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IN THE SUPREME COURT OF MISSOURI

Appeal Number SC95064

AVERY CONTRACTING LLC,

Appellant-Plaintiff,

v.

RICHARD NIEHAUS, LISA J. NIEHAUS, ALICIA NIEHAUS, CREEKSTONE HOMEOWNERS ASSOCIATION, and MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION,

Respondents-Defendants.

On Appeal from the Circuit Court of Jefferson County, Missouri,
The Honorable Nathan B. Stewart, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ix

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF FACTS..... 5

POINTS RELIED ON..... 21

ARGUMENT..... 29

POINT I

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT HAS FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE 50 ACRES, MORE OR LESS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THERE IS NO LONGER A REQUIREMENT OF PLEADING THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL, IN THAT SECTION 228.340, RSMO 1986, HAS BEEN REPEALED, AND SECTION 228.342, RSMO, PROVIDES, IN PART, THAT A PRIVATE ROAD MAY BE ESTABLISHED IN FAVOR OF ANY OWNER OF REAL PROPERTY FOR WHICH THERE IS NO ACCESS, AND SECTION 228.342, RSMO,

CONTAINS NO REQUIREMENT THAT NO PUBLIC ROAD PASS THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL AS WAS THE CASE UNDER REPEALED SECTION 228.340, RSMO 1986 29

POINT II

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA,* AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE NO COUNTERCLAIM FOR A PRIVATE ROAD COULD HAVE BEEN INTERPOSED IN THE PRIOR CONDEMNATION CASE, IN THAT CONDEMNATION ACTIONS ARE *SUI GENERIS* AND NO COUNTERCLAIMS MAY BE INTERPOSED IN CONDEMNATION ACTIONS 49

POINT III

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY A

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STATUTE OF LIMITATIONS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE A WAY OF NECESSITY IS AN APPURTENANT RIGHT THAT RUNS WITH THE LAND AND DOES NOT ATTACH TO A PARTICULAR OWNER AND CANNOT BE EXTINGUISHED SO LONG AS THE WAY OF NECESSITY CONTINUES TO EXIST, IN THAT UNDER THE CONTINUING OR REPEATED WRONG RULE, EACH CONTINUATION OR REPETITION OF WRONGFUL CONDUCT IS CONSIDERED A SEPARATE CAUSE OF ACTION, SO THAT SO LONG AS THE STRICT NECESSITY REQUIRED BY SECTION 228.342, RSMO, EXISTS, SUCH STRICT NECESSITY IS OF AN APPURTENANT AND CONTINUING NATURE, WHICH MEANS THAT FOR PRACTICAL PURPOSES, A STATUTE OF LIMITATIONS CANNOT RUN SO LONG AS THE STRICT NECESSITY CONTINUES TO EXIST 52

POINT IV

THE TRIAL COURT ERRED IN IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT COUNT I OF APPELLANT'S PETITION IS NOT RIPE, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS PLAINTIFF'S'S PETITION

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AND SUPPORTING SUGGESTIONS, BECAUSE THE ISSUES PRESENTED IN COUNT I OF APPELLANT'S PETITION ARE APPROPRIATE FOR JUDICIAL DETERMINATION, THE HARDSHIP ON APPELLANT CAUSED BY A DISMISSAL OF COUNT I OF APPELLANT'S PETITION IS OBVIOUS, IMMINENT AND CERTAIN, AND RULE 55.06(b) PROVIDES THAT A CLAIM COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION MAY BE JOINED WITH THE PRECEDENT ACTION IN A SINGLE ACTION WITH RELIEF GRANTED IN ACCORDANCE WITH THE SUBSTANTIVE RIGHTS OF THE PARTIES 58

POINT V

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE MHTC IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 228, RSMO, AS ARGUED IN RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION, BECAUSE RESPONDENT MHTC IS SUBJECT TO THE PROVISIONS OF ARTICLE I, SECTION 28 OF THE MISSOURI CONSTITUTION CONCERNING THE RIGHT OF EMINENT DOMAIN FOR PRIVATE WAYS OF NECESSITY, AS IMPLEMENTED IN SECTIONS 228.342 TO 228.368, RSMO, IN THAT THE APPLICABLE EXEMPTION IN SECTION 228.341, RSMO, ONLY APPLIES TO ROADS OWNED BY THE MHTC, NECESSARILY IMPLYING THAT PROPERTY OF THE MHTC THAT IS NOT A ROAD OWNED BY

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

THE MHTC IS SUBJECT TO SECTIONS 228.342 TO 228.368, RSMO, AND ANY PART OF CREEKSTONE DRIVE OWNED BY THE MHTC WOULD BE A PUBLIC ROAD PARTIES 66

POINT VI

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE COMMISSIONERS' REPORT IN THE CONDEMNATION CASE PURPORTEDLY CLEARLY LIMITS OR PROHIBITS ACCESS TO THE 50 ACRES, MORE OR LESS, AND RESPONDENT MHTC HAS PURPORTEDLY TAKEN AND PAID FOR THE RIGHT TO LIMIT OR PROHIBIT ACCESS TO THE 50 ACRES, MORE OR LESS, AND THE MHTC HAS NOT LIFTED ANY SUCH RESTRICTIONS OR PROHIBITIONS, SO THE RIGHT OF APPELLANT TO ACCESS THE 50 ACRES, MORE OR LESS, HAS ALREADY BEEN DETERMINED, BECAUSE ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION GRANTS THE MHTC ONLY THE POWER TO LIMIT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, IN THAT SAID CONSTITUTIONAL PROVISION DOES NOT EMPOWER THE MHTC TO COMPLETELY PROHIBIT ALL ACCESS TO THE 50 ACRES, MORE OR LESS, FROM ANY PUBLIC ROAD, AND THE COMMISSIONERS' REPORT IN THE CONDEMNATION CASE IS AMBIGUOUS AS TO WHETHER SUCH JUDGMENT

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

LIMITS DIRECT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, OR WHETHER SUCH COMMISSIONERS' REPORT PURPORTS TO COMPLETELY PROHIBIT ALL ACCESS TO ANY PUBLIC ROAD FROM THE 50 ACRES, MORE OR LESS 89

POINT VII

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT APPELLANT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, BECAUSE THERE IS NO REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES, IN THAT NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED FOR ACTIONS UNDER 42 U.S.C. SECTION 1983 AND/OR NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED UNDER SECTION 536.150, RSMO, AND/OR NO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT EXISTS FOR THE EXERCISE OF THE MHTC'S POWER TO LIMIT ACCESS UNDER MO. CONST. ART. IV, SECTION 29, AND/OR THE COMMISSIONER'S REPORT DOES NOT PROVIDE FOR ANY ADMINISTRATIVE REMEDIES FOR ACCESS PERMIT REQUESTS TO THE 50 ACRES, MORE OR LESS 116

POINT VIII

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT THE "SUBDIVISION ROAD

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

EXEMPTION" IN SECTION 228.341, RSMO, APPLIES, BECAUSE THE "SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, IS NOT APPLICABLE IF THE PRIVATE ROAD CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE, IN THAT THE ROAD PETITIONED FOR BY APPELLANT CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE 126

CONCLUSION 133

CERTIFICATE OF SERVICE 133

COMPLIANCE CERTIFICATION 134

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

TABLE OF AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment V 103, 115

U.S. Const. Amendment XIV 103, 111, 115

FEDERAL STATUTES

42 U.S.C. Section 1983 ..... 5, 27, 109, 114, 116, 117, 126

42 U.S.C. Section 1988 ..... 5, 109, 114, 116

MISSOURI CONSTITUTIONAL PROVISIONS

Mo. Const. art. I, Section 26 102-103

Mo. Const. art. I, Section 27 ..... 14, 102-103

Mo. Const. art. I, Section 28

..... 5, 25, 47, 58, 65, 66, 67, 69, 73, 75, 76, 77, 77-78, 78, 81, 82

Mo. Const. art. IV, Section 29

... 26, 27, 45, 46, 64, 69, 88, 90, 93, 94, 101, 102, 105, 106, 108, 109, 110, 117, 123, 124

Mo. Const. art. V, Section 3 3

Mo. Const. art. V, Section 10 ..... 3, 4, 7

Mo. Const. art. V, Section 18 122

MISSOURI STATUTES

Chapter 226, RSMo 68

Chapter 227, RSMo 68, 93

Chapter 228, RSMo 25, 66, 72, 73, 74, 75

Chapter 536, RSMo 122, 123, 124

Section 227.090, RSMo..... 67, 68, 79, 80, 81, 82

Section 227.120, RSMo..... 93, 98

Section 227.290, RSMo..... 14, 69

Section 228.190, RSMo..... 67, 80, 81

Section 228.340, RSMo 1986 (repealed)

..... 21, 29, 35-36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 62

Section 228.341, RSMo

..... 25, 28, 62, 66, 70, 71, 77, 78-79, 81, 82, 86, 127, 128, 129, 129-130, 130, 131, 132

Section 228.342, RSMo

..... 21, 22, 23, 24, 25, 29, 33-34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 60-61, 61, 62, 63, 65, 66, 70, 72, 73, 74, 75, 78, 81, 86, 121, 125, 129, 131, 132

Section 228.345, RSMo..... 128, 131-132, 132

Section 228.450, RSMo (repealed) 132

Section 228.352, RSMo..... 22, 25, 34, 45, 47, 62, 65, 66, 132

Section 228.369, RSMo..... 129, 130

Section 228.374, RSMo..... 129, 130

Section 442.400, RSMo..... 112

Section 477.050, RSMo..... 3

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Section 516.010, RSMo..... 53, 56, 58

Section 523.040, RSMo..... 108, 110, 112, 113

Section 523.050, RSMo..... 107, 108, 110

Section 523.055, RSMo..... 108

Section 536.010, RSMo..... 122, 125

Section 536.100, RSMo..... 122

Section 536.150, RSMo..... 27, 117, 122, 123, 124

Sections 228.341 to 228.374, RSMo

..... 48, 58, 65, 67, 68, 71, 73, 77, 78, 81, 82, 86, 86-87, 89, 130, 131

Sections 228.342 to 228.368, RSMo..... 5, 25, 66, 67, 130

Sections 442.380 to 442.400, RSMo..... 56, 58, 112, 113, 114

Sections 527.010 to 527.130, RSMo..... 5, 108

Sections 527.150 to 527.250, RSMo..... 5, 108

MISSOURI SESSION LAWS

S.B. 138, 1991 Mo. Laws 733..... 35, 37, 45, 49, 62. 130, 132

C.C.S. No. 2 H.C.S.S.B. 236, 1993 Mo. Laws 691..... 37

S.B. Nos. 1233, 840 & 1043, 2004 Vernon's Missouri Session Laws (West's No. 181), page 1041..... 198

H.B. 1103, 2012 Vernon's Missouri Session Laws (West's No. 79), page 566

..... 81, 82, 129, 130, 131

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

MISSOURI SUPREME COURT RULES

Rule 55.03 134

Rule 55.06 ..... 24, 59, 65-66, 66

Rule 55.08 ..... 32, 51, 56, 90, 98

Rule 55.27 ..... 30, 32, 121

Rule 67.03 1

Rule 74.04 30

Rule 74.06 ..... 5, 108

Rule 83.02 134

Rule 83.04 ..... 3, 4, 6, 7

Rule 83.09 93

Rule 84.06 134

Rule 84.17 ..... 4, 6

Rule 86.08 108

Rule 87 ..... 5, 108

Rule 93.01 ..... 5, 108

CASE LAW

Anderson v. Ken Kauffman & Sons Excavating, LLC, 248 S.W.3d 101 (Mo. App., W.D. 2008) 79-80

Anderson v. Mantel, 49 S.W.3d 760 (Mo. App., S.D. 2001), *subsequent appeal,* 171 S.W.3d 774 (Mo. App., S.D. 2005) 42, 43, 44, 62

Andrews v. State, 248 Ind. 525, 229 N.E.2d 806 (Ind. 1967) 104

Baetje v. Eisenbeis, 296 S.W.3d 463 (Mo. App., E.D. 2009) 41, 42

Bateman v. Rinehart, 391 S.W.3d 441 (Mo. Banc 2013) 86

Beery v. Shinkle, 193 S.W.3d 435 (Mo. App., W.D. 2006) 37-38, 38, 42, 44

Bonner Properties, Inc. v. Planning Board of the Township of Franklin, 185 N.J. Super. 553, 449 A.2d 1350 (N. J. Super. 1982) 45

Blue Pool Farms, LLC v. Basler, 239 S.W.3d 687 (Mo. App., E.D. 2007) 38, 41, 42

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 111-12

Buemi v. Kerckhoff, 359 S.W.3d 16 (Mo. Banc 2011) .....

Carpenter v. King, 679 S.W.2d 866 (Mo. Banc 1984) 83, 84, 85

Chromalloy American Corporation v. Elyria Foundry Company, 955 S.W.2d 1 (Mo. Banc 1997) 2

City of Chesterfield v. Deshetler Homes, Inc., 938 S.W.2d 671 (Mo. App., E.D. 1997) 30

City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441 (Mo. Banc 1980) 46

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Clifford Hindman Real Estate, Inc. v. City of Jennings, 283 S.W.3d 804 (Mo. App., E.D. 2009) 33, 128

Collector of Revenue v. Drury Development Corp., 309 S.W.3d 346 (Mo. App., E.D. 2010) 108

Collector of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens, 453 S.W. 3d 746 (Mo. Banc 2015) 113

Cox v. Tipton, 18 Mo. App. 450 (K. C. 1885) 63

Ethridge v. Tierone Bank, 226 S.W.3d 127 (Mo. Banc 2007) 111

Evans v. Mansfield, 364 S.W.2d 548 (Mo. 1963) 63, 64

Farrow v. Brown, 873 S.W.2d 918 (Mo. App., S.D. 1994) 43

Gross v. Merchants-Produce Bank, 390 S.W.2d 591 (Mo. App., K.C. 1965) 47

Guerra v. Fougere, 201 S.W.3d 44 (Mo. App., W.D. 2006) 41

Hamai v. Witthaus, 965 S.W.2d 379 (Mo. App., E.D. 1998) 42

Handlan-Buck Company v. State Highway Commission, 315 S.W.3d 219 (Mo. 1958) 91

Harrison v. State Highways and Transportation Commission, 732 S.W.2d 214 (Mo. App., S.D. 1987) 68, 81

Hayes v. City of Kansas City, 362 Mo. 368, 241 S.W.2d 888 (Mo. 1951) 83, 84

Hill v. Kennoy, Inc., 522 S.W.2d 775 (Mo. Banc 1975) 49, 61, 63, 63-64

Hollars v. Church of the Apostolic Faith, Inc., 596 S.W.2d 73 (Mo. App., S.D. 1980) 42

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

..... 35, 36, 49

In re: Opening a Private Road for the Benefit of Thomas P. O'Reilly, 100 A.2d 689 (Pa. Commw. Ct., 2014) (Pelligrini, PJ, concurring) 114-115

Jackson County Public Water Supply District No. 1 v. State Highway Commission, 365 S.W.2d 553 (Mo. 1963) 27, 123, 124

Johnston v. Shoults, 160 S.W.3d 440 (Mo. App., S.D. 2005)..... 37, 41, 42

Jones v. Jackson County Circuit Court, 162 S.W.3d 53 (Mo. App., W.D. 2005) 2

J.R. Green Properties Inc. v. City of Bridgeton, 825 S.W.2d 684 (Mo. App., E.D. 1992) 55, 58

Kilbane v. Department of Revenue, 544 S.W.3d 9 (Mo. Banc 1976) 47

King v. Jack Cooper Transport Company, 708 S.W.2d 194 (Mo. App., W.D. 1986) 36

King v. Probate Division, Circuit Court of the County of St. Louis, 958 S.W.2d 92 (Mo. App., E.D. 1997) 83

Kirkpatrick v. Webb, 58 S.W.3d 903 (Mo. App., S.D. 2001)..... 42, 62

Krasney v. Curators of the University of Missouri, 765 S.W.2d 646 (Mo. App., W.D. 1989) 83

Lewis v. Hilkerbaumer, 599 S.W.2d 7 (Mo.App., E.D. 1980)..... 61-62

Lynch v. Lynch, 260 S.W.3d 834 (Mo. Banc 2008) 31

McCracken v. Wal-Mart Stores East LP, 298 S.W.3d 473 (Mo. Banc 2009)..... 32

Main Street Feeds, Inc. v. Hall, 975 S.W.2d 227 (Mo. App., S.D. 1998) 43

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Malan Construction Company v. State Highway Commission, 621 S.W.2d 519 (Mo. App., W.D. 1981) 27, 124

Midella Enterprises, Inc. v. Missouri State Highway Commission, 570 S.W.2d 298 (Mo. App., S.D. 1978) 106

Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts, 343 S.W.3d 348 (Mo. Banc 2011) 65

Missouri Highway & Transp. Comm'n v. Kansas City Cold Storage, Inc., 948 S.W.2d 679, 682 (Mo. App. W.D. 1997) 70, 72

Missouri Real Estate and Insurance Agency, Inc. v. St. Louis County, 959 S.W.2d 847 (Mo. App., E.D. 1997) 109

Missouri Soybean Association v. Missouri Clean Water Commission, 102 S.W.3d 10 (Mo. Banc 2003) 32, 65, 121

Moran v. Flach, 752 S.W.2d 956 (Mo.App., E.D. 1988) 61

Moss Springs Cemetery Association v. Johannes, 970 S.W.2d 372 (Mo. App., S.D. 1998) 22, 43, 44, 45, 61-62, 125

Murray v. Fleischaker, 949 S.W.2d 203 (Mo. App., S.D. 1997) 32, 51, 56, 98

Naylor Senior Citizens Housing LP v. Sides Construction Company, 423 S.W.3d 238 (Mo. Banc 2014) 1

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. Banc 1993) 31

O'Neil v. Missouri, 662 S.W.2d 260 (Mo. Banc 1983) 46

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Osage Water Company v. City of Osage Beach, 58 S.W.3d 35 (Mo. App., S.D. 2001) 30

Rippeto v. Thompson, 216 S.W.2d 505 (Mo. 1949) 77

Rogers v. Brockland, 889 S.W.2d 827 (Mo. Banc 1995) 132

Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. Banc 1983) 46

Sheedy v. Missouri Highways and Transportation Commission, 180 S.W.3d 66 (Mo. App., S.D. 2005) 46, 67, 68, 80

Shepherd v. State Highway Commission, 427 S.W.2d 382 (Mo. 1968) 91

Short v. Southern Union Company, 372 S.W.3d 520 (Mo. App., W.D. 2012) 24, 38, 41, 42, 46, 55, 56, 57, 58, 132

Smith v. Coffey, 37 S.W.3d 797 (Mo banc 2001) 83-85, 86

Spier v. Brewer, 958 S.W.2d 83 (Mo. App., S.D. 1997) 43, 48, 48-49, 63, 125

State ex rel. M. J. Gorzik Corp. v. Mosman, 315 S.W.2d 209 (Mo. 1958) 47

State ex rel. Missouri Cities Water Company v. Hodge, 878 S.W.2d 819, 821 (Mo. Banc 1994) 76

State ex rel. Missouri Highway and Transportation Commission v. Davis, 849 S.W. 704 (Mo. App., E.D. 1993) 22, 52, 73

State ex rel. Missouri Highway and Transportation Commission v. Keeven, 895 S.W.2d 587 (Mo. Banc 1995) 105-106

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

State ex rel. Missouri Highway and Transportation Commission v. Perigo, 886 S.W.2d 149 (Mo. App. S.D. 1994) 92-93, 95, 97, 103, 105, 106, 107, 108

State ex rel. Missouri Highway and Transportation Commission v. Spencer, 820 S.W.2d 87 (Mo. App., E.D. 1991) 99-101

State ex rel. Missouri Highway and Transportation Commission v. Westgrove Corporation, 306 S.W.3d 618, 623 (Mo. App., E.D. 2010) 110

State ex rel. Nixon v. Summit Investment Company, LLC, 186 S.W.3d 428 (Mo. App., S.D. 2006) 1, 2

State ex rel. Rhodes v. City of Springfield, 672 S.W.2d 349 (Mo. App., S.D. 1984) (*quoting Wilhoit v. City of Springfield*, 171 S.W.2d 95 (Mo. App., Spr. 1943) 101-102

State ex rel. State Highway Commission v. Brockfeld, 388 S.W.2d 862 (Mo. Banc 1965) 99, 104

State ex rel. State Highway Commission v. Clevenger, 365 Mo. 970, 291 S.W.2d 57 (1956) 99, 100

State ex rel. State Highway Commission v. Curtis, 222 S.W.2d 64 (Mo. Banc 1949) 93, 93-94, 94

State ex rel. State Highway Commission v. Eakin, 357 S.W.2d 129 (Mo. 1962) 94

State ex rel. State Highway Commission v. Hammel, 372 S.W.2d 852 (Mo. 1963) 91

State ex rel. State Highway Commission v. James, 205 S.W.2d 534 (Mo. 1947) 91, 99, 124

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

State ex rel. State Highway Commission v. Meier, 388 S.W.2d 855 (Mo. Banc 1965) 91, 92, 99, 102, 106

State ex rel. State Highway Commission v. Nickerson and Nickerson, Inc., 494 S.W.2d 344 (Mo. 1973) 107

State ex rel. State Highway Commission v. Vorhof-Duenke Company, 366 S.W.3d 329 (Mo. Banc 1963) 103

State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 373 (Mo. Banc 1982) (*questioned on other grounds, Clay County Realty Company v. City of Gladstone*, 254 S.W.3d 859 (Mo. Banc 2008) 22, 51-52

State v. Liberty, 370 S.W.3d 537 (Mo. Banc 2012) 46

Ste. Genevieve School District R-II v. City of Ste. Genevieve, 66 S.W.3d 6 (Mo. Banc 2002) 31

Strictly Pediatrics Inc. v. Developmental Habilitation Associates, Inc., 820 S.W.2d 731 (Mo. App., E.D. 1991) 27, 126

Strozewski v. City of Springfield, 875 S.W.2d 905 (Mo. Banc 1994) 32, 121, 122-123

Teets v. American Family Mutual Insurance Company, 272 S.W.3d 455 (Mo. App., E.D. 2008) 110-111

Texaco, Inc. v. Short, 454 U.S. 516, 102 S. Ct. 781, 70 L.Ed.2d 738 (1982) 112

Village of Big Lake v. BNSF Railway Company, Inc., 382 S.W.3d 125 (Mo. App., W.D. 2012) 83

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Wagemann v. Elder, 28 S.W.3d 351 (Mo. App., E.D. 2000)..... 42-43, 115-116

Walters Bender Strohbehn & Vaughan, P.C. v. Mason, 316 S.W.3d 475 (Mo. App., W.D. 2010)..... 30, 31, 33, 128

Wolfe v. Swopes, 955 S.W.2d 600 (Mo. App., S.D. 1997)..... 39, 43

Wright v. J. A. Tobin Construction Co., 365 S.W.2d 742 (Mo. App., K.C. 1963) 47

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

JURISDICTIONAL STATEMENT

This is an appeal from two documents denominated Judgment both entered on or about May 30, 2014 by the trial court. LF at 58, 59. The trial court granted Respondents Niehaus and Creekstone Homeowners Association's Motion to Dismiss Plaintiff's Petition and Supporting Suggestions (hereinafter sometimes referred to as the "Niehaus/Creekstone Motion to Dismiss") by dismissing the Petition in its entirety without prejudice, as to Respondents Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, and Creekstone Homeowners Association (hereinafter sometimes referred to collectively as the "Niehaus/Creekstone Respondents"). LF at 59. The trial court granted Respondent Missouri Highways and Transportation Commission's Motion to Dismiss Plaintiff's Petition (hereinafter sometimes referred to as the "MHTC's Motion to Dismiss") by dismissing Appellant's cause without prejudice. LF at 58.

