing the issue in this manner and offering no extrinsic evidence whatsoever, Gladstone presented the issue as purely a legal question on the pleadings.³

Second, Gladstone does not and cannot dispute that Rule 74.04(c)(2) provides “a nonmovant’s one and only opportunity to affirmatively set forth its own evidence through a statement of additional material facts.” CCR Brief at 23. Nor can Gladstone dispute that a statement of additional material facts is an important tool that can be decisive in a nonmovant’s effort to defeat summary judgment. CCR Brief at 30 (citing *Firestone*, 186 S.W.3d at 326). Here, Gladstone engineered CCR’s loss of this key opportunity by misrepresenting its

² Gladstone also asserted that a claim under 42 U.S.C. § 1983 was not ripe. That argument is treated separately in CCR Brief at 41-42 and section III, *infra*.

³ Gladstone is incorrect when it asserts that CCR responded to the motion by arguing “there were material facts.” Gladstone Brief at 7. To the contrary, CCR made it clear that it was responding to Gladstone’s presentation of a legal argument based in CCR’s own pleading: “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.

motion as based on one theory that relied solely on the first amended petition but then going outside the pleadings to change that theory on reply.

Finally, Gladstone does not and cannot dispute that Missouri courts have long expressed concern that summary judgment procedures be implemented in a fair and balanced manner to prevent summary judgment from becoming a tool for the denial of due process. CCR Brief at 30-31. Disregarding this well-settled context for the fair application of summary judgment procedures, Gladstone merely asserts that Rule 74.04(c)(3) gives it an unfettered right to offer an additional statement of facts on reply even though CCR as nonmovant did not dispute Gladstone's initial statement of uncontroverted facts or offer any additional statement of its own. Gladstone Brief at 14. As demonstrated in CCR's opening brief, Missouri law on summary judgment procedures does not support this unprecedented interpretation of Rule 74.04(c)(3). *See* CCR Brief at 19-31.

In that regard, a decision issued January 8 by the Western District reinforces what CCR has already demonstrated: "We found no case in which a court allowed a party to save an otherwise facially deficient motion for summary judgment by bringing up new facts and arguments in a reply." *Taggart v. Maryland Casualty Co.*, WD67762, 2008 WL 65493 at *3 (Mo. App. 2008). In *Taggart*, the claimants sought summary judgment but chose to ignore the nonmovant's affirmative defense. "By not addressing Maryland Casualty's affirmative defense in their motion for summary judgment and waiting to deal with the affirmative defense in their reply to Maryland Casualty's response, the

Taggarts waited too late.” *Id.* The Western District further explained that the 2003 amendment to Rule 74.04 did not open the door to new arguments and facts on reply:

Although modifications to Rule 74.04 authorized the circuit court to decide whether or not to grant summary judgment based on the “motion, the response, the reply and the sur-reply,” we, nevertheless, see nothing in the modified rule that permits a party to file a reply that raises arguments that should have been, but were not, included in its original motion. Rather, as the cases interpreting the old rule make clear, a circuit court cannot consider issues raised in a reply for the first time.

Id. *Taggart* cites with approval *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632 (Mo. App. 2000), thereby confirming its continued vitality.

In an effort to distinguish *Cross* and justify its procedural violation, Gladstone cites *City of Harrisonville v. Public Water Supply Dist.*, 129 S.W.3d 37 (Mo. App. 2004). Gladstone Brief at 14-15. The *Harrisonville* case does not validate Gladstone’s conduct for two reasons. First, Gladstone changed the issue before the court from a purely legal one challenging the sufficiency of the pleaded allegations to a belated contention challenging the accuracy of those allegations based on extrinsic evidence. Second, and even more fundamentally, the quoted passage from the *Harrisonville* case merely states “the court could consider whatever *legal arguments and authorities* it wished on that issue.” 129 S.W.3d at

41 (emphasis added). There is nothing in the opinion validating an improper and belated submission of extrinsic *evidence*.

Ultimately, Gladstone advocates adoption of a procedure permitting summary judgment by ambush. Under Gladstone's view, a defendant seeking summary judgment is free to recharacterize the claims being asserted by a plaintiff and disregard allegations at will. When the nonmovant in response points to allegations overlooked by the movant, this would somehow entitle the movant to dispute in reply what it chose to ignore at the outset. As *Taggart* confirms, Gladstone was not free to disregard the factual allegations showing untoward activity and undue delay as set forth in the first amended petition. Having failed to forthrightly challenge the cause of action as pleaded, Gladstone also failed to establish a right to judgment as a matter of law in its motion, so the grant of summary judgment was in error.