A final judgment is a prerequisite for appellate review. *Buemi v. Kerckhoff,* 359 S.W.3d 16, 20 (Mo. Banc 2011). The quasi-general rule is that an involuntary dismissal under Rule 67.03 without prejudice is not a final judgment. *Naylor Senior Citizens Housing LP v. Sides Construction Company,* 423 S.W.3d 238, 242-43 (Mo. Banc 2014). *See also Guerra v. Fougere,* 201 S.W.3d 44, 47-48 (Mo. App., W.D. 2006). The reason for the quasi-general rule is that the plaintiff may cure the dismissal by filing another suit. *State ex rel. Nixon v. Summit Investment Company, LLC,* 186 S.W.3d 428, 432-433 (Mo. App., S.D. 2006).

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

The quasi-general rule is not applied when the effect of the dismissal without prejudice is to dismiss the plaintiff's action on the merits and not simply the pleading. *Jones v. Jackson County Circuit Court,* 162 S.W.3d 53, 57-58 (Mo. App., W.D. 2005); *Summit Investment Company, LLC,* 186 S.W.3d at 432-433. A dismissal without prejudice may be a final judgment if the dismissal operates to preclude the party from bringing another action for the same cause and is *res judicata* of what the judgment actually decided, or an appeal from such dismissal can be taken where the dismissal has the practical effect of terminating the litigation in the form cast or in the plaintiff's chosen forum. *Chromalloy American Corporation v. Elyria Foundry Company,* 955 S.W.2d 1, 3 (Mo. Banc 1997). If the dismissal is such that the re-filing of the action would be a futile act, then the dismissal is considered a final judgment. *Summit Investment Company, LLC,* 186 S.W.3d at 432-433.

The trial court granted the Niehaus/Creekstone Motion to Dismiss by dismissing the Petition without prejudice "in its entirety". LF at 59. The trial court granted the MHTC's Motion to Dismiss by dismissing Appellant's "cause" without prejudice. LF at 58. No leave was granted for filing amended pleadings. Most of the grounds for dismissal of the Petition advocated by Respondents in written motions were dismissals of Appellant's causes of action on the merits and not dismissals of Appellant's pleading.

On or about June 19, 2014, Appellant filed a timely Notice of Appeal to the Missouri Court of Appeals, Eastern District.

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The Missouri Court of Appeals, Eastern District, took appellate jurisdiction over this matter in *Avery Contracting LLC v. Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, Creekstone Homeowners Association, and Missouri Highways and Transportation Commission,* Appeal No. ED101592 (Missouri Court of Appeals, Eastern District), as this case arose within the geographical boundaries of the Missouri Court of Appeals, Eastern District, under Section 477.050, RSMo, and this appeal is not within the exclusive appellate jurisdiction of the Supreme Court of Missouri under Mo. Const. art. V, § 3.

On April 14, 2015, the Missouri Court of Appeals, Eastern District, issued its Opinion in *Avery Contracting LLC v. Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, Creekstone Homeowners Association, and Missouri Highways and Transportation Commission,* Appeal No. ED101592 (Missouri Court of Appeals, Eastern District) (hereinafter sometimes referred to as the "Eastern District Opinion"). Footnote 1

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1. This matter has been transferred to this Court under Mo. Const. art. V, Section 10, and Rule 83.04. This matter is before this Court as on original appeal. Rule 83.09. The Eastern District Opinion may no longer have legal effect. Appellant makes reference to the Eastern District Opinion in this Brief not for the legal effect of such Opinion but for the purpose of showing the arguments made in the Eastern District Opinion and how those arguments are flawed.

On or about April 28, 2015, Appellant filed its Motion for Modification and/or Rehearing and Application for Transfer, with Suggestions in Support with the Missouri Court of Appeals, Eastern District, under Rules 84.17 and 83.02.

On or about June 3, 2015, the Missouri Court of Appeals, Eastern District, denied Appellant's Motion for Modification and/or Rehearing and Application for Transfer.

On or about June 16, 2015, Appellant filed its Application for Transfer in this Court under Rule 83.04.

On September 22, 2015, this Court sustained the application for transfer of Appellant and ordered this matter transferred to this Court under Mo. Const. art. V, Section 10 and Rule 83.04.

This Court has appellate jurisdiction over this appeal under Mo. Const. art. V, Section 10.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

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STATEMENT OF FACTS

Procedural Background

On February 3, 2014, Appellant filed its two-count Petition. LF at 1, 5-27. Count I of Appellant's Petition is an action directed against all of the Respondents under Mo. Const. art. I, Section 28 (authorizing condemnation proceedings for private roads), Sections 228.342 to 228.368, RSMo (authorizing condemnation proceedings for private roads), Sections 527.010 to 527.130, RSMo (the Declaratory Judgment Act), and Rule 87 (relating to actions for declaratory judgments). LF at 12. Count II of Appellant's Petition is an action directed against Respondent Missouri Highways and Transportation Commission (hereinafter sometimes referred to as the "MHTC") under Sections 527.010 to 527.130, RSMo, Rule 87, Sections 527.150 to 527.250, RSMo (statutes relating to quiet title actions), Rule 93.01 (relating to quiet title actions), Rule 74.06 (relating to independent actions for relief from judgments), 42 U.S.C. Sections 1983 and 1988 (relating to actions for violation of certain federal rights), and the common law of Missouri (authorizing certain independent actions for relief from judgments as well as actions for inverse condemnation claims, among other things). LF at 12.

On March 21, 2014, the MHTC filed the MHTC's Motion to Dismiss. LF at 3, 28-31.

On March 27, 2014, the Niehaus/Creekstone Respondents filed the Niehaus/Creekstone Motion to Dismiss. LF at 3, 32-27.

On April 24, 2014, Appellant filed its Memorandum in Opposition to the Motion to Dismiss of the Defendant Missouri Highways and Transportation Commission and the Motion to Dismiss of Defendants Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, and Creekstone Homeowners Association. LF at 3, 38-53.

On May 30, 2014, the MHTC filed its Suggestions in Support of its Motion to Dismiss Plaintiff's Petition. LF at 3, 54-57.

On May 30, 2014, the trial court entered Judgment granting the MHTC's Motion to Dismiss. LF at 4, 58.

On May 30, 2014, the trial court entered Judgment granting the Niehaus/Creekstone Motion to Dismiss. LF at 4, 59.

On June 19, 2014, Appellant filed its timely Notice of Appeal. LF at 4, 60-77.

On April 14, 2015, the Eastern District Opinion was issued affirming the trial court's Judgments.

On or about April 28, 2015, Appellant filed its Motion for Modification and/or Rehearing and Application for Transfer, with Suggestions in Support with the Missouri Court of Appeals, Eastern District, under Rules 84.17 and 83.02.

On or about June 3, 2015, the Missouri Court of Appeals, Eastern District, denied Appellant's Motion for Modification and/or Rehearing and Application for Transfer.

On or about June 16, 2015, Appellant filed its Application for Transfer in this Court under Rule 83.04.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

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On September 22, 2015, this Court sustained the application for transfer of Appellant and ordered this matter transferred to this Court under Mo. Const. art. V, Section 10 and Rule 83.04.

Facts Alleged in Appellant's Petition

Appellant is a Missouri limited liability company. LF at 6.

Respondents Richard Niehaus, Lisa J. Niehaus, and Alicia Niehaus are necessary parties and residents of Jefferson County, Missouri. LF at 6.

Respondent Creekstone Homeowners Association is a necessary party and an unincorporated association created under the Creekstone plat recorded on or about July 1, 1987, in Plat Book 92, Page 3 of the Jefferson County Records and the Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about July 1, 1987 and recorded on or about July 1, 1987 in Book 0369, Page 1944 of the Jefferson County Records, as amended by Creekstone Amendment to Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about December 13, 1988 and recorded on or about January 5, 1989 in Book 0416, Page 1218 of the Jefferson County Records. LF at 6.

The MHTC is a governmental entity the joinder of which is necessary to determine the issues presented in this matter. LF at 7.

By Missouri Warranty Deed dated on or about July 31, 2003 and recorded on or about August 8, 2003 as Document No. 030059393 of the Jefferson County Records, Burnell A.

Raebel and Rose Marie Raebel, Trustees under the Raebel Living Trust, dated August 17, 1994, conveyed the following described real estate located in Jefferson County, Missouri (hereinafter sometimes referred to as the "50 Acres, More or Less") to Mullins Homes, Inc., to-wit:

> All that part of the following described real estate lying South of Relocated Route M described as follows: All that portion of U.S. Survey No. 335, more particularly described as follows, to-wit: Beginning at a point on the East line of Survey 335, 1234 feet North of the Southeast corner of said Survey No. 335; thence running North 27 degrees East on the East line of Survey No. 335 and the West line of Survey 893, 59.45 chains to the center of the County Road leading from Sulphur Springs to House Springs; thence North 52 degrees 30 minutes West along said road 3.34 chains; thence North 60 degrees West 5.13 chains; thence North 89 degrees 45 minutes West 3.25 chains; thence North 83 degrees 45 minutes West 2 chains; thence North 62 degrees West 8.24 chains; thence South 27 degrees West 57.77 chains; thence South 63 degrees East 21.90 chains to the place of beginning.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

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> LESS AND EXCEPTING that part of said real estate conveyed by Clara Raebel to Edw. W. Uhri by deed dated July 19, 1958, and recorded in Book 276, Page 194 of the Jefferson County Land Records.
>
> LESS AND EXCEPTING therefrom that part of subject property conveyed to Robert J. Karmi and Barbara A. Karmi, his wife, according to instrument dated December 31, 1986, recorded in Book 0354, Page 1383.

LF at 7.

By Report of Commissioners dated on or about April 18, 1996 and recorded on or about April 19, 1996 in Book 0713, Page 2034 of the Jefferson County Records (hereinafter sometimes referred to the "Commissioner's Report"), entered in the case styled, *State of Missouri ex rel. Missouri Highway and Transportation Commission v. The Raebel Living Trust dated August 17, 1994 and any Amendments Thereto, et al.*, Case No. CV195-5715CC (Twenty-third Judicial Circuit Court of Missouri, at Hillsboro, Jefferson County, Missouri) (hereinafter sometimes referred to as the "Condemnation Case"), all abutter's rights of direct access to the thruway of Relocated Highway M from the 50 Acres, More or Less, were "herewith prohibited or limited". LF at 8.

Said 50 Acres, More or Less, has no recorded means of ingress or egress to a public road. LF at 8.

The 50 Acres, More or Less, has split zoning with the majority of the parcel zoned "LR2" and a minority of the parcel zoned "R40" under the Unified Development Order of Jefferson County, Missouri, which zoning districts permit the use of the 50 Acres, More or Less, for residential purposes. LF at 8.

By General Warranty Deed dated on or about September 6, 2013 and recorded on or about September 12, 2013 as Document No. 2013R-036488 of the Jefferson County Records, Mullins Custom Homes, LLC conveyed the 50 Acres, More or Less, to Appellant. LF at 8.

Said 50 Acres, More or Less, is located adjacent to Relocated Highway M in Jefferson County, Missouri, a short distance East of the intersection of Relocated Highway M and Moss Hollow Road. LF at 8.

By plat recorded on or about July 1, 1987, in Plat Book 92, Page 3 of the Jefferson County Records, Clyde Johnson and Florence Johnson, husband and wife, created the platted subdivision known as Creekstone. LF at 8.

By Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about July 1, 1987 and recorded on or about July 1, 1987 in Book 0369, Page 1944 of the Jefferson County Records, and as amended by Creekstone Amendment to Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about December 13, 1988 and recorded on or about January 5, 1989 in Book 0416, Page 1218 of the Jefferson County Records, Clyde Johnson and Florence Johnson, husband and wife, representing more than 2/3rds of the

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lot owners in said Creekstone, created an unincorporated association or group known as the Creekstone Homeowners Association made up of all present and future lot owners in Creekstone and believed to be governed by a three-member Board of Governors. LF at 9.

One of the purposes of the Board of Governors in said Declaration (Book 0369, Page 1949) is to exercise certain control over the easements, streets, drives and rights-of-way in Creekstone until such time as the same are dedicated to public bodies and agencies, public utilities or others furnishing common services to occupants of the land subject thereto. LF at 9.

Creekstone Subdivision is located between the 50 Acres, More or Less, and Moss Hollow Road. LF at 9.

By General Warranty Deed dated on or about January 11, 1990 and recorded on or about January 26, 1990, in Book 0447, Page 958 of the Jefferson County Records, Clyde Johnson and Florence Johnson, his wife, conveyed the following described real estate to the MHTC, to-wit:

> A parcel of land located in part of U. S. Survey No. 335, Township 42 North, Range 5 East in Jefferson County, Missouri; all of Lots 2, 3, 22, 23, 24, 25, 26 and 27 of Creekstone Subdivision recorded in Book 372, Pages 1393 and 1394; including that portion of Creekstone Drive located in Lots 2, 22 and 23; but less and excepting that portion of Creekstone

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Drive located in Lot 3 and Dierks Lane and (Future Dierks Lane) located in Lots 2, 23, 24, 25, 26 and 27, which shall be maintained by the Creekstone Homeowners Association established in Book 369, Page 1914.

LF at 9-10.

The MHTC owns part of Lot 3 of Creekstone, upon which runs part of Creekstone Drive, as shown on the plat of said subdivision. LF at 9-10. See the language of the 1990 General Warranty Deed quoted above.

The MHTC owns Lot 2 of Creekstone, including that part of Lot 2 over which Creekstone Drive is located. LF at 9-10. See the language of the 1990 General Warranty Deed quoted above.

By Quit Claim Deed dated on or about December 30, 2002 and recorded on or about February 3, 2003 as Document No. 030008062 of the Jefferson County Records, the MHTC conveyed the following described real estate located in Jefferson County, Missouri, to Respondent Richard Niehaus, to-wit:

Tract 1

A tract of land being part of Lot 15 of Creekstone, a subdivision recorded in Book 92, Page 3 of the Records of Jefferson County, Missouri, located in part of US Survey No. 335, Township 42 North, Range 5 East, Jefferson County, Missouri, described as

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

follows: starting at a common lot corner of Lots 15 and 14 also being the center of the cul-de-sac of Creekstone Drive; thence South 62 degrees 29 minutes 03 seconds West a distance of 40.01 feet to a corner; thence South 37 Degrees 04 minutes 39 seconds West a distance of 53.53 feet to a corner; thence North 44 degrees 27 minutes 08 seconds West a distance of 326.53 feet to a set iron pin also being the rear lot corner of Lots 15 and 16; thence North 24 degrees 58 minutes 56 seconds East a distance of 40.48 feet to present right of way of State Highway M; thence North 25 degrees 00 minutes 14 seconds East a distance of 33.67 feet to a set iron pin; thence South 65 degrees 03 minutes 02 seconds East a distance of 195.36 feet to a set iron pin; thence South 79 degrees 58 minutes 44 seconds East a distance of 145.36 feet to a set pin; thence South 15 degrees 40 minutes 38 seconds West A distance of 151.47 feet to the point of beginning, a tract of land containing 1.16 acres more or less.

Tract 2

A tract of land being part of Lot 14 of Creekstone A Subdivision recorded in Book 92, Page 3 of the records of Jefferson County, located in part of U.S. Survey No. 335, Township 42 North,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> Range 5 East, Jefferson County, Missouri, described as follows: Starting at a lot corner of Lots 15 and 14 also being the center of the cul-de-sac of Creekstone Drive, thence North 15 degrees 40 minutes 38 seconds East a distance of 151.47 feet to a set iron pin; thence South 79 degrees 57 minutes 16 seconds East a distance of 217.39 feet to a set iron pin located along Highway M right of way; thence along said right of way South 68 degrees 58 minutes 39 seconds East a distance of 135.50 feet to a set iron pin; thence departing from said right of way along lot line of Lot 14 South 26 degrees 57 minutes 37 seconds West a distance of 117.16 feet to a found iron pin being the corner of Lots 13 and 14; thence North 62 degrees 02 minutes 16 seconds West a distance of 340.39 feet to the point of beginning, a tract of land containing 1.24 acres more or less.

LF at 10-11. Footnote 2

Said Quit Claim Deed recorded as Document No. 030008062 of the Jefferson County Records was made on the express condition that the Grantees named therein, as well as their successors and assigns, shall have no right of direct access from the land therein conveyed to

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2 Section 227.290, RSMo, authorizes the MHTC to sell excess land. *See also* Mo. Const. art. I, Section 27.

the adjacent highway now known as State Route M, including its right of way, as such rights of direct access were reserved by the MHTC. LF at 11.

Respondents Richard Niehaus and Lisa Niehaus caused the real estate described in the Quit Claim Deed recorded as Document No. 030008062 of the Jefferson County Records to be platted as Tract A of the Lot Consolidation of Tract 1 and Tract 2, a Tract of Land Being a Part of Lots 14 and 15 of Creekstone Subdivision Being Part of U.S. Survey No. 335, Township 42 North, Range 5 East, Jefferson County, Missouri, according to the plat thereof recorded on or about January 29, 2004 in Plat Book 211, Page 14B of the Jefferson County Records. LF at 11.

By Quit Claim Deed dated on or about November 27, 2009 and recorded on or about December 1, 2009 as Document No. 2009R-048008 of the Jefferson County Records, Respondents Richard Niehaus and Lisa J. Niehaus, husband and wife, conveyed the following real estate located in Jefferson County, Missouri (hereinafter sometimes referred to as the "Consolidation Plat"), to Respondents Richard Niehaus and Lisa J. Niehaus, husband and wife, and Alicia Niehaus, a single person, to-wit:

> Lot A of Consolidation Plat of Part of Lots 14 and 15 of Creekstone, a subdivision in Jefferson County, Missouri, according to the plat thereof recorded in Plat Book 211, Page 14B of the Jefferson County Records.

LF at 11-12.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Appellant owns the 50 Acres, More or Less. LF at 13.

Appellant has no recorded legal right of access from any part of the 50 Acres, More or Less, to a public road. LF at 14.

The establishment of the private road petitioned for is a way of strict necessity. LF at 14.

There is an absence of a reasonably practical way to and from the 50 Acres, More or Less, to a public road that Appellant has a legally enforceable right to use. LF at 14.

Although the issue of the general location of the private road established herein is for the trial court to determine, Appellant petitioned for the establishment of the following private road:

PRIVATE ROAD PETITIONED FOR

A. The 50 Acres, More or Less, lies adjacent to the Consolidation Plat.

B. The road petitioned for would begin at the intersection of the Consolidation Plat and the 50 Acres, More or Less.

C. The Consolidation Plat lies adjacent to the cul-de-sac bowl of Creekstone Drive, according to the plat of Creekstone.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

D. The road petitioned for would run from its beginning point over part of the Consolidation Plat to the cul-de-sac bowl of Creekstone Drive.

E. Creekstone Drive allows access from its cul-de-sac bowl to Moss Hollow Road, believed to be a county road maintained by Jefferson County, Missouri.

F. The road petitioned for would run over the same general location as the road known as Creekstone Drive to Moss Hollow Road.

G. Part of Creekstone Drive on part of Lot 3 of Creekstone is located on land owned by the MHTC, which may or may not be a party bound by the Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about July 1, 1987 and recorded on or about July 1, 1987 in Book 0369, Page 1944 of the Jefferson County Records, as amended by Creekstone Amendment to Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated on or about December 13, 1988 and recorded on or about

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

January 5, 1989 in Book 0416, Page 1218 of the Jefferson County Records.

H. Appellant requested that a road of 40 feet in width be established in order to utilize the 50 Acres, More or Less, for the uses permitted by law.

I. Appellant requested that such private road begin at a point on the intersection of the boundary between the Eastern border of the Consolidation Plat and the 50 Acres, More or Less, and end at a point in the intersection between the Western boundary of part of Lot 3 of Creekstone, believed to be owned by the MHTC, and Moss Hollow Road.

LF at 14-15. Footnote 3

The respective benefits and burdens to the parties are such that the general location of the private road petitioned for is situated so as to do as little damage and cause as little

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3 If passage over Lot 2 of Creekstone is necessary to reach Moss Hollow Road, Appellant believes any part of Creekstone Drive located on Lot 2 is a public road owned by the MHTC. The Petition may need to be amended to allege the connection with a public road at the intersection of Western boundary of Lot 3 of Creekstone and the Eastern Boundary of Lot 2 of Creekstone upon which Creekstone Drive is located.

inconvenience as practicable to the owners of land over which the proposed private road petitioned for will pass. LF at 15.

The Commissioner's Report states that "all direct access to the thruway of Route M from the abutting property is herewith prohibited or limited". LF at 22.

The Commissioner's Report states that the damages assessed were for "the appropriation set out in the petition". LF at 22.

Said Petition referred to in said Report does not expressly specify whether the prohibition or the limitation of direct access to the 50 Acres, More or Less, was sought in said Condemnation Case. LF at 22.

Said Petition contains the same ambiguity as the Commissioners' Report by referring to the prohibition or limiting of direct access to the thruway of Relocated Highway M. LF at 23.

Appellant has no information indicating whether the prohibition or the limitation of direct access to the 50 Acres, More or Less, was an item of damage specifically pleaded in the Petition referred to in said Report. LF at 23.

The Commissioner's Report does not specify that the damages assessed included damages for the complete prohibition of direct access to Relocated Highway M or merely the limitation of direct access to Relocated Highway M. LF at 23.

The Commissioner's Report does not state whether direct access to Relocated Highway M is completely prohibited or only limited. LF at 23.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Nothing in the Condemnation Case shows that the predecessors in title of the 50 Acres, More or Less, were given specific notice of whether the MHTC elected to completely and forever prohibit access to Relocated Highway M and to essentially deprive the prior owners and their successors in title of all rights of access to a public road forever or whether the MHTC elected to merely limit the access to the 50 Acres, More or Less, in said Condemnation Case. LF at 24.

There is ambiguity in the Commissioner's Report as to whether the MHTC acquired the right to completely prohibit direct access to Relocated Highway M from the 50 Acres, More or Less, or whether the MHTC only acquired a right to limit direct access to the 50 Acres, More or Less, in the Condemnation Case. LF at 24.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT HAS FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE 50 ACRES, MORE OR LESS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THERE IS NO LONGER A REQUIREMENT OF PLEADING THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL, IN THAT SECTION 228.340, RSMO 1986, HAS BEEN REPEALED, AND SECTION 228.342, RSMO, PROVIDES, IN PART, THAT A PRIVATE ROAD MAY BE ESTABLISHED IN FAVOR OF ANY OWNER OF REAL PROPERTY FOR WHICH THERE IS NO ACCESS, AND SECTION 228.342, RSMO, CONTAINS NO REQUIREMENT THAT NO PUBLIC ROAD PASS THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL AS WAS THE CASE UNDER REPEALED SECTION 228.340, RSMO 1986.

Section 228.340, RSMo 1986 (repealed)

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Section 228.342, RSMo

Section 228.352, RSMo

Moss Springs Cemetery Association v. Johannes, 970 S.W.2d 372 (Mo. App., S.D. 1998)

II.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA,* AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE NO COUNTERCLAIM FOR A PRIVATE ROAD COULD HAVE BEEN INTERPOSED IN THE PRIOR CONDEMNATION CASE, IN THAT CONDEMNATION ACTIONS ARE *SUI GENERIS* AND NO COUNTERCLAIMS MAY BE INTERPOSED IN CONDEMNATION ACTIONS.

State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 373 (Mo. Banc 1982) (*questioned on other grounds, Clay County Realty Company v. City of Gladstone,* 254 S.W.3d 859 (Mo. Banc 2008))

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

State ex rel. Missouri Highway and Transportation Commission v. Davis, 849 S.W. 704 (Mo. App., E.D. 1993)

III.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE A WAY OF NECESSITY IS AN APPURTENANT RIGHT THAT RUNS WITH THE LAND AND DOES NOT ATTACH TO A PARTICULAR OWNER AND CANNOT BE EXTINGUISHED SO LONG AS THE WAY OF NECESSITY CONTINUES TO EXIST, IN THAT UNDER THE CONTINUING OR REPEATED WRONG RULE, EACH CONTINUATION OR REPETITION OF WRONGFUL CONDUCT IS CONSIDERED A SEPARATE CAUSE OF ACTION, SO THAT SO LONG AS THE STRICT NECESSITY REQUIRED BY SECTION 228.342, RSMO, EXISTS, SUCH STRICT NECESSITY IS OF AN APPURTENANT AND CONTINUING NATURE, WHICH MEANS THAT FOR PRACTICAL PURPOSES, A STATUTE OF LIMITATIONS CANNOT RUN SO

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

LONG AS THE STRICT NECESSITY CONTINUES TO EXIST.

Short v. Southern Union Company, 372 S.W.3d 520 (Mo. App., W.D. 2012)

IV.

THE TRIAL COURT ERRED IN IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT COUNT I OF APPELLANT'S PETITION IS NOT RIPE, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THE ISSUES PRESENTED IN COUNT I OF APPELLANT'S PETITION ARE APPROPRIATE FOR JUDICIAL DETERMINATION, THE HARDSHIP ON APPELLANT CAUSED BY A DISMISSAL OF COUNT I OF APPELLANT'S PETITION IS OBVIOUS, IMMINENT AND CERTAIN, AND RULE 55.06(b) PROVIDES THAT A CLAIM COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION MAY BE JOINED WITH THE PRECEDENT ACTION IN A SINGLE ACTION WITH RELIEF GRANTED IN ACCORDANCE WITH THE SUBSTANTIVE RIGHTS OF THE PARTIES.

Rule 55.06(b)

Section 228.342, RSMo

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Section 228.352, RSMo

V.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE MHTC IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 228, RSMO, AS ARGUED IN RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION, BECAUSE RESPONDENT MHTC IS SUBJECT TO THE PROVISIONS OF ARTICLE I, SECTION 28 OF THE MISSOURI CONSTITUTION CONCERNING THE RIGHT OF EMINENT DOMAIN FOR PRIVATE WAYS OF NECESSITY, AS IMPLEMENTED IN SECTIONS 228.342 TO 228.368, RSMO, IN THAT THE APPLICABLE EXEMPTION IN SECTION 228.341, RSMO, ONLY APPLIES TO ROADS OWNED BY THE MHTC, NECESSARILY IMPLYING THAT PROPERTY OF THE MHTC THAT IS NOT A ROAD OWNED BY THE MHTC IS SUBJECT TO SECTIONS 228.342 TO 228.368, RSMO, AND ANY PART OF CREEKSTONE DRIVE OWNED BY THE MHTC WOULD BE A PUBLIC ROAD.

Mo. Const. art. I, Section 28

Section 228.342, RSMo

Section 228.341, RSMo

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

VI.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE COMMISSIONERS' REPORT IN THE CONDEMNATION CASE PURPORTEDLY CLEARLY LIMITS OR PROHIBITS ACCESS TO THE 50 ACRES, MORE OR LESS, AND RESPONDENT MHTC HAS PURPORTEDLY TAKEN AND PAID FOR THE RIGHT TO LIMIT OR PROHIBIT ACCESS TO THE 50 ACRES, MORE OR LESS, AND THE MHTC HAS NOT LIFTED ANY SUCH RESTRICTIONS OR PROHIBITIONS, SO THE RIGHT OF APPELLANT TO ACCESS THE 50 ACRES, MORE OR LESS, HAS ALREADY BEEN DETERMINED, BECAUSE ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION GRANTS THE MHTC ONLY THE POWER TO LIMIT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, IN THAT SAID CONSTITUTIONAL PROVISION DOES NOT EMPOWER THE MHTC TO COMPLETELY PROHIBIT ALL ACCESS TO THE 50 ACRES, MORE OR LESS, FROM ANY PUBLIC ROAD, AND THE COMMISSIONERS' REPORT IN THE CONDEMNATION CASE IS AMBIGUOUS AS TO WHETHER SUCH JUDGMENT LIMITS DIRECT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, OR WHETHER SUCH COMMISSIONERS' REPORT PURPORTS TO COMPLETELY

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

PROHIBIT ALL ACCESS TO ANY PUBLIC ROAD FROM THE 50 ACRES, MORE OR LESS.

Mo. Const. art. IV, Section 29

VII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT APPELLANT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, BECAUSE THERE IS NO REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES, IN THAT NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED FOR ACTIONS UNDER 42 U.S.C. SECTION 1983 AND/OR NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED UNDER SECTION 536.150, RSMO, AND/OR NO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT EXISTS FOR THE EXERCISE OF THE MHTC'S POWER TO LIMIT ACCESS UNDER MO. CONST. ART. IV, SECTION 29, AND/OR THE COMMISSIONER'S REPORT DOES NOT PROVIDE FOR ANY ADMINISTRATIVE REMEDIES FOR ACCESS PERMIT REQUESTS TO THE 50 ACRES, MORE OR LESS.

Section 536.150, RSMo

Jackson County Public Water Supply District No. 1 v. State Highway Commission, 365 S.W.2d 553 (Mo. 1963)

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Malan Construction Company v. State Highway Commission, 621 S.W.2d 519 (Mo. App., W.D. 1981)

Strictly Pediatrics Inc. v. Developmental Habilitation Associates, Inc., 820 S.W.2d 731 (Mo. App., E.D. 1991)

VIII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT THE "SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, APPLIES, BECAUSE THE "SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, IS NOT APPLICABLE IF THE PRIVATE ROAD CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE, IN THAT THE ROAD PETITIONED FOR BY APPELLANT CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE.

Section 228.341, RSMo

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT HAS FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE 50 ACRES, MORE OR LESS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THERE IS NO LONGER A REQUIREMENT OF PLEADING THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL, IN THAT SECTION 228.340, RSMO 1986, HAS BEEN REPEALED, AND SECTION 228.342, REMO, PROVIDES, IN PART, THAT A PRIVATE ROAD MAY BE ESTABLISHED IN FAVOR OF ANY OWNER OF REAL PROPERTY FOR WHICH THERE IS NO ACCESS, AND SECTION 228.342, RSMO, CONTAINS NO REQUIREMENT THAT NO PUBLIC ROAD PASS THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL AS WAS THE CASE UNDER REPEALED SECTION 228.340, RSMO 1986.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

A.

STANDARD OF JUDICIAL REVIEW

To consider matters outside the pleadings and treat a motion to dismiss for failure to state a claim under Rule 55.27(a)(6) as a motion for summary judgment under Rule 74.04, the trial court must first give the parties notice that it is going to do so, and the trial court must provide all parties a reasonable opportunity to present all materials pertinent to a motion for summary judgment. *Walters Bender Strohbehn & Vaughan, P.C. v. Mason,* 316 S.W.3d 475, 478-481 (Mo. App., W.D. 2010). The Record on Appeal contains no notice by the trial court of the treatment of the Respondents' motions to dismiss as motions for summary judgment, nor is there anything in the record showing that the Appellant acquiesced in the treatment of the motions to dismiss as motions for summary judgment. *See Osage Water Company v. City of Osage Beach,* 58 S.W.3d 35 (Mo. App., S.D. 2001). Despite the discussion of a number of matters outside the pleadings before the trial court at oral argument, Mr. Drazen stated: "Our motions don't have anything to do with the evidence. … [T]hese are motions that are addressing the actual pleadings that are filed." Tr. at 22.

When the trial court does not notify the parties that the trial court intends to review the pleadings and documents as a motion for summary judgment, the case is reviewed as a judgment granting a motion to dismiss on the pleadings. *City of Chesterfield v. Deshetler Homes, Inc.,* 938 S.W.2d 671, 673 (Mo. App., E.D. 1997).

Judicial review of a trial court's grant of a motion to dismiss is *de novo*. *Lynch v. Lynch,* 260 S.W.3d 834, 836 (Mo. Banc 2008). *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. Banc 1993), states:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. ... [Citation omitted.] No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

If the petition asserts any set of facts that would, if proven, entitle the plaintiff to relief, the petition states a claim. *Ste. Genevieve School District R-II v. City of Ste. Genevieve,* 66 S.W.3d 6, 11 (Mo. Banc 2002). When the trial court does not indicate the reasoning for its dismissals of the petition, it is presumed that the dismissals are based on the grounds alleged in the motions to dismiss, and the reviewing court will affirm the judgment if the dismissals are proper under any of the grounds stated in the motions to dismiss. *Walters Bender Strohbehn & Vaughan, P.C.,* 316 S.W.3d at 478.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Points II, III and VI relate to potential affirmative defenses under Rule 55.08. Sustaining a motion to dismiss based on an affirmative defense requires that the defense be irrefutably established by the pleadings. *Murray v. Fleischaker,* 949 S.W.2d 203, 205 (Mo. App., S.D. 1997).

Point VII relates to oral arguments made before the trial court and gratuitous statements made by the trial court related to the *sua sponte* dismissal of the Petition based upon a purported failure to exhaust administrative remedies. Tr. at 19-21. The purported failure to exhaust administrative remedies was not alleged as a ground for dismissal stated in any written motion filed by Respondents. The exhaustion of administrative remedies is a matter of subject matter jurisdiction. *Strozewski v. City of Springfield,* 875 S.W.2d 905, 906 (Mo. Banc 1994). Dismissal for lack of subject matter jurisdiction is appropriate whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction. Rule 57.27(g)(3); *McCracken v. Wal-Mart Stores East LP,* 298 S.W.3d 473, 476 (Mo. Banc 2009). Where the facts are uncontested, a question as to the subject matter jurisdiction of a court is purely a question of law that is reviewed *de* novo. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003).

Point VIII relates to gratuitous statements made by the trial court that do not relate to grounds for dismissal stated in any written motion. It is not clear whether the presumption that dismissals are based on the grounds alleged in written motions to dismiss is a legally binding and conclusive presumption or whether oral statements of the trial judge in open

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

court can rebut that presumption. *See Walters Bender Strohbehn & Vaughan, P.C.*, 316 S.W.3d at 478. In cases where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile. *Clifford Hindman Real Estate, Inc. v. City of Jennings*, 283 S.W.3d 804, 808 (Mo. App., E.D. 2009) (trial court ruled declaratory judgment claimant had no standing and gratuitously ruled against claimant on the merits; a remand based solely on the standing issue would likely result in an unnecessary second appeal "where Appellant would not receive a fresh look at the merits from the trial court"; therefore, review of the legal questions decided by the trial court was warranted).

Appellant wishes to adopt the foregoing standards of judicial review for the Points Relied On in this Brief without further recitation unless the Point Relied On requires specific reference to judicial review standards.

B.

STATUTES AND PORTIONS OF THE PETITION

RELEVANT TO POINT I

Section 228.342, RSMo, provides, in part:

> A private road may be established or widened in favor of any owner or owners of real property **for which there is no access, or insufficiently wide access, from such property to a public road** if the private road sought to be established or

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

widened is a way of strict necessity. * * *

(Emphasis added.)

Section 228.352, RSMo, provides, in part:

> After the time for filing the answer to the petition has expired and after the parties have had a reasonable time for discovery, the court shall conduct a nonjury hearing during which the parties may submit evidence pertaining to the allegations of the petition and to the proposed location of the private road. If the court determines upon a petition to establish a private road **that there is access to a public road** or that the way sought is not a way of strict necessity, then the petition shall be dismissed. If the court determines **that there is no access to a public road** and the way sought is a way of strict necessity, then it shall further determine the location of a private road that is situated so as to do as little damage or injury and cause as little inconvenience as practicable to the defendants. * * *

(Emphasis added.)

Appellant's Petition alleges, in part:

> 9. Upon information and belief, said 50 Acres, More or Less, in U.S. Survey No. 335 has no recorded means of

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

ingress or egress to a public road.

* * *

29. Upon information and belief, Plaintiff has no recorded legal right of access from any part of the 50 Acres, More or Less, in U.S. Survey No. 335 to a public road.

* * *

31. There is an absence of a reasonably practical way to and from the 50 Acres, More or Less, in U.S. Survey No. 335 to a public road that Plaintiff has a legally enforceable right to use.

LF at 8, 14.

C.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS ON POINT I IN THE NIEHAUS/CREEKSTONE MOTION TO DISMISS AND SUGGESTIONS IN SUPPORT THEREOF

The Niehaus/Creekstone Respondents argue that no right of access exists under Section 228.342, RSMo, because Relocated Highway M lies adjacent to the 50 Acres, More or Less. LF at 33-34.

The Niehaus/Creekstone Motion to Dismiss cites *Hollars v. Church of the Apostolic Faith, Inc.*, 596 S.W.2d 73 (Mo. App., S.D. 1980). LF at 33. *Hollars* interpreted Section

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

228.340, RSMo 1986, repealed by S.B. 138, 1991 Mo. Laws 733, which stated:

> If any person of this state shall file a verified petition in the circuit court of the proper county, setting forth that he or she is the owner of a tract or lot of land in such county, or in an adjoining county in this state, **and that no public road passes through or alongside said tract or lot of land**, and asking for the establishment of a private road from his or her premises, to connect at some convenient point with some public road of the county, or with any road for the state highway system within the county, * * *

King v. Jack Cooper Transport Company, 708 S.W.2d 194, 195 (Mo. App., W.D. 1986) (quoting Section 228.340, RSMo (repealed)) (emphasis added).

The Niehaus/Creekstone Respondents state: "*Hollars* is directly on point to the instant case in that the Court held that quite simply, 'there is a public road alongside the tract and thus the plaintiffs are not entitled to the relief sought.'" LF at 33.

D.

ORAL ARGUMENT BY THE NIEHAUS/CREEKSTONE RESPONDENTS OF THE NIEHAUS/CREEKSTONE MOTION TO DISMISS BEFORE THE TRIAL COURT CONCERNING POINT I

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

At oral argument before the trial court, Mr. Drazen stated: "There are also two cases, one 2009 called Badgee (sic) and the one opposing counsel cites, which was Short in 2012, that uses the exact same three elements. So despite the statute change in '91 and '93, the Courts still confirmed that the second element is that no public road goes through or alongside the track. Not only has it not been alleged here, it can't be alleged, because everybody knows that Route M runs right along the entire northern boundary." LF at 12. Footnote 4

In *Beery v. Shinkle,* 193 S.W.3d 435 (Mo. App., W.D. 2006) (which may be the "Badgee" case referred to in oral argument before the trial court), the Court stated, in part:

> Pursuant to § 228.342, a private road may be established in favor of an owner of real property **for which there is no access to a public road**, if the private road "is a way of strict necessity." * * * To be entitled to a private road for strict necessity, pursuant to § 228.342, the plaintiff must show that: "he or she owns the land, that no public road goes through or alongside the tract of land, and that the private road petitioned

---

4. S.B. 138, 1991 Mo. Laws 733, repealed Section 228.340, RSMo 1986, and enacted ten new sections. Sections 1 through 9 of S.B. 138, 1991 Mo. Laws at 734-735, were codified as Sections 228.342 to 228.368, RSMo. In part, C.C.S. No. 2 H.C.S.S.B. 236, 1993 Mo. Laws 691, amended some of the relevant statutes regarding widening of ways of necessity.

for is a way of strict necessity." *Johnston v. Shoults*, 160 S.W.3d 440, 442 (Mo.App.2005).

193 S.W.3d at 441 (emphasis added).

In *Short v. Southern Union Company,* 372 S.W.3d 520 (Mo. App., W.D. 2012), the Court stated:

> Missouri courts have consistently interpreted section 228.342 to require a plaintiff to "show that he owns the land, that there exist no public roads through or alongside the land and that the private road petitioned for is mandated by strict necessity." *Blue Pool Farms, LLC v. Basler*, 239 S.W.3d 687, 690 (Mo.App. E.D.2007) (*citing Beery v. Shinkle*, 193 S.W.3d 435, 441 (Mo.App. W.D.2006)). **This principle simply restates, of course, the criteria described in the first sentence of section 228.342.**

Short, 372 S.W.3d at 530 (emphasis added).

E.

ARGUMENTS OF THE NIEHAUS/CREEKSTONE RESPONDENTS IN THEIR BRIEF TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ON POINT I

In their Brief before the Missouri Court of Appeals, Eastern District, the

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Niehaus/Creekstone Respondents argued no substantive change in the law was caused by the repeal of Section 228.340, RSMo 1986 (stating "that no public road passes through or alongside said tract or lot of land"), and the enactment of Section 228.342, RSMo (stating that "there is no access, or insufficiently wide access, from such property to a public road"). Respondents relied on *Wolfe v. Swopes,* 955 S.W.2d 600, 602 (Mo. App., S.D. 1997), which states that cases interpreting "strict necessity" decided under repealed Section 228.340, RSMo 1986, are authoritative in interpreting Section 228.342, RSMo. *Niehaus/Creekstone Eastern District Brief* at 10.

The Niehaus/Creekstone Respondents for the first time in the Brief before the Missouri Court of Appeals, Eastern District, argued that Appellant failed to plead the element of strict necessity. *Niehaus/Creekstone Eastern District Brief* at 10-12. As counsel for Appellant understands this argument, the Niehaus/Creekstone Respondents argue that because the MHTC could at some future date convey a right of access to Appellant or its successors or assigns, the 50 Acres, More or Less, is not landlocked and Appellant has no right to a private way of necessity under Section 228.342, RSMo. *Niehaus/Creekstone Eastern District Brief* at 11.

F.

THE EASTERN DISTRICT OPINION ON POINT I

The Eastern District Opinion states, in part:

> The question before us is whether the legislative revision

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

made to Section 228.342 alters the pleading requirement recognized by Missouri courts to state a claim for the establishment of a private roadway pursuant to this statute. We hold that it does not.