D. Erroneous ruling on motion to strike

Despite overwhelming Missouri authority establishing that a grant of summary judgment is reviewed *de novo*, Gladstone erroneously claims that the lower court's decision to strike CCR's summary judgment responses is somehow reviewed for abuse of discretion. Gladstone Brief at 16. Gladstone supports this proposition with two inapposite citations. Gladstone's primary authority is *Yates v. Rexton, Inc.*, 267 F.3d 793, 802 (8th Cir. 2001), where the Eighth Circuit concluded that the trial court had abused its discretion in excluding certain summary judgment evidence as hearsay. This federal decision is not controlling

here, and Gladstone’s motion to strike had nothing to do with an analysis or application of any evidentiary doctrine—it related solely to the purely legal question of summary judgment procedure. II LF 243-44. Gladstone also offers a “see” citation to *Whelan v. Missouri Public Service*, 163 S.W.3d 459 (Mo. App. 2005), but it involved an appeal of evidentiary rulings from a jury trial that had absolutely nothing to do with summary judgment procedure.

Gladstone does nothing to dispel the confusion regarding the scope of relief sought, *i.e.* whether its motion to strike was directed at CCR’s initial response, its sur-reply, or both. Gladstone argues that “Rule 74.04(c)(2) [governing a nonmovant’s initial response] required CCR to specifically deny Gladstone’s recitation of facts.” Gladstone Brief at 16. This assertion is demonstrably incorrect because Rule 74.04(c)(2) allows a response to “admit or deny each of movant’s factual statements” and further provides that a noncompliant response “is an admission of the truth of that numbered paragraph.” Considering that Gladstone’s statement of facts was taken verbatim from CCR’s own first amended petition, it was entirely permissible and expedient for CCR to admit its own facts without addressing each paragraph separately.

In the final analysis, Gladstone’s motion to strike was an improper attempt to gain still more unfair procedural advantage, but it could not spare Gladstone from the consequences of its failure to establish a right to judgment as a matter of law in its initial motion papers. Even in summary judgment cases where the nonmovant makes no response, a reviewing court is still obligated to conduct a

searching review of the record in the light most favorable to the nonmovant. *ITT Commercial Finance Corp.*, 854 S.W.2d at 380; *E.O. Dorsch Electric Co. v. Plaza Construction Co.*, 413 S.W.2d 167, 173 (Mo. 1967). Therefore, even assuming CCR's responses were properly stricken, Gladstone was not entitled to summary judgment because it failed to show a right to judgment on the pleaded claims.

II. Genuine Issues of Material Fact on CCR's Claims

Gladstone seeks to uphold the summary judgment with legal arguments that are more about redefinition rather than any real dispute about applicable Missouri law. Gladstone first attempts to recharacterize CCR's claim as brought only under 42 U.S.C. § 1983, but as previously demonstrated, the pleaded facts establish a Missouri constitutional claim for inverse condemnation. *See* section I.A., *supra*. Moreover, as recognized by the court of appeals, CCR's petition also stated "a cause of action in *tort* for pre-condemnation damages." Slip op. at 2 (emphasis in original). Gladstone ignores CCR's tort claim and the court of appeals' decision on that point although elsewhere Gladstone does state that it "does not take issue with the Western District's analysis." Gladstone Brief at 19.

As it did in its initial motion papers below, Gladstone renews its attempt to reframe the factual basis for CCR's claim as involving nothing more than a declaration of blight. Gladstone Brief at 10. However, both in its first amended petition and its response to the motion below, CCR has made it perfectly clear that this case is about much more than a declaration of blight:

Gladstone contends that CCR's petition should be dismissed based on the proposition that the mere designation of property as "blighted" does not give rise to a taking. CCR does not dispute this legal proposition. However, CCR does not assert that it is entitled to relief merely because its property has been designated as blighted.

I LF 34. Instead, as CCR pointed out to the circuit court, the first amended petition alleges wrongful conduct in the nature of "aggravated delay" and "untoward activity" which gives rise to a cognizable cause of action. I LF 34-35.

The pleaded facts show that Gladstone has—through a combination of bureaucratic foot dragging, landowner harassment, and tenant interference—sought to run down the value of CCR's property, thereby turning the declaration of blight into a self-fulfilling prophecy that will eventually enable Gladstone or its redeveloper de jour to condemn the property at a fire-sale price. The law grants redress for such abuse of governmental power, and that is the redress CCR seeks here. *See* CCR Brief at 32-40.