* * *

Section 228.340 was repealed in 1991 and replaced by Section 228.342. As previously noted, the language of Section 228.342 allows for the establishment of a private roadway to "owners of real property for which there is no access." Avery maintains that the attendant change in statutory language necessitates a corresponding change in the pleading requirements to state a cause of action for the establishment of a private road. Specifically, Avery posits that the petition at issue expressly alleges its ownership of the Property and the Property's lack of any legal right of access, which is all that is required to plead a claim for the establishment of a private road under Section 228.342. Avery reasons that the repeal of Section 228.340 and subsequent enactment of Section 228.342 eliminates the pleading requirement that "no public road pass through or alongside the Property at issue."

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

While Avery presents an argument which, upon initial review, appears persuasive, we reject Avery's argument given the clear direction provided by Missouri courts since the repeal of Section 228.340 and subsequent enactment of Section 228.342. Although the statutory language of Section 228.342 differs from that of Section 228.340, Missouri courts have consistently held that a plaintiff must plead the same three elements that were required under Section 228.340 in order to state a cause of action under Section 228.342. As the Western District explained in *Short v Southern Union Co.*, "Missouri courts have consistently interpreted section 228.342 to require a plaintiff to 'show that he owns the land, that there exist no public roads through or alongside the land and that the private road petitioned for is mandated by strict necessity.'" *Short*, 372 S.W.3d at 530 (*quoting Blue Pool Farms, LLC v. Basler*, 239 S.W.3d 687, 690 (Mo. App. E.D. 2007)); *see also Baetje v. Eisenbeis*, 296 S.W.3d 463, 469 (Mo. App. E.D. 2009); *Shoults*, 160 S.W.3d at 442 (stating the same three required elements for a cause of action under Section 228.342). The court in *Short* further explained why the three required elements have

> remained unchanged despite the change in statutory language: "[t]his principle simply restates, of course, the criteria described in the *first sentence* of section 228.342." *Short*, 372 S.W.3d at 530. Missouri courts have consistently equated the "lack of access" of Section 228.342 with the "lack of a public roadway passing through or alongside the property" of Section 228.340. We will not stray from this interpretation of Section 228.342.

Slip Op. at 8-9 (footnote omitted).

G.

APPELLANT'S ARGUMENTS ON POINT I

The Eastern District Opinion is correct in finding that appellate opinions from all three districts of the Missouri Court of Appeals appear to equate the "lack of access" requirement of Section 228.342, RSMo, with the "lack of a public roadway passing through or alongside the property" as stated in repealed Section 228.340, RSMo 1986. *See Short v. Southern Union Company,* 372 S.W.3d 520, 530 (Mo. App., W.D. 2012); *Baetje v. Eisenbeis,* 296 S.W.3d 463, 469 (Mo. App., E.D. 2009); *Blue Pool Farms, LLC v. Basler,* 239 S.W.3d 687, 690 (Mo. App., E.D. 2007); *Beery v. Shinkle,* 193 S.W.3d 435, 441 (Mo. App., W.D. 2006); *Johnston v. Shoults,* 160 S.W.3d 440, 442 (Mo. App., S.D. 2005); *Anderson v. Mantel,* 49 S.W.3d 760, 763 (Mo. App., S.D. 2001), *subsequent appeal,* 171 S.W.3d 774 (Mo. App., S.D. 2005); *Kirkpatrick v. Webb,* 58 S.W.3d 903, 907 (Mo. App., S.D. 2001); *Wagemann v. Elder,* 28

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

S.W.3d 351, 355 (Mo. App., E.D. 2000); *Hamai v. Witthaus,* 965 S.W.2d 379, 382 (Mo. App., E.D. 1998); *Moss Springs Cemetery Association v. Johannes,* 970 S.W.2d 372, 376 (Mo. App., S.D. 1998); *Spier v. Brewer,* 958 S.W.2d 83, 87 (Mo. App., S.D. 1997); and *Farrow v. Brown,* 873 S.W.2d 918, 920 (Mo. App., S.D. 1994).

There are only a minority of appellate opinions of the Missouri Court of Appeals that recite the second element of a cause of action for a constitutional/statutory way of necessity under Section 228.342, RSMo, as requiring a showing of "no access" consistent with the current statutory language of Section 228.342, RSMo, without reference to the "lack of a public roadway passing through or alongside the property" language in repealed Section 228.340, RSMo 1986. *See Wolfe v. Swopes*, 955 S.W.2d 600, 602 (Mo. App., S.D. 1997) and *Main Street Feeds, Inc. v. Hall*, 975 S.W.2d 227, 234 (Mo. App., S.D. 1998).

Even the majority of opinions of the Missouri Court of Appeals reciting that the language of repealed Section 228.340, RSMo 1986, stating "that no public road passes through or alongside said tract or lot of land" continues on as a required element of a constitutional/statutory claim for a way of necessity under Section 228.342, RSMo, are not the "clear" pronouncement of law the Eastern District Opinion indicates. For example, in *Anderson v. Mantel,* 49 S.W.3d 760, 763 (Mo. App., S.D. 2001), *subsequent appeal,* 171 S.W.3d 774 (Mo. App., S.D. 2005), the Court recites the disputed language stated in repealed Section 228.340, RSMo 1986, continues on as a legal requirement of a cause of action under Section 228.342, RSMo, but then the Court states: '"If the party seeking a private road has

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

no legally enforceable right to use an alternative route, he is entitled to a way of necessity." * * *' *Anderson I,* 49 S.W.3d at 764 (citations omitted). Another example of this confusion in the case law is found in *Beery v. Shinkle,* 193 S.W.3d 435, 441 (Mo. App., W.D. 2006), which recites the language of repealed Section 228.340, RSMo 1986, as a legal requirement of a cause of action under Section 228.342, RSMo, but states: "Pursuant to § 228.342, a private road may be established in favor of an owner of real property for which there is no access to a public road, if the private road "is a way of strict necessity."' *Beery*, 193 S.W.3d at 441. In *Moss Springs Cemetery Association,* the Court recited the language of repealed Section 228.340, RSMo 1986 as a required element of a cause of action under Section 228.342, RSMo, *Moss Springs Cemetery Association,* 970 S.W.2d at 376, yet in the recitation of facts states:

> It [the cemetery] is surrounded by land owned by Respondents. The Missouri State Highway Department (Highway Department) has a "permanent easement" granted by Johannes on property next to the cemetery. Highway Department also owns land in fee simple which borders Respondents' land and a state highway.

Moss Springs Cemetery Association, 970 S.W.2d at 374. Despite the foregoing, the Court in *Moss Springs Cemetery Association* found that the cemetery association stated a cause of

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

action under Section 228.342, RSMo, and remanded for interlocutory proceedings under Section 228.352, RSMo. *Moss Springs Cemetery Association,* 970 S.W.2d at 377.

Despite the statement in the Eastern District Opinion that the existing opinions of the Missouri Court of Appeals give "clear direction" that the language of repealed Section 228.340, RSMo 1986, lives on regardless of the repeal of that language by S.B. 138, 1991 Mo. Laws 733, Slip Op. at 8-9, the opinions of the Missouri Court of Appeals are not the "clear direction" of law indicated by the Eastern District Opinion.

No case cited by Respondents or in the Eastern District Opinion has dealt with the abrogation of abutters' rights of access to a state highway (first authorized in 1945 through adoption of Mo. Const. art. IV, Section 29) resulting in land for which there is no access to a public road, even though a state highway easement encumbers that land. As stated in *Bonner Properties, Inc. v. Planning Board of the Township of Franklin,* 185 N.J. Super. 553, 570, 449 A.2d 1350 (N. J. Super. 1982): "And it may be well to recall that often there are more things in heaven and earth than are dreamt of in our jurisprudence." *Compare Hamlet* Act I, Scene 5, 167.

Nothing in any of the opinions cited by Respondents or in the Eastern District Opinion gives any indication that consideration was made of the abrogation of abutters' rights of access under Mo. Const. art. IV, Section 29, in announcing that the language of repealed Section 228.340, RSMo 1986, requiring that: "[N]o public road passes through or alongside said tract or lot of land" is the equivalent of the language of Section 228.342, RSMo,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

requiring that: "[T]here is no access, or insufficiently wide access, from such property to a public road." Appellant emphatically believes that the language of repealed Section 228.340, RSMo 1986, is, **of course**, NOT the equivalent of the language of Section 228.342, RSMo, requiring that: "[T]here is no access, or insufficiently wide access, from such property to a public road"—especially if one considers the possibility of the abrogation of abutters' rights of direct access as authorized under Mo. Const. art. IV, Section 29.

The purpose of statutory construction is to ascertain the legislature's intent from the language used and to give effect to that intent. *Short,* 180 S.W.3d at 532. Statutes are read in their plain, ordinary and usual sense. *Sheedy v. Missouri Highways and Transportation Commission,* 180 S.W.3d 66, 72 (Mo. App., S.D. 2005). Where there is no ambiguity, there is no resort to statutory construction. *Sheedy,* 180 S.W.3d at 72. Interpretations that are unjust, absurd, or unreasonable are to be avoided. *Short,* 372 S.W.3d at 535. Consideration of the statute in the context of the entire statutory scheme on the same subject should be given in order to discern legislative intent. *Sheedy,* 180 S.W.3d at 72. An amended statute should be construed on the theory that the legislature intended a substantive change in the law. *Sermchief v. Gonzales,* 660 S.W.2d 683, 689 (Mo. Banc 1983). Amendments of statutory language are presumed to have some substantive effect and not be meaningless acts of housekeeping. *State v. Liberty,* 370 S.W.3d 537, 552 (Mo. Banc 2012); *O'Neil v. Missouri,* 662 S.W.2d 260, 262 (Mo. Banc 1983); *City of Willow Springs v. Missouri State Librarian,* 596 S.W.2d 441, 444 (Mo. Banc 1980).

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Kilbane v. Department of Revenue, 544 S.W.3d 9, 11 (Mo. Banc 1976) states:

> 'In construing statutes to ascertain legislative intent it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law. If this were not so the legislature would be accomplishing nothing, and legislatures are not presumed to have intended a useless act. *Wright v. J. A. Tobin Construction Co.*, Mo.App., 365 S.W.2d 742; *State ex rel. M. J. Gorzik Corp. v. Mosman*, Mo.Sup., 315 S.W.2d 209.'

544 S.W.3d at 11 (*quoting Gross v. Merchants-Produce Bank*, 390 S.W.2d 591, 597 (Mo. App., K.C. 1965)).

The repealed Section 228.340, RSMo 1986, required that: "[N]o public road passes through or alongside said tract or lot of land". The operative language of Section 228.342, RSMo, requires that: "[T]here is no access, or insufficiently wide access, from such property to a public road." In part, Section 228.352, RSMo, requires the trial court to conduct a nonjury hearing to determine whether there is "access to a public road". Reading Sections 228.342 and 228.352, RSMo, together and in conjunction with Mo. Const. art, I, Section 28, the plain and ordinary meaning of the words, "for which there is no access, or insufficiently

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

wide access, from such property to a public road", in Section 228.342, RSMo, requires a party petitioning for a constitutional/statutory way of necessity to plead that there is no access, or insufficiently wide access, from such property to a public road—not that there exist no public roads through or alongside the land as was required under repealed Section 228.340, RSMo 1986.

Further, the result advocated by Respondents (and endorsed in the Eastern District Opinion) is absurd and unreasonable. Relocated Highway M may be a public road, but the Commissioner's Report has limited or prohibited the abutters' rights of access to that public road. Appellant has no known direct or indirect access from the 50 Acres, More or Less, to any public road. LF at 8. To deny Appellant any way of necessity would frustrate the purpose behind authorizing the right of condemnation for private ways of necessity under Mo. Const. art. I, Section 28, and its implementing legislation, Sections 228.341 to 228.374, RSMo.

The argument of the Niehaus/Creekstone Respondents that the possibility of a future conveyance of a right of access by the MHTC at some uncertain date begs the question: "If not now, when?" *See Niehaus/Creekstone Eastern District Brief* at 11. Speculation that at some uncertain time in the future the MHTC might convey access to Appellant or its successors or assigns does not give Appellant a legally enforceable right of access to the 50 Acres, More or Less. *Compare Spier*, 958 S.W.2d at 87 (plaintiff, who was given permission by his uncle to use a road on his uncle's land in order to reach his own property, did not have

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

a legally enforceable right to reach his property because the alternative route over his uncle's land was merely permissive). *See also Hill v. Kennoy, Inc.*, 522 S.W.2d 775, 779 (Mo. Banc 1975) (for the proposition that one is entitled to a way of necessity if one does not have a legally enforceable right of access to a public road).

The holding of *Hollars* was based upon a statute, Section 228.340, RSMo 1986, repealed by S.B. 138, 1991 Mo. Laws 733. *Hollars* should not be followed, as the language of Section 228.342, RSMo, has changed from that construed in *Hollars.* The Niehaus/Creekstone Motion to Dismiss should have been denied by the trial court.

The Petition alleges that Appellant has no legally enforceable way of access available from the subject property to a public road. LF at 8, 14. Said Petition satisfies the requirements of Section 228.342, RSMo.

II.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA,* AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE NO COUNTERCLAIM FOR A

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

PRIVATE ROAD COULD HAVE BEEN INTERPOSED IN THE PRIOR CONDEMNATION CASE, IN THAT CONDEMNATION ACTIONS ARE *SUI GENERIS* AND NO COUNTERCLAIMS MAY BE INTERPOSED IN CONDEMNATION ACTIONS.

A.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS ON POINT II IN THE NIEHAUS/CREEKSTONE MOTION TO DISMISS OR SUGGESTIONS IN SUPPORT THEREOF

Respondents Niehaus and Creekstone argue that Count I of Appellant's Petition is barred by the doctrine of *res judicata*. LF at 34-35. Respondents Niehaus and Creekstone argue that Count I of the Petition should be dismissed on the supposition that a counterclaim for private road access could and should have been filed in the Condemnation Case. LF at 35.

B.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS IN THEIR BRIEF TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ON POINT II

The Niehaus/Creekstone Respondents argued in their Brief before the Missouri Court of Appeals, Eastern District, that the doctrine of *res judicata* bars Count I of the Petition on the purported ground that once exceptions were withdrawn by Appellant's predecessor in

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

interest in the Condemnation Case, no irregularities in the Condemnation Case could be litigated. *Niehaus/Creekstone Eastern District Brief* at 13-14. Said Brief states: "Simply because a counterclaim could not be filed in the condemnation hearing does not mean that Appellant earns the right to bring a claim for something that could have, and should have, been fully litigated by defending and/or appealing the decision of the Raebel Condemnation." *Niehaus/Creekstone Eastern District Brief* at 14.

C.

APPELLANT'S ARGUMENTS ON POINT II:

(1) THE PLEADINGS ARE INSUFFICIENT TO ESTABLISH AN AFFIRMATIVE DEFENSE OF *RES JUDICATA*

Res judicata is an affirmative defense under Rule 55.08. Sustaining a motion to dismiss based on an affirmative defense requires that the defense be irrefutably established by the pleadings. *Murray,* 949 S.W.2d at 205. No pleadings filed by the Niehaus/Creekstone Respondents contain allegations regarding the filing of or withdrawal of exceptions in the Condemnation Case or other matters concerning actions taken in the Condemnation Case. No allegations of any pleadings filed herein irrefutably support the defense of *res judicata.*

(2) NO ACTION FOR A PRIVATE ROAD COULD HAVE BEEN BROUGHT AS A COUNTERCLAIM IN THE CONDEMNATION CASE

Condemnation actions are essentially *sui generis*, and no counterclaims can be filed therein. *State ex rel. Washington University Medical Center Redevelopment Corp. v.*

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Gaertner, 626 S.W.2d 373 (Mo. Banc 1982) (*questioned on other grounds, Clay County Realty Company v. City of Gladstone,* 254 S.W.3d 859 (Mo. Banc 2008)). No action for a private road of necessity could have been brought as a counterclaim in the Condemnation Case. Further, Appellant's predecessors in title were not required to institute an action under Section 228.342, RSMo, prior to the date of the taking by the MHTC. *State ex rel. Missouri Highway and Transportation Commission v. Davis*, 849 S.W. 704, 705 (Mo. App., E.D. 1993).

Count I of Appellant's Petition is not barred by the doctrine of *res judicata* or any form of claim preclusion as a result of prior litigation in the Condemnation Case, except to the extent that the publicly recorded Commissioner's Report states that "all **direct** access to the thruway of Route M from the abutting property is herewith prohibited **or** limited" (emphasis added). LF at 22. The Niehaus/Creekstone Motion to Dismiss should have been denied by the trial court.

III.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE A WAY OF NECESSITY IS AN APPURTENANT RIGHT THAT RUNS WITH THE LAND AND DOES NOT ATTACH TO A PARTICULAR OWNER AND CANNOT BE EXTINGUISHED SO LONG AS THE WAY OF NECESSITY CONTINUES TO EXIST, IN THAT UNDER THE CONTINUING OR REPEATED WRONG RULE, EACH CONTINUATION OR REPETITION OF WRONGFUL CONDUCT IS CONSIDERED A SEPARATE CAUSE OF ACTION, SO THAT SO LONG AS THE STRICT NECESSITY REQUIRED BY SECTION 228.342, RSMO, EXISTS, SUCH STRICT NECESSITY IS OF AN APPURTENANT AND CONTINUING NATURE, WHICH MEANS THAT FOR PRACTICAL PURPOSES, A STATUTE OF LIMITATIONS CANNOT RUN SO LONG AS THE STRICT NECESSITY CONTINUES TO EXIST.

A.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS ON POINT III IN THE NIEHAUS/CREEKSTONE MOTION TO DISMISS AND SUGGESTIONS IN SUPPORT THEREOF

Respondents Niehaus and Creekstone argue that the statute of limitations stated in Section 516.010, RSMo, has expired on Appellant's claims stated in Count I of the Petition. LF at 35-36.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

B.

ORAL ARGUMENT BY THE NIEHAUS/CREEKSTONE RESPONDENTS OF THE NIEHAUS/CREEKSTONE MOTION TO DISMISS BEFORE THE TRIAL COURT CONCERNING POINT III

Before the trial court, Mr. Drazen argued as follows:

> The statute of limitations argument, I realize that the statute of -- the statute of limitations is ten years on a matter like this. The argument that Plaintiff has is that some of the case law basically indicates, as long as the necessity is continuing, there is no statute of limitations that applies.
>
> What my position is, is that this is not continuing. It was self-inflicted. As of the time that this $500,000 almost was paid, that statute of limitations absolutely kicked in. And they would have had ten years to bring a claim to fix this, they didn't do that.
>
> THE COURT: Even though they are a subsequent purchaser.
>
> MR. DRAZEN: All of these other cases have acknowledged -- all of the other cases have acknowledged basically is no statute of limitations, as long as the strict necessity is continuing. I don't believe -- none of the cases

consider the fact that this is a self-inflicted harm. That this was agreed to by the predecessor in interest, that the predecessor in interest got $500,000 to take this and damage their own property. Not one case acknowledged that.

And I believe that the Statute of Limitations should apply in that instance because on -- by the virtue of the fact that the strict necessity is no longer continuing once you self-inflicted your alleged necessity.

LF at 13-15.

C.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS IN THEIR BRIEF TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ON POINT III

The Niehaus/Creekstone Respondents argue that *Short v. Southern Union Company,* 372 S.W.3d 520 (Mo. App., W.D. 2012) does not apply based upon a self-inflicted harm argument, citing *J.R. Green Properties Inc. v. City of Bridgeton,* 825 S.W.2d 684 (Mo. App., E.D. 1992). *Niehaus/Creekstone Eastern District Brief* at 15-16.

D.

APPELLANT'S ARGUMENTS ON POINT III:

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

(1) THE PLEADINGS ARE INSUFFICIENT TO ESTABLISH AN AFFIRMATIVE DEFENSE BASED ON A STATUTE OF LIMITATIONS

A defense based upon a statute of limitations is an affirmative defense under Rule 55.08. *Short,* 372 S.W.3d at 537. Sustaining a motion to dismiss based on an affirmative defense requires that the defense be irrefutably established by the pleadings. *Murray,* 949 S.W.2d at 205. No pleadings filed by the Niehaus/Creekstone Respondents contain any allegations of self-inflicted harm as a basis for triggering the running of Section 516.010, RSMo, as a statute of limitations in this matter. No pleadings filed herein irrefutably establish an affirmative defense based upon the ten-year statute of limitations, Section 516.010, RSMo.

Assuming *arguendo* that "self-inflicted harm" is a trigger that starts the running of the ten-year statute of limitations under Section 516.010, RSMo, to a claim for a way of necessity, Count I of the Petition should not have been dismissed without some kind of pleadings or allegations by the Niehaus/Creekstone Respondents establishing that the predecessors in interest of Appellant "voluntarily" chose to be sued in the Condemnation Case to have all rights of access to the subject property prohibited and/or that the predecessors in interest voluntarily agreed that the subject property be landlocked forever and in perpetuity, and that the Commissioner's Report gave Appellant notice that the subject property was landlocked in perpetuity consistent with constitutional principles of Due Process and the Missouri Recording Statutes, Sections 442.380 to 442.400, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

(2) STATUTES OF LIMITATION DO NOT APPLY TO WAYS OF NECESSITY

Short, 372 S.W.3d at 537-540, contains an extensive analysis of the application of statutes of limitations to ways of necessity. *Short* concludes that, under the common law, a way of necessity cannot be extinguished so long as the necessity continues to exist, because a common law way of necessity is an appurtenant right that runs with the land and does not attach to any particular owner. *Short,* 372 S.W.3d at 538. Given the appurtenant nature of a way of necessity, the duration of the easement of necessity is limited by the existence of the necessity and is not subject to a statute of limitations. *Short,* 372 S.W.3d at 538. Although no Missouri case prior to *Short* addressed the issue of the application of a statute of limitations to a common law way of necessity or a constitutional/statutory claim to establish a way of necessity, *Short* adopted the reasoning articulated in the precedent examined and concluded that the appurtenant character of a way of necessity and the corresponding lack of or continuing nature of the statute of limitations means that no statute of limitations applies to a constitutional/statutory claim of necessity so long as the necessity continues. *Short,* 372 S.W.3d at 358-359.

Short further concluded that the rule that statutes of limitation do not apply to ways of necessity is wholly consistent with Missouri's recognition of the repeated or continuing wrong rule with respect to the application of statutes of limitation. *Short,* 372 S.W.3d at 358-359. Under the repeated or continuing wrong rule, each repetition of a continuing wrong may be viewed as a separate cause of action, which is barred by the running of the statute of

limitations on each successive cause of action and not by the running of the statute of limitations from the time of the original cause of action. *Short,* 372 S.W.3d at 539.

The argument that Appellant "self-inflicted" itself with a lack of access by being a subsequent purchaser of the property is inconsistent with *Short*, which states, in part: "**Thus, "'the right to a way by necessity may lay dormant through several transfers of title yet pass with each transfer as appurtenant ... and be exercised at any time by the holder of title thereto.**'" [Citation omitted]. *Short,* 372 S.W.3d at 539-540 (emphasis added). Any other rule would mean that once a transfer of land locked property occurs and ten years passes from such transfer, that land is landlocked forever and in perpetuity. Such a rule is inconsistent with the public policy evidenced by the right of condemnation for private ways of necessity under Mo. Const. art. I, Section 28, and its implementing legislation, Sections 228.341 to 228.374, RSMo.

Further, Appellant was not the developer of Creekstone and did not "paint himself into a corner" as did the developer in *J.R. Green Properties Inc.*, a zoning case, which does not apply to ways of necessity. The Niehaus/Creekstone Motion to Dismiss should have been denied by the trial court.

Count I of Appellant's Petition is not barred by Section 516.010, RSMo.

IV.

THE TRIAL COURT ERRED IN IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT COUNT I OF APPELLANT'S PETITION IS NOT RIPE, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THE ISSUES PRESENTED IN COUNT I OF APPELLANT'S PETITION ARE APPROPRIATE FOR JUDICIAL DETERMINATION, THE HARDSHIP ON APPELLANT CAUSED BY A DISMISSAL OF COUNT I OF APPELLANT'S PETITION IS OBVIOUS, IMMINENT AND CERTAIN, AND RULE 55.06(b) PROVIDES THAT A CLAIM COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION MAY BE JOINED WITH THE PRECEDENT ACTION IN A SINGLE ACTION WITH RELIEF GRANTED IN ACCORDANCE WITH THE SUBSTANTIVE RIGHTS OF THE PARTIES.

A.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS ON POINT IV IN THE NIEHAUS/CREEKSTONE MOTION TO DISMISS OR SUGGESTIONS IN SUPPORT THEREOF

The Niehaus/Creekstone Respondents argue that Count I of the Petition is not ripe for adjudication on the ground that if Appellant prevails under Count II of the Petition, the MHTC may be obligated to build a public service road connecting the 50 Acres, More or

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Less, to a public road, thereby purportedly making Appellant's claim for a private way of necessity premature. LF at 36.

B.

ARGUMENT OF THE NIEHAUS/CREEKSTONE RESPONDENTS IN THEIR BRIEF TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ON POINT IV

In their Brief to the Missouri Court of Appeals, Eastern District, the Niehaus/Creekstone Respondents argue that Appellant failed to exhaust administrative remedies before the MHTC. *Niehaus/Creekstone Eastern District Brief* at 16. Footnote 5 The Niehaus/Creekstone Respondents argued that Appellant's claims in Count I of the Petition are not ripe for adjudication purportedly because Appellant has "never officially and formally inquired of and petitioned the MHTC about access." *Niehaus/Creekstone Eastern District Brief* at 17.

C.

APPELLANT'S ARGUMENTS ON POINT IV

Appellant is not aware of any requirement that Appellant seek access over or along the right-of-way of Relocated Highway M as a precondition of seeking relief under Section

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5 Appellant incorporates by reference any and all arguments applicable to any purported failure to exhaust administrative remedies made under Point VII of this Brief herein as if fully set forth.

228.342, RSMo. The Niehaus/Creekstone Respondents cannot defeat a constitutional/statutory claim of an easement by necessity under Section 228.342, RSMo, at the motion to dismiss stage of this litigation on the theory that an alternative route may lie for access in a claim directed against the MHTC or that at some future point in time, the MHTC might be required to or may voluntarily provide access through some administrative remedy. As stated in *Moss Springs Cemetery Association*:

> As stated above, the judgment suggests that Appellant can seek an easement from the Highway Department on property adjacent to the requested roadway. "While plaintiffs may have a choice between surrounding landowners against whom they might have proceeded for the establishment of a private road, neither [the statute] nor the case law indicates that one landowner can defeat a plaintiff's right to a way of necessity simply by pointing to another against whom plaintiff might have sought relief." *Hill v. Kennoy, Inc.*, 522 S.W.2d 775, 778 (Mo. banc 1975). *See also Moran v. Flach*, 752 S.W.2d 956, 959 (Mo.App.1988) (statute "does not direct that alternate ways of necessity across other adjoining land owner's property be considered."), and *Lewis v. Hilkerbaumer*, 599 S.W.2d 7, 9 (Mo.App.1980) ("it is for the plaintiffs to determine against

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> whom they will proceed in seeking a roadway. The defendants may not defeat the plaintiffs' claim by showing that other landowners exists against whom the plaintiffs may have asserted a claim."). Respondents Johannes cannot require Appellant to seek its access from the State.

Moss Springs Cemetery Association, 970 S.W.2d at 376-77 (footnote omitted). *See also Kirkpatrick,* 58 S.W.3d at 908; *Anderson I,* 49 S.W.3d at 763.

The Niehaus/Creekstone Respondents cannot defeat Count I of the Petition by way of a motion to dismiss on the theory that the Appellant should first seek relief under Count II of the Petition against the MHTC before bringing an action under Section 228.342, RSMo. The 1991 legislation (S.B. 138, 1991 Mo. Laws 733) that repealed Section 228.340, 1986, now provides for a non-jury hearing under Section 228.352, RSMo, through which the Court determines the location of the access to the landlocked property through an interlocutory order. Under Section 228.352, RSMo, the Niehaus/Creekstone Respondents have the option of advocating that a private road be established on the MHTC's property; however, the "government road" exemption in Section 228.341, RSMo, may prevent the establishment of a "private service road" on what is arguably the right-of-way of Relocated Highway M. See Point V of this Brief. A legal issue therein being whether the term "road" in the "government road" exemption in Section 228.341, RSMo, encompasses the entire right-of-way of the MHTC or only the "road" owned by the MHTC.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Further, the mere prospect that the MHTC could issue a permit to Appellant allowing Appellant access to the 50 Acres, More or Less, through some kind of administrative proceedings or through bureaucratic internal procedures of the MHTC should not make Appellant's claims any less ripe for adjudication. In *Spier*, the landlocked property owner had obtained permission from his uncle to cut a road through the uncle's land that permitted access from the landlocked property to Highway M. The appellate court reversed a trial court ruling that this permissive access was sufficient to bar an action under Section 228.342, RSMo. The Court stated:

> Nothing in the record would support a finding that plaintiff has a legally enforceable right to use this road. An alternate route which is merely permissive does not provide any legally enforceable right to ingress and egress. *Hill v. Kennoy, Inc.*, 522 S.W.2d 775, 779 (Mo. banc 1975).

Spier, 958 S.W.2d at 87.

In *Hill*, this Court stated:

> It has also been said that if the party seeking a private road has no 'legally enforceable right' to use an alternative route, he is entitled to a way of necessity, *Cox v. Tipton*, supra. It was thus stated in *Evans v. Mansfield, supra*, at 551:
>
> 'So long as the plaintiff had a practicable way to and from his

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> land, either private or public, he had not a right, by necessity, to a way over the defendant's lands . . . (A) way as here meant, is a legal way, to use which one has a legal right, which may be enforced, and which may not be rightfully interfered with.'
>
> * * * The rule was positively stated by this court in *Evans v. Mansfield, supra*, at 551:
>
> > 'Defendants contend that because there is another road extending . . .to plaintiff's land the new road is not a way of strict necessity. That would be quite true if the old road (1) were a reasonably practical way to and from plaintiff's land and (2) if plaintiffs had a legally enforceable right to use said road.'

Hill, 552 S.W.2d at 777-78.

Count II of the Petition is based on the constitutional obligation of the MHTC not to permanently land lock property. Count II of the Petition maintains that the MHTC is only authorized by Mo. Const. art. IV, Section 29 to limit rights of access when the public interests and safety require, and that the MHTC may not completely prohibit any right of access to the remainder after a partial taking condemnation. Count II of the Petition asks the Court to order the MHTC to build a public service road to the 50 Acres, More or Less, **or** to indemnify Appellant for the cost of obtaining a private road to such property from a public

road. LF at 21-27.

A route alternative to that proposed by Plaintiff in the Petition could be established by an interlocutory order under Section 228.352, RSMo. Until such time, Appellant should be able to seek access under Section 228.342, RSMo, to establish a way of necessity to the 50 Acres, More or Less, from a public road along the route proposed in Appellant's Petition.

The doctrine of ripeness involves a determination of subject matter jurisdiction. *Missouri Soybean Association v. Missouri Clean Water Commission,* 102 S.W.3d 10, 21-22 (Mo. Banc 2003). Ripeness involves a two-fold inquiry: (1) whether the issues presented are appropriate for judicial resolution; and (2) the hardship to the parties if judicial relief is denied. *Missouri Soybean Association,* 102 S.W.3d at 26-27. First, Mo. Const. art I, Section 28 and Sections 228.341 to 228.374, RSMo, provide subject matter jurisdiction for Appellant's claims for a way of necessity. Count I of the Petition presents issues appropriate for judicial resolution. Second, Appellant's lack of access is a hardship that is obvious, imminent and certain. *See Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts,* 343 S.W.3d 348, 355 (Mo. Banc 2011).

Rule 55.06(b) provides:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

substantive rights of the parties. * * *

Based upon Sections 228.342 and 228.352, RSMo, and Rule 55.06(b), the trial court erred in dismissing Count I of the Petition for a purported lack of ripeness and not allowing Counts I and II of the Petition to be joined in a single action with relief granted "in accordance with the substantive rights of the parties" under Rule 55.06(b). The Niehaus/Creekstone Motion to Dismiss should have been denied by the trial court.

V.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE MHTC IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 228, RSMO, AS ARGUED IN RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION, BECAUSE RESPONDENT MHTC IS SUBJECT TO THE PROVISIONS OF ARTICLE I, SECTION 28 OF THE MISSOURI CONSTITUTION CONCERNING THE RIGHT OF EMINENT DOMAIN FOR PRIVATE WAYS OF NECESSITY, AS IMPLEMENTED IN SECTIONS 228.342 TO 228.368, RSMO, IN THAT THE APPLICABLE EXEMPTION IN SECTION 228.341, RSMO, ONLY APPLIES TO ROADS OWNED BY THE MHTC, NECESSARILY IMPLYING THAT PROPERTY OF THE MHTC THAT IS NOT A ROAD OWNED BY THE MHTC IS SUBJECT TO

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

SECTIONS 228.342 TO 228.368, RSMO, AND ANY PART OF CREEKSTONE DRIVE OWNED BY THE MHTC WOULD BE A PUBLIC ROAD.

A.

ARGUMENT OF THE MHTC ON POINT V IN THE MHTC MOTION TO DISMISS OR SUGGESTIONS IN SUPPORT THEREOF

The MHTC argues that the MHTC is not subject to Sections 228.341 to 228.374, RSMo. LF at 28-31. The Suggestions in Support of its Motion to Dismiss Plaintiff's Petition cite *Sheedy,* 180 S.W.3d at 66. LF at 54-55. *Sheedy* construed Sections 227.090 and 228.190, RSMo, and concluded that Section 228.190, RSMo, does not apply to the MHTC under Section 227.090, RSMo. *Sheedy,* 180 S.W.3d at 72-75. By analogy, the MHTC argues that Sections 228.341 to 228.374, RSMo, do not apply to the MHTC under Section 227.090, RSMo. LF at 54-55.

B.

ARGUMENT OF THE MHTC ON POINT V IN THE BRIEF FILED BY THE MHTC IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

In the Brief filed in the Missouri Court of Appeals, Eastern District, the MHTC argued that as an agency of the executive branch of state government, the MHTC is not subject to Mo. Const. art. I, Section 28, which prohibits the taking of private property for private use, with certain exceptions, including, without limitation, an exception for ways of necessity. *MHTC Eastern District Brief* at 21-22. The MHTC argues that general laws do

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

not apply to the State. *MHTC Eastern District Brief* at 22-23. The MHTC states:

> If the intent of the General Assembly was for Sections 228.340-228.374 RSMo [sic] to apply to properties owned by the state and to allow private individuals to exercise the state's power of eminent domain against the state and force a private roadway onto state property, then the state should have been specifically named as being subject to these statutes.

MHTC Eastern District Brief at 24.

The MHTC also argued in its Brief filed before the Missouri Court of Appeals, Eastern District, that Section 227.090, RSMo, as interpreted in *Sheedy*, 180 S.W.3d at 68, and *Harrison v. State Highways and Transportation Commission,* 732 S.W.2d 214, 219-220 (Mo. App., S.D. 1987):

> [S]erves as a mechanism that allows state statutes outside of those in Chapters 226 and 227 RSMo., which relate to the operation of public roads, to apply to the State Highway System only to the extent that they are not inconsistent with Chapters 226 and 227 RSMo. Sections 228.240-228.374 RSMo [sic] only relate to the establishment of private roadways of necessity; they have absolutely no application to MHTC via 227.090 RSMo. regarding the construction, maintenance, or obstruction of a

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

public road.

MHTC Eastern District Brief at 27.

The MHTC asserts in its Brief filed before the Missouri Court of Appeals, Eastern District, that Mo. Const. art. IV, Section 29 vests the MHTC with the power to limit access to state highways and other transportation facilities where the public interests and safety may require. *MHTC Eastern District Brief* at 28. The MHTC argues that as part of the sovereign, the MHTC cannot be subject to the right of eminent domain granted private parties under Mo. Const. art. I, Section 28. *MHTC Eastern District Brief* at 28. The MHTC argues that it owns all rights of access to the 50 Acres, More or Less, and the MHTC's power to limit access under Mo. Const. art. IV, Section 29, also allows the MHTC to limit access in Lot 3 for safety reasons. *MHTC Eastern District Brief* at 28-29. The MHTC argues that subjecting the MHTC's property to ways of necessity under Chapter 228, RSMo, is inconsistent with statutory provisions that govern the power of the MHTC to convey property interests under Section 227.290, RSMo. *MHTC Eastern District Brief* at 28-29.

The MHTC states:

> Plaintiff does not allege that it is an abutter of Lot 3. The record is clear that MHTC prohibited access from the remaining 50 acres to Route M and it is also clear that MHTC retained the right to limit access from the Niehaus property to Lot 3. (L.F. 10-11). However, it is not established in the record, or even

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> alleged, that MHTC prohibited access from the Niehaus property (Lots 1 and 2) to Lot 3. If that access was not specifically prohibited, then some abutter's right of access exists from the Niehaus property to Lot 3. As an abutter, Niehaus may have some right of reasonable access to Lot 3, but a property owner who is not an abutter would have no such right. Plaintiff has not alleged or established that it is an abutting property owner of Lot 3, which is a prerequisite to any claim that it has a right to break an access limitation to Lot 3.

MHTC Eastern District Brief at 30-31.

The MHTC argues that "it does not matter if MHTC operates an actual roadway on Lot 3", the MHTC is using the land it owns in Creekstone for the benefit of the public and such land should be exempt from Section 228.342, RSMo. *MHTC Eastern District Brief* at 31.

The MHTC states:

> Section 228.341 RSMo. states that, "A private road does not include any road owned by ... the state of Missouri ... or agency of the state of Missouri." As noted in ***MHTC v. Kansas City Cold Storage,*** the Commission is an agency of the executive branch of the government of the state of Missouri.

> This legislative carving out of roads owned by MHTC from the definition of private roads also means that state roads cannot be maintained as part of a private roadway of necessity under Sections 228.341 through 228.374 RSMo. Plaintiff's attempts to limit the application of 228.341 RSMo., by stating that the petition only alleges MHTC owns an interest in Lot 3 and not Creekstone Drive itself, reflects a glaring omission in the Plaintiffs petition: it is unclear who actually owns the subject portion of Creekstone Drive on Lot 3. Ownership of the portion of Creekstone Drive on Lot 3 could be an important factor; it is possible that MHTC owns that part of Creekstone Drive, and, therefore it would be exempt under Section 228.341 RSMo.

MHTC Eastern District Brief at 31-32.

The MHTC also argued that Lot 3 is part of the MHTC's right-of-way and cannot be used as part of a private roadway because at some uncertain future date the MHTC might need Lot 3 for some unnamed, uncertain public benefit. *MHTC Eastern District Brief* at 32-33.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

C.

THE EASTERN DISTRICT OPINION ON POINT V

The Eastern District Opinion states, in part:

> Avery's petition also asserts a claim for the establishment of a private way of necessity against MHTC pursuant to the provisions of Chapter 228, specifically, under Section 228.342. MHTC argues that it is not subject to the provisions of Chapter 228 or Section 228.342, and therefore cannot be compelled to provide Avery with a private roadway over public property. MHTC notes that while the provisions of Chapter 228 allow for the establishment of a private road of necessity over the property owned by an adjacent private property owner, no statutory cause of action allows a landowner to acquire public property to create a private way of necessity. We agree.
>
> MHTC is a department of the executive branch of the state government. *Missouri Highway & Transp. Comm'n v. Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 682 (Mo. App. W.D. 1997). All of MHTC's property interests are publicly held; MHTC does not own private property or private property interests.

Article I, Section 28 of the Missouri Constitution addresses the limitations on the taking of private property for private use, including the taking of private property for private roadways of necessity. Mo. Const. art. I, section 28. Chapter 228 implements the limitations expressed in Article I, Section 28. *See State ex rel. Missouri Highway & Transp. Comm'n v. Davis*, 849 S.W.2d 704, 705 (Mo. App. E.D. 1993). In particular, Sections 228.340 [sic] through 228.374 include provisions for the establishment and maintenance of private roads, with Section 228.342 governing the establishment of private roadways of necessity. The plain language of Article I, Section 28 and Section 228.342 relates solely to the taking of private property for private uses. Article I, Section 28 provides in relevant part:

> That *private property* shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law. Mo. Const. art. I, section 28.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

(emphasis added)

Similarly, Section 228.342 allows only for the establishment or widening of a "private road." No other provision in Chapter 228 provides a statutory cause of action allowing the establishment of a private roadway of necessity over public property. While Chapter 228 allows property owners to acquire private property from private property owners to establish private ways of necessity, the language of Chapter 228 does not create a similar right of owners of private property to take *public* property to establish private ways of necessity.

Avery has provided this court with no judicial authority supporting its argument that publicly owned land is subject to the taking authority of Chapter 228. Similarly, our review of Missouri case law has not revealed any support for applying Chapter 228 generally, or Section 228.342 specifically, to takings of public property for the purpose of creating a private way of necessity for a private landowner. This appeal therefore presents an issue of first impression.

We have found no circumstances in which Section 228.342 or its predecessor has been applied to compel the

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> creation of a private roadway benefitting a private landowner over public land. To do so runs contrary to the plain language of both Article I, Section 28 of the Missouri Constitution and Section 228.342. We find no support for the proposition that Chapter 228 allows the taking of public land for the purposes of establishing private roadways of necessity, and hold that it does not. MHTC is simply not an appropriate party against which Avery may bring such an action under the current statutory scheme. Accordingly, Avery fails to state a claim against MHTC upon which relief can be granted, and the trial court did not err in granting MHTC's motion to dismiss Avery's petition.

Slip Op. at 11-12.

D.

APPELLANT'S ARGUMENTS ON POINT V:

(1) AS A GOVERNMENTAL ENTITY, THE MHTC'S PROPERTY IS NOT PROTECTED BY MISSOURI'S BILL OF RIGHTS, INCLUDING, WITHOUT LIMITATION, MO. CONST. ART. I, SECTION 28.

The same panel of the Missouri Court of Appeals, Eastern District, which concurred in the Eastern District Opinion also concurred in an opinion rendered in *Metropolitan St. Louis Sewer District v. City of Bellefontaine Neighbors,* Appeal No. ED101713 (Mo. App.,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

E.D. February 24, 2015), *now pending on transfer in this Court as* Appeal No. SC94831, stating:

> "There is no precedent in Missouri for including public property under the blanket of the state constitutional protections for private property."

The MHTC's property is not protected by Mo. Const. art. I, Section 28. That constitutional provision prohibits the taking of private property for private use, with exceptions, including an exception for ways of necessity. Article I, Section 28 of the Missouri Constitution does not prohibit the taking of public property for private use. Appellant recognizes that common law or judicial limitations have been created to prevent public property from being taken for other public uses. *See State ex rel. Missouri Cities Water Company v. Hodge,* 878 S.W.2d 819, 821 (Mo. Banc 1994). Unless some precedent on the issue is generated as a result of *Metropolitan St. Louis Sewer District v. City of Bellefontaine Neighbors*, Appeal No. SC94831 (Mo. Banc, submitted September 2, 2015) or other pending actions, there is currently no known precedent in Missouri supporting including public property under the blanket of state constitutional protections for private property, as was done in the Eastern District Opinion in its interpretation of Mo. Const. art. I, Section 28.

Article I, Section 28 of the Missouri Constitution is not self-enforcing and is dependent upon the legislature for implementation "in the manner prescribed by law".