After first attempting to ignore the alleged facts showing aggravated delay and untoward activity and then improperly attempting to dispute them for the first time in reply, Gladstone now attempts to belittle CCR's allegations as "inappropriate" and "disingenuous" in light of Gladstone's self-proclaimed "reasoned and prudent deliberation." Gladstone Brief at 12. This is yet another unfounded attempt by Gladstone to recharacterize CCR's claim as challenging nothing more than the declaration of blight; equally unfounded is Gladstone's

conclusory assertion that “[a]s a matter of law, . . . CCR was a not a victim of aggravated delay or untoward delay.” Gladstone Brief at 17.

To the contrary, CCR pleaded specific facts showing a multi-year chronology of false starts, ever-changing plans and redevelopers, and a descent into bureaucratic limbo (which continues to this day). I LF 7-11. CCR also pleaded untoward activity in the form of interference with CCR’s peaceful and profitable enjoyment of its property. I LF 9-10. Among other things, the first amended petition contains specific factual allegations that Gladstone harassed CCR “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. Moreover, 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. These allegations are well within established precedent recognizing a cause of action for a landowner subjected to governmental stall tactics, harassment by code enforcement, and interference with tenants and the income stream they produce; in particular, these facts bring the case squarely within the cause of action recognized in *Roth v. State Highway Comm’n*, 688 S.W.2d 775 (Mo. App. 1984). *See also* CCR Brief at 32-37 (collecting cases). They also state a tort claim as recognized by the court of appeals.

On this record and under either or both theories, CCR is plainly entitled to its day in court, and the circuit court erred by failing to recognize that genuine issues of material fact preclude summary judgment. By first admitting all the allegations of CCR’s first amended petition and then attempting to contradict some of them for the first time in its reply, Gladstone presented inconsistent versions of the material facts that defeated its own motion for summary judgment. CCR Brief at 39-40. This result follows from this Court’s landmark decision in *ITT Commercial Finance*: “materials submitted by the movant that are, themselves, inconsistent on the material facts defeat the movant’s prima facie showing.” 854 S.W.2d at 382. Consistent with its approach to so many of the arguments raised by CCR, Gladstone simply ignores this controlling authority, preferring instead to argue that it did not admit CCR’s pleaded facts—yet another argument which ignores authorities cited in CCR’s opening brief. *See* section I.B., *supra*.

III. Federal Exhaustion Requirement Inapplicable

In its opening brief, CCR demonstrated that this state court action was not subject to whatever exhaustion requirement may apply in federal court—indeed, by proceeding with its state inverse condemnation claim against Gladstone in state court, CCR was proceeding precisely as contemplated by whatever federal exhaustion requirement might exist. CCR Brief at 41-42.

Gladstone does not respond to this point. Instead, Gladstone reiterates the wishful but false premise that “CCR chose only to plead a 42 U.S.C. § 1983 claim

in its First Amended Petition.” Gladstone Brief at 18. To the contrary, the first amended petition includes a claim for inverse condemnation under the self-enforcing terms of Article I, Section 26 of the Missouri Constitution (*see* section I.A., *supra*) as well as a tort claim for pre-condemnation damages. Slip op. at 5-6. Moreover, the case cited by Gladstone involved no appellate review of any ruling on a claim under 42 U.S.C. § 1983; instead, the analysis was limited to an inverse condemnation claim, which the court held was properly brought in state court. *CIS Communications, L.L.C. v. County of Jefferson*, 177 S.W.3d 848 (Mo. App. 2005).

IV. No Support for the Court of Appeals on Ripeness

Although Gladstone early in its brief frames the fourth issue as “whether the Missouri Court of Appeals correctly applied the ‘ripeness doctrine’” (Gladstone Brief at 8), Gladstone ultimately ducks that issue and neither attacks nor defends the court of appeals’ treatment of ripeness and jurisdiction. Instead, under a point heading that says nothing about ripeness, Gladstone cryptically asserts that it “does not take issue with the Western District’s analysis, especially with regard to whether a taking occurred.” Gladstone Brief at 19. Without belaboring the point, suffice it to say that Gladstone in no way disputes the arguments or authorities CCR offered in Point IV of its Brief. CCR Brief at 42-49.

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 4,872 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 5th day of February, 2008, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by first-class mail, postage prepaid, addressed to:

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