Rippeto v. Thompson, 216 S.W.2d 505, 507 (Mo. 1949) ("Taking of private property for private use is permitted by the Constitution (1945) only when it is done in strict conformity with statutory authority."). As explained elsewhere in this Brief, the enactment of Section 228.341, RSMo, by the legislature is an implementation of Mo. Const. art. I, Section 28 that makes public property that is not a road owned the governmental entities named therein subject to inclusion in a private road if the other requirements of Sections 228.341 to 228.374, RSMo, are satisfied. The legislature's implementation of Mo. Const. art. I, Section 28 through the enactment of Section 228.341, RSMo, is fully consistent with that constitutional provision.

(2) **STATUTES RELATING TO THE SAME SUBJECT MATTER ARE *IN PARI MATERIA* AND SHOULD BE CONSTRUED HARMONIOUSLY; WHEN IT IS IMPOSSIBLE TO HARMONIZE TWO CONFLICTING STATUTORY PROVISIONS, AS A GENERAL RULE, THE CHRONOLOGICALLY LATER STATUTE WILL PREVAIL OVER A MORE GENERAL EARLIER STATUTE, AND THE CHRONOLOGICALLY LATER STATUTE WILL BE READ AS AN EXCEPTION TO THE EARLIER GENERAL STATUTE**

Article I, Section 28 of the Missouri Constitution states, in part:

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

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* * *

> That private property shall not be taken for private use with or without compensation, unless by consent of the owner, **except for private ways of necessity**, * * *, **in the manner prescribed by law**; * * *.

(Emphasis added.)

The General Assembly has implemented Mo. Const. art. I, Section 28 through the enactment of Sections 228.341 to 228.374, RSMo.

Section 228.342, RSMo, provides, in part:

> A **private road** may be established or widened in favor of any owner or owners of real property for which there is no access, or insufficiently wide access, from such property to a public road if the private road sought to be established or widened is a way of strict necessity. ***

(Emphasis added.)

Section 228.341, RSMo, provides:

> For purposes of sections 228.341 to 228.374, "private road" with regard to a proceeding to obtain a maintenance order means any private road established under this chapter or any easement of access, regardless of how created, which provides a

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> means of ingress and egress by motor vehicle for any owner or owners of residences from such homes to a public road. **A private road does not include any road owned by the United States or any agency or instrumentality thereof, or the state of Missouri, or any county, municipality, political subdivision, special district, instrumentality, or agency of the state of Missouri.** * * * .

(Emphasis added.)

Section 227.090, RSMo, provides:

> All laws of this state **relating to the construction, maintenance or obstruction of roads**, which do not conflict with the provisions of chapters 226 and 227 and are consistent with the provisions of said chapters, shall apply to the construction, maintenance and obstruction of all state highways, and the duties and powers imposed by such laws on certain officials shall devolve upon the engineer, or other officer of the highways and transportation commission designated by the commission.

In *Anderson v. Ken Kauffman & Sons Excavating, LLC,* 248 S.W.3d 101, 107-108 (Mo. App., W.D. 2008), the Court stated:

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> Generally, "[a] provision in a statute must be read in harmony with the entire section." … [Citation omitted.] Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously. … [Citation omitted.] …
>
> When it is impossible to harmonize two conflicting statutory provisions, "[a]s a general rule, a `chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.'" … [Citation omitted.]. "Furthermore, '[w]here one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific.'" … [Citation omitted.]

248 S.W.3d at 107-108.

Sheedy found that the part of Section 228.190, RSMo, which deals with the abandonment of public roads does not relate to the construction, maintenance or obstruction of roads within the meaning of Section 227.090, RSMo. *Sheedy,* 180 S.W.3d at 72-75. Despite contrary assertions in the Brief filed by the MHTC before the Missouri Court of Appeals, Eastern District, *MHTC Eastern District Brief* at 26-27, *Harrison* did not reach the

issue of whether Section 228.190, RSMo, applies to the MHTC under Section 227.090, RSMo. *Harrison,* 732 S.W.2d at 219-20.

Section 228.341, RSMo, is part of a group of statutes that implement the constitutional authority to use the power of eminent domain for private ways of necessity under Mo. Const. art. I, Section 28. Section 228.341, RSMo, was enacted by H.B. 1103, 2012 Vernon's Missouri Session Laws (West's No. 79), page 566, and defines the private roads that may be established or widened under Section 228.342, RSMo, in part by exempting from the definition of "private road" those roads owned by the State of Missouri or an agency thereof.

Appellant concedes that the MHTC is an agency of the State of Missouri. The Petition alleges that the MHTC owns Lot 3 of Creekstone over which part of Creekstone Drive passes. LF at 10. That part of Lot 3 of Creekstone over which Creekstone Drive passes is not a road owned by the MHTC, as that part of Creekstone Drive located on Lot 3 is excepted from said deed of conveyance and is maintained by Respondent Creekstone Homeowners Association under the 1990 General Warranty Deed vesting the MHTC with title to Lot 3 of Creekstone. LF at 9-10. That same 1990 General Warranty Deed vests the MHTC with title to Lot 2 of Creekstone, including that part of Lot 2 encumbered by Creekstone Drive. That part of Creekstone Drive located on Lot 2 of Creekstone is a public road owned by the MHTC and is not a private road under Section 228.341, RSMo.

Section 227.090, RSMo, and Sections 228.341 to 228.374, RSMo, are *in pari materia* as those statutes relate to roads and should be harmonized, if possible. Section 227.090,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

RSMo, and Sections 228.341 to 228.374, RSMo, can be harmonized if Sections 228.341 to 228.374, RSMo, are found to relate to the construction of roads and are thus applicable to the MHTC under Section 227.090, RSMo.

If Sections 227.090 and 228.341 to 228.374, RSMo, cannot be harmonized and are found to be in irreconcilable conflict, then the later enacted and more specific statute, Section 228.341, RSMo (enacted as part of H.B. 1103 in 2012), should govern over any general rules on the application of road laws to the MHTC in the earlier enacted Section 227.090, RSMo.

The MHTC is subject to Sections 228.341 to 228.374, RSMo, because neither Mo. Const. art. I, Section 28 nor Section 227.090, RSMo, shield the MHTC from the application of Sections 228.341 to 228.374, RSMo.

(3) **STATUTES IMPOSING OBLIGATIONS DO NOT APPLY TO GOVERNMENTAL ENTITIES UNLESS GOVERNMENTAL ENTITIES ARE EXPRESSLY OR BY NECESSARY IMPLICATION INCLUDED WITH THE SCOPE OF THE STATUTE; HERE, ALL OF THE MHTC'S PROPERTY, OTHER THAN ROADS OWNED BY THE MHTC, ARE NECESSARILY INCLUDED WITHIN THE SCOPE OF SECTION 228.341, RSMO, BECAUSE THE "GOVERNMENT ROADS" EXEMPTION IN SECTION 228.341, RSMO, IS LIMITED TO "ROADS" AND NECESSARILY IMPLIES THAT OTHER PROPERTY OF THE MHTC IS SUBJECT TO BEING INCLUDED WITHIN A PRIVATE ROAD.**

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

There is a rule of statutory construction that statutes do not apply to governmental entities unless governmental entities are expressly or by necessary implication included within the scope of the statute. *Carpenter v. King,* 679 S.W.2d 866, 868 (Mo. Banc 1984). Among the authorities cited in *Carpenter* in support of the above rule is *Hayes v. City of Kansas City,* 362 Mo. 368, 241 S.W.2d 888, 892 (Mo. 1951), which states:

> 'The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, * * *.

Carpenter, 679 S.W.2d at 868. *See also Krasney v. Curators of the University of Missouri,* 765 S.W.2d 646, 650 (Mo. App., W.D. 1989); *King v. Probate Division, Circuit Court of the County of St. Louis,* 958 S.W.2d 92, 93 (Mo. App., E.D. 1997).

The rule in *Carpenter* has been applied to the MHTC in *Village of Big Lake v. BNSF Railway Company, Inc.,* 382 S.W.3d 125, 131 (Mo. App., W.D. 2012). In *Smith v. Coffey,* 37 S.W.3d 797 (Mo banc 2001), this Court interpreted a statutory waiver of the MHTC's

sovereign immunity by holding that the rule in *Carpenter* does not apply to the application of other general laws to the State once there is a statutory waiver of tort liability:

> MHTC stresses the fact that the joint and several liability statute does not specifically mention the state or its agencies. To this end, it cites *Carpenter v. King*, 679 S.W.2d 866, 868 (Mo. banc 1984) (*quoting Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W.2d 888 (1951)), which recognized that "'the state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.'" From this, MHTC reasons the joint and several liability statute does not apply to it as neither the state nor its agencies are specifically mentioned in sec. 537.067. But the rule articulated in Carpenter, requiring the state to be specifically named in the statute in order to be subject to tort liability, is satisfied by the express waiver of sovereign immunity in the limited class of tort cases described in sec. 537.600.1. Joint and several liability is a generally applicable principle that furthers Missouri's policy of placing the financial

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

burden of injuries on the parties at fault in causing the injuries. It does not create a new theory of recovery for which sovereign immunity must be waived anew. Moreover, the common law doctrine of joint and several liability was firmly imbedded in tort law long before the legislature resolved to subject the government to tort liability. *Berry v. Kansas City Pub. Serv. Co.*, 121 S.W.2d 825, 833 (Mo. 1938). The Court must presume that the legislature was aware of the state of the law at the time of enactment of sec. 537.600. *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000). The legislative choice to make sec. 537.067.1 applicable to "all tort actions for damages" cannot be taken for any less than a legislative reaffirmation that the government is subject to joint and several liability. Furthermore, it would be absurd to insist that the legislature must specifically provide whether each and every statute relating to tort law is applicable to the state and its agencies where it has already adopted a clear exception to governmental tort immunity. *Carpenter* and cases providing likewise do not require such redundancy.

37 S.W.3d at 799-800.

In this instance, Section 228.341, RSMo, specifically exempts from the definition of "private road" those roads owned by the MHTC, as a state agency. If all of the property of the MHTC were already exempt from Section 228.342, RSMo, by operation of law under the *Carpenter* doctrine or some other similar rule, then the express "governmental roads" exemption in Section 228.341, RSMo, would be totally superfluous. This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language. *Bateman v. Rinehart,* 391 S.W.3d 441, 446 (Mo. Banc 2013). Further, this Court must presume the legislature knew the state of the law at the time of the enactment of Section 228.341, RSMo. *Smith,* 37 S.W.3d at 799. By exempting "roads" owned by certain governmental entities, Section 228.341, RSMo, necessarily implies that other governmental property that is not a road owned by the enumerated governmental entities may be included as part of a "private road" created under Sections 228.341 to 228.374, RSMo, if the other requirements of those statutes are met.

The legislature, by providing in Section 228.342, RSMo, that: A private road may be established or widened in favor of any owner or owners of real property for which there is no access, or insufficiently wide access" and by providing in Section 228.341, RSMo, that: "A private road does not include any road owned by … the state of Missouri, or any … instrumentality, or agency of the state of Missouri" necessarily implies that property of the state of Missouri, or any instrumentality or agency of the state of Missouri, that is not a road may be included as part of a private road established under Sections 228.341 to 228.374,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

RSMo, if the requirements of those statutes are met.

(4) IN PART, THE RELEVANT CONVEYANCE DEED VESTS THE MHTC WITH TITLE TO ALL OF LOT 2, INCLUDING THAT PART OF CREEKSTONE DRIVE LOCATED ON LOT 2, AND ALL OF LOT 3 OF CREEKSTONE, EXCEPTING THAT PORTION OF CREEKSTONE DRIVE LOCATED IN LOT 3 WHICH IS MAINTAINED BY THE RESPONDENT CREEKSTONE HOMEOWNERS ASSOCIATION; THAT PART OF LOT 3 UPON WHICH CREEKSTONE DRIVE IS LOCATED IS NOT A "ROAD" OWNED BY THE MHTC, AND THAT PART OF CREEKSTONE DRIVE LOCATED ON LOT 2 IS A PUBLIC ROAD

The conveyance deed granting the MHTC title to Lots 2 and 3 of Creekstone vests the MHTC with the following real estate:

> A parcel of land located in part of U. S. Survey No. 335, Township 42 North, Range 5 East in Jefferson County, Missouri; all of Lots 2, 3, 22, 23, 24, 25, 26 and 27 of Creekstone Subdivision recorded in Book 372, Pages 1393 and 1394; including that portion of Creekstone Drive located in Lots 2, 22 and 23; but less and excepting that portion of Creekstone Drive located in Lot 3 and Dierks Lane and (Future Dierks Lane) located in Lots 2, 23, 24, 25, 26 and 27, which shall be

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

maintained by the Creekstone Homeowners Association established in Book 369, Page 1914.

LF at 9-10.

The MHTC cannot exercise any authority to limit access to that part of Creekstone Drive located on Lot 3 under Mo. Const. art. IV, Section 29, as is argued by the MHTC, *MHTC Eastern District Brief* at 28-29, because the MHTC does not own that part of Lot 3 over which Creekstone Drive is located, as that part of Creekstone Drive located on Lot 3 was excepted from the conveyance deed, and that conveyance deed imposes a duty on Respondent Creekstone Homeowners Association to maintain that part of Creekstone Drive that is located on Lot 3 of Creekstone. See the language of the said conveyance deed above. That part of Creekstone Drive located on Lot 2 of Creekstone is owned by the MHTC and is a public road. Even under a rational basis standard of equal protection analysis, the MHTC cannot possibly justify any rational basis for excluding Appellant from using the public road on Lot 2 of Creekstone but then allowing all of the lot owners in Creekstone and the general public to access the lots and homes in Creekstone via that part of Creekstone Drive located on Lot 2 of Creekstone.

(5) APPELLANT IS NOT SEEKING ANY ABUTTER'S RIGHTS TO LOT 3 OF CREEKSTONE.

The MHTC does not cite any authority supporting its argument that the 50 Acres, More or Less, must abut Lot 3 in order for Appellant to be able to state a claim under Section

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

228.342, RSMo. *MHTC Eastern District Brief* at 30-31. In fact that Brief is incorrect in asserting that the Consolidation Plat abuts Lot 3 of Creekstone. The Petition alleges that the MHTC conveyed parts of Lots 14 and 15 of Creekstone to Respondent Richard Niehaus, which was re-platted as the Consolidation Plat. LF at 10-12. There is no allegation in the Petition that the Consolidation Plat abuts Lot 3 of Creekstone, nor is there any legal requirement that the Consolidation Plat or the 50 Acres, More or Less, abut Lot 3 of Creekstone under Sections 228.341 to 228.374, RSMo. Appellant is not seeking any abutter's rights of access to Lot 3 of Creekstone.

For the foregoing reasons, the trial court erred in granting the MHTC Motion to Dismiss for any purported reason that the MHTC is not subject to Sections 228.341 to 228.374, RSMo.

VI.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE MHTCERS' REPORT IN THE CONDEMNATION CASE PURPORTEDLY CLEARLY LIMITS OR PROHIBITS ACCESS TO THE 50 ACRES, MORE OR LESS, AND RESPONDENT MHTC HAS PURPORTEDLY TAKEN AND PAID FOR THE RIGHT TO LIMIT OR PROHIBIT ACCESS TO THE 50 ACRES, MORE OR LESS, AND THE MHTC HAS NOT LIFTED ANY SUCH RESTRICTIONS OR

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

PROHIBITIONS, SO THE RIGHT OF APPELLANT TO ACCESS THE 50 ACRES, MORE OR LESS, HAS ALREADY BEEN DETERMINED, BECAUSE ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION GRANTS THE MHTC ONLY THE POWER TO LIMIT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, IN THAT SAID CONSTITUTIONAL PROVISION DOES NOT EMPOWER THE MHTC TO COMPLETELY PROHIBIT ALL ACCESS TO THE 50 ACRES, MORE OR LESS, FROM ANY PUBLIC ROAD, AND THE MHTCERS' REPORT IN THE CONDEMNATION CASE IS AMBIGUOUS AS TO WHETHER SUCH COMMISSIONERS' REPORT LIMITS DIRECT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, OR WHETHER SUCH COMMISSIONERS' REPORT PURPORTS TO COMPLETELY PROHIBIT ALL ACCESS TO ANY PUBLIC ROAD FROM THE 50 ACRES, MORE OR LESS.

A.

ARGUMENT OF THE MHTC ON POINT VI IN THE MHTC MOTION TO DISMISS OR SUGGESTIONS IN SUPPORT THEREOF AND AT ORAL ARGUMENT BEFORE THE TRIAL COURT

The MHTC argues that the Condemnation Case has already determined the access rights of Appellant. LF at 55-56. To the extent that said argument is based upon the *res judicata* doctrine, such is an affirmative defense under Rule 55.08. The MHTC argues that

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

whether the right of access was prohibited or only limited under the Commissioner's Report is immaterial, as the MHTC clearly took and paid for all of the access rights. LF at 29; Tr. at 7, 10-11.

B.

ARGUMENT OF THE MHTC ON POINT VI IN THE BRIEF FILED BY BY THE MHTC IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

The MHTC argues that it has the authority to acquire all access rights of properties neighboring state highways. *MHTC Eastern District Brief* at 34-41. The MHTC also argues that there is no ambiguity in the Commissioner's Report filed in the Condemnation Case. *MHTC Eastern District Brief* at 41-46.

In the Brief filed before the Missouri Court of Appeals, Eastern District, the MHTC cites a number of cases affirming the right of the MHTC to limit access to state highways and transportation facilities where the public interests and safety so requires, such as *State ex rel. State Highway Commission v. James,* 205 S.W.3d 534, 537-538 (Mo. Banc 1947); *Handlan-Buck Company v. State Highway Commission,* 315 S.W.3d 219, 222-223 (Mo. 1958); *State ex rel. State Highway Commission v. Hammel,* 372 S.W.2d 852, 855 (Mo. 1963); *State ex rel. State Highway Commission v. Meier,* 388 S.W.2d 855, 857 (Mo. Banc 1965); and *Shepherd v. State ex rel. State Highway Commission,* 472 S.W.2d 382, 386 (Mo. 1968). The MHTC states in the Brief filed before the Missouri Court of Appeals, Eastern District:

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> *Meier*, and a number of cases reported after *Meier* indicate that although the Commission may limit direct access from neighboring property to a state highway in accordance with its police powers, some access must still be allowed. The facts of those cases do not indicate whether MHTC had condemned the right to prohibit all access from those remainder properties to the state highways in question. Those cases only indicate that the Commission had limited the access from the remainder; that is to say the cases only indicate that MHTC had paid for the right to limit access. It does not appear in these cases that MHTC had actually paid for the right to completely prohibit access from the remainder properties to the state highways in question.

MHTC Eastern District Brief at 38-39.

The MHTC then states in its Brief before the Missouri Court of Appeals, Eastern District:

> The present case is similar to *State ex rel. Missouri Highway and Transportation Commission v. Perigo*, 886 S.W.2d 149 (Mo. App. S.D. 1994). In *Perigo*, MHTC sought to condemn property for a project in Newton County related to the

relocated Route 71. *Perigo* at 150. With regard to MHTC's ability to acquire all access rights to a property and subsequently landlock the remainder, the Court of Appeals stated:

> Relator's authority to decide the public necessity or propriety for a public highway is found in both constitutional and statutory provisions. *See Mo. Canst. art. IV sec. 29*; Chapter 227, RSMo. "The power to locate a state highway, to determine its width, type of construction and *the extent of land necessary for economical ... construction are vested in the sound discretion of the State Highway Commission*, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use." *Curtis*, 222 S.W.2d at 68 (emphasis ours). In Art. IV, sec. 29 of our Constitution, Relator is expressly authorized to construct "limited access" highways and § 227.120(13) vests Relator with authority to institute proceedings to condemn lands for right-of-way and "for any other purpose necessary for the proper and economical

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> construction of the state highway system .... " *See Curtis*, 222 S.W.2d at 67.
>
> Here, Relator designed newly relocated Highway 71 as a limited access highway. It had authority to do so. Art. IV, sec. 29. Being so designed and planned, the proposed highway left Albright's and Browning's remaining land without public access. Whether "economical construction" of this 6.348 miles of Highway 71 was more likely achieved by paying Albright and Browning additional money to leave their property landlocked or by taking more land from the Copes and the Jansses for outer roads to serve the Albright and Browning properties, is a question for Relator initially to decide. It is not a proper subject of judicial inquiry, absent fraud or bad faith or unwarranted abuse of discretion. *See State ex rel. State Highway Commission v. Eakin*, 357 S.W.2d 129, 134 (Mo. 1962); *Clothier*, 465 S.W.2d 632. (Emphasis added).

MHTC Eastern District Brief at 39-40.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

The MHTC concluded from the foregoing in its Brief before the Missouri Court of Appeals, Eastern District, as follows:

> *Perigo* is directly on point with the present case. So long as there is a public purpose served by the condemnation, it is the Commission's decision whether to either pay damages to a property owner and landlock a remainder or to provide some other means of ingress/egress. So long as a public purpose, typically motorist safety, is served and so long as the Commission pays just compensation for the damage to the remaining property, MHTC may condemn all rights of public access. Here, the Commission previously decided to landlock the subject property, it did so through the use of eminent domain, and it paid $494,340 just compensation damages to Plaintiff's predecessor in title.

MHTC Eastern District Brief at 39-40.

The MHTC stated the following in its Brief before the Missouri Court of Appeals, Eastern District, with respect to Appellant's claim that the Commissioner's Report is ambiguous:

> The Report of Commissioners dated on or about April 18, 1996 entered in the case of *State of Missouri ex rel. MHTC v.*

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> *The Raebel Living Trust*, Case No. 195-5715CC (Twenty-third Judicial Circuit of Missouri, at Hillsboro, Jefferson County) specifically provided that all abutter's rights of direct access to the thruway of Route M from the subject remainder property was "herewith prohibited or limited". (L.F. 8).
>
> Plaintiff now claims that there is an ambiguity due to the use of the words "prohibited" and "limited". (Tr. 18-19). Plaintiff appears to assert that the access restriction has to be one or the other, but cannot be both (Tr. 18-19). The trial court disagreed and observed:
>
> > Well, as I read that, that was an alternative. They could either limit or prohibit, but doesn't define them. My reading of it was: They can limit or prohibit access.

MHTC Eastern District Brief at 42.

The MHTC argues that a fair reading of the Commissioner's Report grants the MHTC the right to alternatively either prohibit or limit access to the 50 Acres, More or Less, at the discretion of the MHTC. *MHTC Eastern District Brief* at 43. Further, the MHTC argues that any irregularity in the Commissioner's Report is *res judicata* and cannot be re-litigated. *MHTC Eastern District Brief* at 43-44.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

C.

THE EASTERN DISTRICT OPINION ON POINT VI

The Eastern District Opinion makes the following gratuitous comments:

> While having no effect on our above holding, we additionally reject Avery's second argument advanced in Count II of its petition and reflected in its sixth point on appeal that MHTC is required to provide Avery with access to Route M. Avery's predecessor-in-interest to the Property, the Raebel Trust, received $494,340 in compensation in exchange for MHTC's taking and its subsequent access restriction of the Property. The Raebel Condemnation specified that all abutter's rights of direct access to Route M were "herewith prohibited or limited." MHTC's power to restrict access to a public road as part of a condemnation proceeding, pursuant to its constitutional eminent authority, is well-established. *See, e.g., State ex rel. Missouri Highway & Transp. Comm'n v. Perigo,* 886 S.W.2d 149, 152-53 (Mo. App. S.D. 1994). Avery was fully aware of the Raebel Condemnation at the time Avery acquired the Property, and cannot now seek to reverse the effects of the lawful and proper condemnation that resulted in the Property's

lack of access to a public road.

Slip Op. at 13.

D.

APPELLANT'S ARGUMENTS ON POINT VI:

(1) THE PLEADINGS ARE INSUFFICIENT TO ESTABLISH AN AFFIRMATIVE DEFENSE OF *RES JUDICATA*

Res judicata is an affirmative defense under Rule 55.08. Sustaining a motion to dismiss based on an affirmative defense requires that the defense be irrefutably established by the pleadings. *Murray,* 949 S.W.2d at 205. No pleadings filed by the MHTC in this matter contain allegations regarding the pleadings filed in the Condemnation Case or other matters concerning actions taken in the Condemnation Case. In particular, no pleadings filed in the Condemnation Case concerning any compensation for special damages (or benefits) for lack of access due to the relocation of Highway M have been made a part of the Record on Appeal. *See* Section 227.120.2, RSMo, enacted in 2004 by S.B. Nos. 1233, 840 & 1043, 2004 Vernon's Missouri Session Laws (West's No. 181), pages 1041, 1052 (which provides: "In any case in which the commission exercises eminent domain involving a taking of real estate, the court, commissioners, and jury shall consider the restriction of or loss of access to any adjacent highway as an element in assessing the damages"). The Condemnation Case was tried and decided prior to the adoption of subsection 2 of Section 227.120, RSMo, implying, at least, that loss of access to any adjacent highway was not an element in assessing

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

damages at the time the Commissioner's Report was filed in the Condemnation Case.

Further, there is a body of case law indicating that when the MHTC "splits the farm" by placing a new dissecting highway that did not previously exist through an existing property, thereby splitting the property in two (as the evidence may show happened with respect to what the MHTC did to the Raebel Farm), deprivation of access is not compensable. In *State ex rel. Missouri Highway and Transportation Commission v. Spencer,* 820 S.W.2d 87 (Mo. App., E.D. 1991), the Court stated:

> A right of access has long been recognized as a compensable interest in this state. *State ex rel. State Highway Commission v. Clevenger*, 365 Mo. 970, 291 S.W.2d 57, 62 (1956); *State ex rel. State Highway Commission v. James*, 356 Mo. 1161, 205 S.W.2d 534, 537 (banc 1947); *Wilson v. Kansas City*, 162 S.W.2d 802, 803 (Mo.1942). However, the right which has been recognized and protected is that of an abutting property owner to pass freely from his property to the street. *State ex rel. State Highway Commission v. Meier*, 388 S.W.2d 855, 857 (Mo. banc 1965); *Deutsch v. City of Ladue*, 728 S.W.2d 239, 242 (Mo.App.1987). When this right of access is later extinguished, compensation has been allowed. *See State v. Brockfeld*, 388 S.W.2d 862, 864 (Mo. banc 1965).

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

* * * Recognition of damages when a taking will interfere with the right of ingress and egress from the abutting property to the road does not include access between parcels separated by the highway. *See Clevenger*, 291 S.W.2d at 62.

In *Clevenger*, our Supreme Court drew the distinction between assessing damages for the loss of ones "right of access to the road" and "separation of [one's] land" due to future construction of the road. The condemnation at issue in *Clevenger* included land appropriated for the location of a highway to be built. After construction the highway would bisect property owners' land. On appeal, property owners claimed damages for the limitation of their access to the new highway. The court noted the evidence adduced at trial confused the "supposed right of access to the road, and the inconvenience of access from one part of the farm to the other; after the location of the new highway." The case warranted reversal and remand for retrial because property owners' claim of right to access was not compensable. **The court reasoned: there could be here no taking of an easement of access to the new roadway, because no prior right of access existed; thus, the**

supposed deprivation of a right of access to the road itself could not constitute a compensable element of damage.

Spencer, 820 S.W.2d at 89 (emphasis added).

Relocated Highway M did not exist prior to the Condemnation Case, and any supposed deprivation of a right of access to Relocated Highway M could not have been a compensable element of damage in the Condemnation Case.

No allegations of any pleadings filed in this matter irrefutably support the defense of *res judicata.*

(2) ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION ONLY AUTHORIZES THE MHTC TO LIMIT ACCESS WHEN THE PUBLIC INTERESTS AND SAFETY REQUIRE; NO PUBLIC INTEREST OR PURPOSE OR PUBLIC SAFETY SUPPORTS COMPLETELY LANDLOCKING REAL ESTATE THROUGH THE EXERCISE OF THE POWER OF EMIENT DOMAIN; ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION DOES NOT AUTHORIZE THE MHTC TO COMPLETELY PROHIBIT ACCESS TO AND LANDLOCK THE REMAINDER AFTER A PARTIAL TAKING CONDEMNATION

An abutting owner has the same right to use a street as the public, but in addition has the special right of ingress and egress. *State ex rel. Rhodes v. City of Springfield*, 672

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

S.W.2d 349, 256-357 (Mo. App., S.D. 1984) (*quoting Wilhoit v. City of Springfield*, 171 S.W.2d 95, 98 (Mo. App., Spr. 1943)). *See also Meier,* 388 S.W.2d at 857.

Article IV, Section 29 of the Missouri Constitution allows the MHTC to limit access by stating the MHTC "shall have authority to limit access to, from and across state highways and other transportation facilities **where the public interests and safety may require.**" (Emphasis added.)

Article I, Sections 26 and 27 of the Missouri Constitution provides:

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:
>
> * * *
>
> That private property shall not be taken or damaged for **public use** without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

shall remain in such owner subject to the use for which it is taken.

That in such manner and under such limitations as may be provided by law, the state, or any county or city **may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended**, and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made.

(Emphasis added.) *See also* U.S. Const. Amends. V and XIV.

Under the foregoing constitutional provisions, the MHTC is only authorized to acquire property by eminent domain for public use, with the acquisition of such excess property as may be reasonably necessary to effectuate the purposes intended.

Construction of public service roads is an authorized public use for which the MHTC may take private property. *Perigo*, 886 S.W.2d at 151-153. *See generally State ex rel. State Highway Commission v. Vorhof-Duenke Company,* 366 S.W.2d 329 (Mo. Banc 1963). Construction of a service road to allow access to the remainder after a partial taking is a way

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

for the MHTC to mitigate damages. *State ex rel. State Highway Commission v. Brockfeld*, 388 S.W.2d 862 (Mo. Banc 1965).

In *Andrews v. State*, 248 Ind. 525, 229 N.E.2d 806 (Ind. 1967), the Court concluded that service roads that provide access to a few private individuals do in fact benefit the public and fulfill a public purpose thusly:

> In truth and in fact, we must conclude that a service road would alleviate a land-locked condition of the Baldwin property and would certainly have the effect of reducing the amount of damages payable to the Baldwins. If the State of Indiana is not in a position to minimize the damages paid to land owners, **then the cost of Interstate Highways would soar astronomically and Indiana would be dotted abnormally with land-locked real estate.** We believe that in planning and providing for condemnation of service roads, under Burns', § 36--2949, supra, the Legislature properly intended such service roads would constitute a public use whether such road served one property owner or many. We so hold.

Andrews, 229 N.E.2d at 810 (emphasis added).

The use of eminent domain powers by the MHTC for the construction of public service or outer roads to provide access to those whose access has been abrogated by a

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

limited access highway is for a public purpose. *Perigo*, 886 S.W.2d at 151-153. The converse must be true. The MHTC's complete prohibition of any access to the 50 Acres, More or Less, under the Commissioner's Report cannot be a limitation of access "**where the public interests and safety may require**" consistent with Mo. Const. art. IV, Section 29. What public interests and safety are advanced by denying all access to the privately owned remainder after a partial taking condemnation?

The power of eminent domain is narrowly limited. *State ex rel. Missouri Highway and Transportation Commission v. Keeven,* 895 S.W.2d 587, 589 (Mo. Banc 1995) provides:

> The power of government to condemn private property is a frightening power. It allows government to deprive landowners of the enjoyment and use of their property against their wishes. The power to condemn proceeds from utilitarian principles that place the public good over any individual's private desires and assumes that monetary compensation can sufficiently replace what the government takes without regard to ancestral acquisition or plans for progeny. For this reason, courts properly read condemnation authority narrowly, limiting the government to taking only property that the law clearly and expressly permits the government to take for the narrow

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

purposes the law clearly and expressly or by necessary implication permits.

The express constitutional power to limit access under Mo. Const. art. IV, Section 29 where the public interests and safety require does not and should not give rise to an implied power to completely prohibit access to private property forever and in perpetuity or give the MHTC the right to sell access to private land it acquires through condemnation for whatever exaction the MHTC determines is appropriate.

Perigo contains no analysis of the language of Mo. Const. art. IV, Section 29 (which only authorizes the MHTC to limit access where the public interests and safety require). Nowhere in *Perigo* is it explained how totally prohibiting access is required by public interests and safety. *Perigo* is inconsistent with *Midella Enterprises, Inc. v. Missouri State Highway Commission,* 570 S.W.2d 298, 302-303 (Mo. App., S.D. 1978) and *Meier,* 388 S.W.2d at 857, which hold that an abutting owner's right to access includes the right to connect with or reach the system of public highways, subject to reasonable restrictions that can be imposed under the police power of the State to protect the public and facilitate traffic.

Perigo is also internally inconsistent. *Perigo* holds that the use of eminent domain authority to take private property for the construction of outer or service roads to provide access to those whose rights of access have been abrogated in the construction of a primary highway is for a public purpose. *Perigo* holds that the land locking of the remainder after a partial taking condemnation for the construction of an outer or service road to provide access

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

to those whose access rights have been abrogated through construction of the primary highway is for a public purpose. These concepts are internally inconsistent. If the construction of a service or outer road to provide access for those whose rights of access have been abrogated through the construction of a primary highway is for a public purpose, then providing those whose rights of access are being abrogated by construction of the service or outer road should also be a public purpose.

The perils of *Perigo* are evident in this case. It would appear that no judicial review of the Commissioner's Report was required under Section 523.050, RSMo. From all appearances, we are dealing with a botched condemnation by the MHTC. *Compare State ex rel. State Highway Commission v. Nickerson and Nickerson, Inc.*, 494 S.W.2d 344 (Mo. 1973) (MHTC, after receiving a high jury award after presenting evidence that the MHTC's amended plan would land lock private property, was not permitted to change litigation strategy and re-try case). No prudent public interests or safety or public purpose is advanced by authorizing the MHTC to completely prohibit access to 50 Acres, More or Less, by expending $494,300.00 in public funds instead using some of those public funds to mitigate the damages to be paid through construction of a public service road to provide access. The result of such a policy is the result reached in the trial court and affirmed by the Missouri Court of Appeals, Eastern District, in this case: 50 Acres, More or Less, that is not useable for any practical purpose due to a lack of access.

To the extent that *Perigo* holds that the public interests and safety can require

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

prohibition of all access to the remainder after a partial taking condemnation under Mo. Const. art. IV, Section 29, *Perigo* should not be followed.

(3) **THE COMMISSIONER'S REPORT IS IRREGULAR AND AMBIGUOUS AS TO WHETHER SUCH REPORT PURPORTS TO LIMIT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, OR WHETHER SUCH REPORT PURPORTS TO COMPLETELY PROHIBIT ALL ACCESS TO ANY PUBLIC ROAD FROM THE 50 ACRES, MORE OR LESS.**

Rule 86.08 and Sections 523.040 and 523.050, RSMo, authorize the filing of commissioners' reports in condemnation cases. Section 523.040, RSMo, requires the commissioners' report to be recorded in the land records maintained by the relevant recorder of deeds. Transfer of title of the land condemned occurs when the commissioner's award is paid into the registry of the court. Sections 523.040, 523.050, 523.055, RSMo, and Rule 86.08; *Collector of Revenue v. Drury Development Corp.*, 309 S.W.3d 346, 348 (Mo. App., E.D. 2010). The Petition alleges that the Commissioner's Report is recorded in the Office of the Recorder of Deeds of Jefferson County, Missouri. LF at 8.

Count II of the Petition is brought under Sections 527.010 to 527.130, RSMo (the Declaratory Judgment Act), and Rule 87 (relating to actions for declaratory judgments), Sections 527.150 to 527.250, RSMo (statutes relating to quiet title actions), Rule 93.01 (relating to quiet title actions), Rule 74.06 (relating to independent actions for relief from

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

judgments), 42 U.S.C. Sections 1983 and 1988 (relating to actions for violation of certain federal rights), and the common law of Missouri (authorizing certain independent actions for relief from judgments as well as actions for inverse condemnation claims, among other things). One of the purposes of Count II of the Petition is for the Court to declare the meaning of the Commissioner's Report that states: "[A]ll **direct** access to the thruway of Route M from the abutting property is herewith prohibited **or** limited" (emphasis added). LF at 22.

Further, the Commissioner's Report is inherently ambiguous by not determining whether the right of access is only limited or is completely prohibited. What is meant by "direct access" in the Commissioner's Report? Does the use of the phrase "direct access" in the Commissioner's Report imply a right to "indirect access"? Whether access under the Commissioner's Report is only limited or completely prohibited is ambiguous. A declaratory judgment and relief from the irregularity caused by the ambiguous Commissioner's Report is in order. The four elements of res judicata are not present. *Missouri Real Estate and Insurance Agency, Inc. v. St. Louis County*, 959 S.W.2d 847, 850-851 (Mo. App., E.D. 1997).

Nothing in Counts I and II of the Petition seeks to nullify the Commissioner's Report. The Commissioner's Report states that "all **direct** access to the thruway of Route M from the abutting property is herewith prohibited **or** limited" (emphasis added). LF at 22. In part, Count II of the Petition is based upon the following premises: (1) that the power to limit access where public interests and safety require under Mo. Const. art. IV, Section 29, does

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

not include the right to completely prohibit access to and land lock such real estate, (2) that any action by the MHTC to completely prohibit access is an unauthorized and unconstitutional taking or damaging of land outside the scope of the power to limit access under Mo. Const. art. IV, Section 29, (3) that the Commissioner's Report is an ambiguous and irregular instrument from which judicial relief in the form of a declaratory judgment may be had, in that the Commissioner's Report states, in part: "[A]ll **direct** access to the thruway of Route M from the abutting property is herewith prohibited **or** limited" (emphasis added), and (4) that said Commissioner's Report did not provide Appellant with adequate notice of the purported complete prohibition of access to the 50 Acres, More or Less, consistent with constitutional principles of due process if, in fact, said Commissioner's Report was intended to completely prohibit all access to the 50 Acres, More or Less. LF at 21-27.

State ex rel. Missouri Highway and Transportation Commission v. Westgrove Corporation, 306 S.W.3d 618, 623 (Mo. App., E.D. 2010) indicates a judgment or order is to be construed under general rules of construction. Whether the Commissioner's Report is a judgment or order or something else under Rule 86.08 and Sections 523.040 and 523.050, RSMo, the rules governing its construction are the same as those applying to other written instruments.

Teets v. American Family Mutual Insurance Company, 272 S.W.3d 455, 462 (Mo. App., E.D. 2008) sets forth some of these general rules of construction, including, a definition of ambiguity as language that is reasonably susceptible of more than one

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

construction when the words are given their plain and ordinary meaning in the context of the entire document. *See also Ethridge v. Tierone Bank,* 226 S.W.3d 127, 131 (Mo. Banc 2007).

The Commissioner's Report states that "all direct access to the thruway of Route M from the abutting property is herewith prohibited or limited". LF at 22. The Commissioner's Report states that the damages assessed were for "the appropriation set out in the petition". LF at 22.

Whether the access rights to the 50 Acres, More or Less, were completely prohibited or only limited by the Commissioner's Report is susceptible to more than construction; therefore, the Commissioner's Report is ambiguous. Relief in the form of a declaratory judgment should be available.

(4)THE COMMISSIONER'S REPORT DID NOT PROVIDE APPELLANT WITH ADEQUATE NOTICE OF THE PURPORTED COMPLETE PROHIBITION OF ACCESS TO THE 50 ACRES, MORE OR LESS, CONSISTENT WITH CONSTITUTIONAL PRINCIPLES OF DUE PROCESS IF, IN FACT, THIS COURT DETERMINES THAT THE COMMISSIONER'S REPORT WAS INTENDED TO COMPLETELY PROHIBIT ALL ACCESS TO THE 50 ACRES, MORE OR LESS.

The Fourteenth Amendment to the United States Constitution provides, in part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; * * * .

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

In *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), the Court stated:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The State of Missouri has defined the property interests of subsequent purchasers of real estate by enacting notice requirements to subsequent purchasers in the Missouri Recording Statutes, Sections 442.380 to 442.400, RSMo. These statutes require interests in real estate to be publicly recorded and provide that interests that are not publicly recorded are not binding on subsequent purchasers, except as to parties with actual notice of the interest or who are parties to the instrument creating that interest. *See* Section 442.400, RSMo. In *Texaco, Inc. v. Short,* 454 U.S. 516, 528-529, 102 S. Ct. 781, 70 L.Ed.2d 738 (1982), the Court approved the enactment of recording statutes by state legislatures and noted that such are not held to impair contracts or unconstitutionally impose limitations. The difference in this case is that the condemnation process requires the recordation of the commissioners' report. Section 523.040, RSMo. Such recordation can only be for the purpose of notifying subsequent purchasers of the extent of the taking that occurs in the condemnation

proceedings. The government is under an affirmative obligation to record the Commissioners' Report under Section 523.040, RSMo.

As a subsequent property owner, Appellant has an interest in real estate protected by the Fourteenth Amendment with notice requirements defined by the Missouri Recording Statutes and constitutional Due Process principles. *Compare Collector of Revenue v. Parcels of Land Encumbered with Delinquent Tax Liens,* 453 S.W. 3d 746 (Mo. Banc 2015) (recognizing that mechanic's lien claimants have property interests protected by due process). Under the Missouri Recording Statutes, Sections 442.380 to 442.400, RSMo, Appellant takes the 50 Acres, More or Less, free of unrecorded interests in real estate. Section 523.040, RSMo, requires the taking evidenced by commissioners' reports in condemnation cases to be recorded in the offices of recorders of deeds in the county where the real estate is located. Here, the MHTC has purported to take all rights of access from Appellant's successors in interest and to burden Appellant, as a subsequent purchaser, with a complete prohibition of access with notice of same purportedly given in a Commissioner's Report that is so vague and ambiguous that it should not be given the protections of the Missouri Recording Statutes, Sections 442.380 to 442.400, RSMo. The Commissioners' Report does not inform subsequent purchasers of the remainder of property taken through a partial condemnation that all access rights to the remainder are completely prohibited by the MHTC in unambiguous terms. Appellant believes that principles of Due Process require the MHTC to give notice of the extent of its taking to subsequent purchasers by unambiguous language. The effect of the

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

recording of the ambiguous Commissioners' Report on Appellant, as a subsequent purchaser, is tantamount to a complete lack of recording under the Missouri Recording Statutes, Sections 442.380 to 442.400, RSMo. The ambiguous Commissioners' Report did not give Appellant constitutionally adequate notice of the total prohibition of access to the 50 Acres, More or Less, consistent with constitutional principles of Due Process. An action for such constitutional deprivations is available under 42 U.S.C. Sections 1983 and 1988.

(5) THE FACTS ALLEGED IN THE PETITION ARE SUFFICIENT STATE A CAUSE OF ACTION AGAINST THE MHTC FOR INVERSE CONDEMNATION UNDER THE COMMON LAW AND 42 U.S.C. SECTIONS 1983 AND 1988 FOR THE *DE FACTO* TAKING OF ACCESS WHEN THE MHTC SOLD THE LAND THAT IS NOW DESCRIBED IN THE CONSOLIDATION PLAT TO RESPONDENT RICHARD NIEHAUS INSTEAD OF PROVIDING ACCESS THROUGH THE CONVEYANCE OF THAT LAND TO BURNELL A. RAEBEL AND ROSE MARIE RAEBEL, TRUSTEES UNDER THE RAEBEL LIVING TRUST, DATED AUGUST 17, 1994

In re: Opening a Private Road for the Benefit of Thomas P. O'Reilly, 100 A.2d 689, 695-96 (Pa. Commw. Ct., 2014) (Pelligrini, PJ, concurring), is the concurring opinion of an intermediate appellate court judge given the task of applying an interpretation of the Public Use Doctrine of the Takings Clause to the Pennsylvania Private Roads Act that resulted in

the complete lack of access to real estate where the Commonwealth's initial exercise of the power of eminent domain in the construction of an interstate highway landlocked the subject land and the action under the Pennsylvania Private Roads Act was to restore access denied by the Commonwealth. President Judge Pelligrini concurred in the majority opinion that no right of access existed in such case, but opined that "if the establishment of a private road is no longer available for a landlocked owner to gain access to his or her property, it may make those who created the landlocked condition liable for damages." *Thomas P. O'Reilly*, 100 A.2d at 696 (Pelligrini, PJ, concurring).

The MHTC created the initial impairment of access to the 50 Acres, More or Less, through the recordation of the Commissioner's Report stating that access is "herewith prohibited or limited". LF at 22. Then the MHTC sold the land that was subsequently described by the Consolidation Plat to Respondent Richard Neihaus. Tr. at 10-11. If the MHTC had provided access to the 50 Acres, More or Less, by conveying that excess land currently described by the Consolidation Plat to Burnell A. Raebel and Rose Marie Raebel, Trustees under the Raebel Living Trust, dated August 17, 1994 instead of to Respondent Richard Neihaus, Appellant's predecessors in interest, as lot owners in Creekstone, would have had a legal right of access to the 50 Acres, More or Less, through the land currently described in the Consolidation Plat over Creekstone Drive to Moss Hollow Road. *Compare Wagemann v. Elder,* 28 S.W.3d 351 (Mo. App., E.D. 2000) (holding that the need for a private road was not established if the owner of the landlocked parcel also owns an adjacent

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

parcel which has legal access rights and the landlocked parcel can be accessed by traveling over the adjacent parcel). The facts alleged in the Petition are sufficient to state a claim under 42 U.S.C. Sections 1983 and 1988 and the common law regarding inverse condemnation against the MHTC for the *de facto* taking of the right of access via Creekstone Drive through sale of the land currently described in the Consolidation Plat to Respondent Richard Neihaus instead of conveyance of such land to Burnell A. Raebel and Rose Marie Raebel, Trustees under the Raebel Living Trust, dated August 17, 1994. The net result of the sale of the land described in the Consolidation Plat to Respondent Neihaus for relatively nominal consideration instead of conveyance of said land to Burnell A. Raebel and Rose Marie Raebel, Trustees under the Raebel Living Trust, dated August 17, 1994 created the *de facto* taking of access to the 50 Acres, More or Less, by making that land landlocked and unusable. The MHTC had the ability to convey access to the 50 Acres, More or Less, to Appellant's predecessors in interest but chose instead to sell that access for a relatively nominal sum to Respondent Richard Neihaus.

VII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT APPELLANT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, BECAUSE THERE IS NO REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES, IN THAT NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED FOR

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

ACTIONS UNDER 42 U.S.C. SECTION 1983 AND/OR NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED UNDER SECTION 536.150, RSMO, AND/OR NO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT EXISTS FOR THE EXERCISE OF THE MHTC'S POWER TO LIMIT ACCESS UNDER MO. CONST. ART. IV, SECTION 29, AND/OR THE COMMISSIONER'S REPORT DOES NOT PROVIDE FOR ANY ADMINISTRATIVE REMEDIES FOR ACCESS PERMIT REQUESTS TO THE 50 ACRES, MORE OR LESS.

A.

BASIS OF THE POINT RELIED ON

This Point Relied On relates to oral arguments made before the trial court and gratuitous statements made by the trial court that do not relate to grounds for dismissal in any written motion to dismiss as follows:

> THE COURT: And they have provided a remedy by which they can seek access, correct? The State? And they have taken advantage of that, although it didn't turn out in your favor –
>
> MR. GEBHARDT: Well, there has been no formal proceedings.
>
> THE COURT: There is a request?
>
> MS. REID: It was –

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

MR. GEBHARDT: -- it was a formal -- it was some informal discussions as far as I am concerned.

MS. REID: Then I would think –

MR. GEBHARDT: Let's put it this way: There is nothing in writing –

THE COURT: Well, yeah, if there is administrative remedy, then you have to exhaust that before you sue them anyway.

MR. GEBHARDT: But I don't know of any administrative remedy. The Constitution says that they can –

MS. REID: It's the permit process.

THE COURT: That's what I thought you said.

MS. REID: And I believe you and I have even discussed the permit process, and it's my understanding from my clients that your client has actually been to our local office to discuss the permit, and it was a very lively discussion.

MR. GEBHARDT: And there was verbal, I guess, if that's what counts as a denial, as a verbal denial of a permit.

MS. REID: Then you can go ahead and apply for the permit before you sue us.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

THE COURT: If that's what you are saying, then this becomes very easy. If you have not exhausted your administrative remedies. You have to exhaust those first anyway.

MR. GEBHARDT: Well, they haven't pled that as a --

MS. REID: Well no, I didn't. You are right. Because I thought you had been turned down for the permit. And I still don't know why you are suing us, because we still own the rights.

Tr. at 19-21.

B.

ARGUMENT IN THE MHTC'S MOTION TO DISMISS APPEAL FILED IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

In paragraph 7 of its Motion to Dismiss Appeal filed by the MHTC in the Missouri Court of Appeals, Eastern District, the MHTC stated:

7. At the hearing, it was discovered that although MHTC had an administrative permit process to review access requests from property owners, Plaintiff had not availed itself of MHTC's process. (Tr.19 Li. 24 - Tr. 21 Li. 17).

Motion to Dismiss Appeal, page 2.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

C.

ARGUMENT OF THE MHTC IN THEIR BRIEF TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ON POINT VII

The MHTC attempted to identify the administrative remedies for those seeking access permits from the MHTC as follows:

> Although not required by statute, MHTC established this permit process in order to properly review requests for breaks in limited access and reach a professionally considered decision. Information on how to apply and the process involved is available on MoDOT's website as part of Section 941 of MoDOT's Engineering Policy Guide. Until that process has been pursued however, no decision has yet been made by the Commission. Instead, all that has happened is that Plaintiff has informally met with a MoDOT employee and received verbal input. Plaintiff apparently did not like that input and instead filed the present action.

MHTC's Eastern District Brief at 50-51.

In addition, the Niehaus/Creekstone Respondents have parroted the failure to exhaust administrative remedies in their Brief to the Missouri Court of Appeals, Eastern District, as a basis for dismissal of the Petition. *Niehaus/Creekstone Eastern District Respondents' Brief*

at 16.

D.

STANDARD OF JUDICIAL REVIEW

The exhaustion of administrative remedies is a matter of subject matter jurisdiction. *Strozewski v. City of Springfield,* 875 S.W.2d 905, 906 (Mo. Banc 1994). Dismissal for lack of subject matter jurisdiction is appropriate whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction. Rule 55.27(g)(3). When the facts are uncontested, a question as to subject matter jurisdiction is a question of law reviewed *de novo. Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003). See the discussion of the Standard of Judicial Review under Point I of this Brief, which is incorporated herein as if fully set forth.

E.

APPELLANT'S ARGUMENTS ON POINT VII:

(1) EXHAUSTION OF ADMINISTRATIVE REMEDIES IS ONLY REQUIRED IN CONTESTED CASES; NO HEARING IS REQUIRED PRIOR TO THE ISSUANCE OR DENIAL OF AN ACCESS PERMIT BY THE MHTC, AND WITHOUT SUCH A HEARING REQUIREMENT, THERE CAN BE NO CONTESTED CASE; THEREFORE, NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED PRIOR TO FILING AN ACTION UNDER SECTION 228.342, RSMO.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Strozewski stated:

> Any analysis of administrative procedure begins with Mo. Const. art. V, § 18, which states in part: "All final decisions, findings, rules and orders on [sic] any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law." * * *
>
> Chapter 536 provides the statutory framework for judicial review of administrative decisions. When legal rights are required by law to be decided after a hearing, the proceeding is a "contested case." § 536.010(2), RSMo 1986. In a contested case, administrative remedies must be exhausted prior to judicial review. § 536.100, RSMo 1986. By contrast, an administrative decision is uncontested if the decision is made without any requirement of an adversarial hearing at which a measure of procedural formality is followed. [Citation omitted.] Decisions in uncontested cases are subject to judicial review if the decision affects "the legal rights, duties or privileges of any person." § 536.150.1, RSMo 1986. That statute has no requirement of exhaustion of administrative remedies. Indeed, it provides,

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> "Nothing in this section shall be construed ... to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section." § 536.150.3. Thus, exhaustion of administrative remedies is not a jurisdictional prerequisite in uncontested cases. [Citation omitted.]

Strozewski. 875 S.W.2d at 906-907.

Article IV, Section 29 of the Missouri Constitution states, in part:

> The highways and transportation commission * * * (iii) shall have authority to limit access to, from and across state highways and other transportation facilities where the public interests and safety may require. * * *

Article IV, Section 29 of the Missouri Constitution does not require hearings prior to issuance or denial of an access permit by the MHTC. In *Jackson County Public Water Supply District No. 1 v. State Highway Commission,* 365 S.W.2d 553, 556 (Mo. 1963), the authority of the MHTC to order utilities to remove and relocate utility lines was held to be a legislatively delegated policy decision of the MHTC not reviewable under the Administrative Procedure Act, Chapter 536, RSMo. The right of the MHTC to limit access under Mo. Const. art. IV, Section 29 is a constitutionally delegated authority that may not be subject to legislative regulation. As originally adopted in 1945, Mo. Const. art. IV, Section 29 made the power of the MHTC to limit access "subject to such limitations and conditions as may be

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

imposed by law." *See* Mo. Const. art. IV, Section 29 as quoted in *James,* 205 S.W.2d at 535. The words "subject to such limitations and conditions as may be imposed by law" no longer appear in Mo. Const. art. IV, Section 29.

Further, in *Malan Construction Company v. State Highway Commission,* 621 S.W.2d 519 (Mo. App., W.D. 1981), a landowner attempted to recover an exaction paid to the MHTC for access, and no mention of the effect of any administrative "permit process" or exhaustion of administrative remedies requirement was made by the Court.

The exercise of the MHTC's authority under Mo. Const. art. IV, Section 29 to permit or limit access either results: (1) in a non-contested case for which no exhaustion of administrative remedies is required under Section 536.150, RSMo, or (2) such decisions are constitutionally delegated policy decisions of a body granted independent, constitutional authority to restrict access to state highways and other transportation facilities "where the public interests and safety may require" under Mo. Const. art. IV, Section 29 which are not reviewable under the Administrative Procedure Act, Chapter 536, RSMo. *See Jackson County Public Water Supply District No. 1,* 365 S.W.2d at 556; *Malan Construction Company,* 621 S.W.2d at 519-524.

At oral argument before the trial court, there was no citation to any specific right to a hearing before the MHTC prior to issuance or denial of an access permit or to any right to administrative review of decisions of the MHTC to permit or deny access, only a generic reference to the "permit process". Tr. at 19-21. In its Brief filed in the Missouri Court of

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Appeals, Eastern District, the MHTC cites Section 941 of the MODOT Engineering Policy Guide as the administrative remedy available to Appellant. The relevant MODOT Engineering Policy Guide has not been made a part of the Record on Appeal in this Case. The MHTC does not state in its Brief filed in the Missouri Court of Appeals, Eastern District, that any hearing before the MHTC is required before an access permit will be issued or denied by the MHTC. Section 941 of the MODOT Engineering Policy Guide appears to be nothing more than a part of the bureaucratic processes internal to the MHTC used to regulate access "where the public interests and safety may require" under Mo. Const. art. IV, Section 29. Nothing in the Record on Appeal before this Court suggests that Section 941 of the MODOT Engineering Policy Guide is a published administrative "rule" as defined in Section 536.010(6), RSMo.

Additionally, the legal standard under Section 228.342, RSMo, for "strict necessity" is whether the claimant has a legally enforceable right to use a road to the landlocked property from a public road; an alternative permissive use of an alternative route from a third party does not provide any legally enforceable right to ingress or egress. *Spier,* 958 S.W.2d at 87 (permission from the landlocked property owner's uncle to cut a road through the uncle's land that permitted access from the landlocked property to Highway M was insufficient to bar an action under Section 228.342, RSMo). The fact that an alternative route might be available through land controlled by the MHTC is not sufficient to deny a claim under Section 228.342, RSMo. *Moss Springs Cemetery Association,* 970 S.W.2d at 374-377.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

(2) **THE COMMISSIONER'S REPORT DOES NOT PROVIDE FOR ANY ADMINISTRATIVE REMEDIES FOR ACCESS PERMIT REQUESTS TO THE 50 ACRES, MORE OR LESS**

The MHTC has taken the position that the Commissioner's Report has already declared the rights of access to this private property as a binding judgment. See Point VI herein. The Commissioner's Report does make any reference to any administrative remedies available to the owner of the 50 Acres, More or Less, regarding access.

(3) **NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED FOR ACTIONS UNDER 42 U.S.C. SECTION 1983**

Exhaustion of administrative remedies is not required to bring an action under 42 U.S.C. Section 1983, such as Count II of the Petition. *Strictly Pediatrics Inc. v. Developmental Habilitation Associates, Inc.*, 820 S.W.2d 731, 731-732 (Mo. App., E.D. 1991).

Appellant was not required to exhaust any administrative remedies of the MHTC, assuming *arguendo* that such remedies exist. The trial court erred in *sua sponte* dismissing the Petition on the basis that Appellant failed to exhaust administrative remedies of the MHTC, as is indicated in the Transcript, Tr. at 19-21.

VIII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT THE

"SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, APPLIES, BECAUSE THE "SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, IS NOT APPLICABLE IF THE PRIVATE ROAD CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE, IN THAT THE ROAD PETITIONED FOR BY APPELLANT CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE.

A.

BASIS OF THE POINT RELIED ON

This Point Relied On relates to a gratuitous statement made by the trial court that does not relate to any ground for dismissal stated in any written motion filed in this matter as follows:

> THE COURT: So he bought the donut hole knowing it was a donut hole, two purchases later, and now he wants me to force a highway or and [sic] access road to go through the subdivision?

Tr. at 6.

B.

STANDARD OF JUDICIAL REVIEW

It is not clear whether the presumption that dismissals are based on the grounds

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

alleged in written motions to dismiss is a legally binding and conclusive presumption or whether oral statements of the trial judge in open court can rebut that presumption. *See Walters Bender Strohbehn & Vaughan, P.C.*, 316 S.W.3d at 478. In cases where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile. *Clifford Hindman Real Estate, Inc. v. City of Jennings*, 283 S.W.3d 804, 808 (Mo. App., E.D. 2009). See the discussion of the Standard of Judicial Review under Point I of this Brief, which is incorporated herein as if fully set forth.

C.

APPELLANT'S ARGUMENTS ON POINT VIII

Count I of the Petition contains a request for declaratory judgment on the application of the "subdivision road exemption" in Section 228.341, RSMo. LF at 15-17. Count I of the Petition does not contain a legal description of the road petitioned for. *See* Section 228.345, RSMo (which does not require a legal description of a proposed road in the petition). Count I of the Petition asks for a declaratory judgment on whether the legal description of the road petitioned for can be a metes and bounds legal description that does not make any reference to any recorded subdivision plat or recorded subdivision indenture or declaration but generally runs along the same path as Creekstone Drive under Section 228.341, RSMo. LF at 15-17. In essence, Count I of the Petition asks the Court to declare that a road that can be described without any reference to any recorded subdivision plat or recorded subdivision

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

indenture or declaration where some portion of the road to be established runs generally along the same path as a road that is described by reference to a recorded subdivision plat or recorded subdivision indenture or declaration is a "private road" under Section 228.341, RSMo. Footnote 6 Part of a road that can be described by reference to a recorded subdivision plat or recorded subdivision indenture or declaration is not a complete "road created by or included in any recorded plat referencing or referenced in an indenture or declaration creating an owner's association, regardless of whether such road is designated as a common element". Section 228.341, RSMo.

Sections 228.341, 228.369, and 228.374, RSMo, were all newly enacted by H.B. 1103, 2012 Vernon's Missouri Session Laws (West's No. 79), pages 566-567. The definition of "private road" in Section 228.341, RSMo, states, in part:

> For purposes of sections 228.341 to 228.374, "private road" with regard to a proceeding to obtain a maintenance order means any private road established under this chapter or any easement of access, regardless of how created, which provides a means of ingress and egress by motor vehicle for any owner or

---

6 If the entire road sought to be established under Section 228.342, RSMo, can be described with reference to a recorded subdivision plat or recorded subdivision indenture or declaration, such road would not be a "private road" under Section 228.341, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

> owners of residences from such homes to a public road. * * * Nothing in sections 228.341 to 228.374 shall be deemed to apply to any road created by or included in any recorded plat referencing or referenced in an indenture or declaration creating an owner's association, regardless of whether such road is designated as a common element. * * *

(Emphasis added.)

Sections 228.341 to 228.374, RSMo, authorize two different and distinct types of actions: Actions to establish a private way of necessity under Sections 228.342 to 228.368, RSMo (enacted by S.B. 138, 1991 Mo. Laws 733), and actions to obtain (or amend, or modify or restate) a maintenance plan or order for a private road under Sections 228.369 and 228.374, RSMo (enacted by H.B. 1103, 2012 Vernon's Missouri Session Laws (West's No. 79), pages 566-567).

Section 228.341, RSMo, specifically defines the term "private road" only "with regard to a proceeding to obtain a maintenance order." Section 228.341, RSMo, has no specific definition of the term "private road" as that term is used in Sections 228.342 to 228.368, RSMo, although Section 228.341, RSMo, contains certain types of roads that are excluded from establishment under Sections 228.342 to 228.368, RSMo. Sections 228.369 and 228.374, RSMo, describe the proceedings to obtain (or amend or modify or restate) a maintenance order for a private road. Section 228.341, RSMo, creates a "subdivision road

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

exemption" by stating: "Nothing in sections 228.341 to 228.374 shall be deemed to apply to any road created by or included in any recorded plat referencing or referenced in an indenture or declaration creating an owner's association, * * *."

Appellant believes that the "subdivision road exemption" was intended to apply only when the entire road to be established under Section 228.342, RSMo, has already been created by or included in any recorded plat referencing or referenced in any indenture or declaration creating an owner's association.

In this instance, Count I of the Petition proposes the establishment of a road under Section 228.342, RSMo, which is not already wholly created by or wholly included in a recorded plat or referenced in an indenture or declaration creating an owner's association, regardless of whether such road is designated as a common element. A road that can only be partially described by reference to a recorded subdivision plat or a recorded subdivision indenture or declaration would never be designated a common element in those subdivision documents.

Appellant believes that it was not the intent of H.B. 1103 to preclude establishing a portion of a private road by extending a portion of that private road along a path described by a metes and bounds legal description but generally lying along the path of a road created by or included in a recorded plat referencing or referenced in an indenture or declaration creating an owner's association, so long as said metes and bounds legal description does not reference said plat or indenture or declaration. Section 228.345, RSMo, specifically requires

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

that the private road "shall be situated so as to do as little damage or injury and cause as little inconvenience as practicable to the owner or owners of the real property over which the private road shall pass." *See also* Section 228.352, RSMo. Appellant does not wish to propose a road that imposes more damages than necessary on any parties by varying from the general path of Creekstone Drive to, for example, place the private road to be established through yards or structures parallel with or adjacent to the path of the existing Creekstone Drive for the sole purpose of varying the path of the private road from the path of Creekstone Drive. Any interpretation of Section 228.341, RSMo, requiring such superfluous roads would be contrary to the canon of statutory construction that avoids unjust, absurd, or unreasonable results. *Short,* 372 S.W.3d at 535.

Section 228.342, RSMo, provides, in part: "The owners of the real property over which the proposed private road shall pass shall be named as defendants." Respondent Creekstone Homeowners Association, which is an association of all present and future lot owners in Creekstone, LF at 9, is the "owner" of the dominant estate of the road easement rights being "the real property over which the proposed private road shall pass" for purposes of Section 228.342, RSMo. If not, the petition could be amended to add as parties all of the owners of lots abutting that portion of Creekstone Drive over which the road petitioned for will pass. *Compare Rogers v. Brockland,* 889 S.W.2d 827 (Mo. Banc 1995) (concluding that any landowner whose right of access would be destroyed by a road vacation must be notified under Section 228.450, RSMo (repealed by S.B. 138, 1991 Mo. Laws 733)).

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM

CONCLUSION

For the foregoing reasons, Appellant concludes that the trial court erred in dismissing Appellant's Petition. This Court should reverse the trial court's Judgments, and this Court should remand this matter for further proceedings consistent with such instructions as this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 12th day of October, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Andrew Thomas Drazen, Attorney for Respondents Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, and Creekstone Homeowners Association, at adrazen@dubllc.com; John William Koenig, Jr., Attorney for Respondent Missouri Highways and Transportation Commission, at john.koenig@modot.mo.gov; Bryce David Gamblin, Co-counsel for Respondent Missouri Highways and Transportation Commission, at bryce.gamblin@modot.mo.gov; and Richard L. Tiemeyer, Co-counsel for Respondent Missouri Highways and Transportation Commission, at Rich.Tiemeyer@modot.mo.gov.

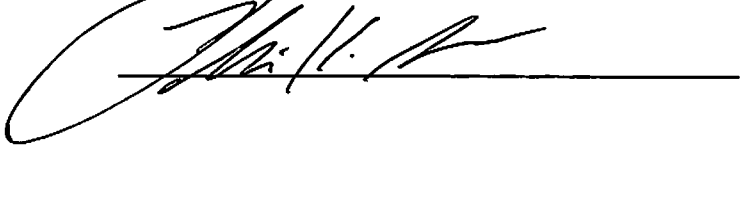
COMPLIANCE CERTIFICATION

In compliance with Rule 84.06(c), the undersigned does hereby certify that:

1. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief complies with Rule 55.03.

2. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b).

3. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief, excluding cover, certificate of service, certificate required by Rule 84.06(c), and signature block, contains 30,918 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Substitute Brief was prepared.



Electronically Filed - SUPREME COURT OF MISSOURI - October 12, 2015 - 10:15 PM