IN THE SUPREME COURT OF MISSOURI

Appeal No. SC95064

AVERY CONTRACTING, LLC,
Plaintiff/Appellant,

vs.

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

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
TWENTY-THIRD JUDICIAL DISTRICT, CAUSE NO. 14JE-CC00089, DIVISION 3
THE HONORABLE NATHAN B. STEWART, CIRCUIT JUDGE

SUBSTITUTE BRIEF OF RESPONDENTS RICHARD NIEHAUS, LISA J. NIEHAUS, ALICIA NIEHAUS AND THE CREEKSTONE HOMEOWNERS ASSOCIATION

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STATEMENT OF FACTS

The Raebel Trust owned the real property currently owned by Appellant Avery Contracting, LLC ("Avery" or "Appellant") that is at issue in this lawsuit (the "Property") when the Jefferson County Circuit Court entered an order of condemnation on December 4, 1995 ("Raebel Condemnation") in favor of the Respondent, Missouri Highways and Transportation Commission ("MHTC"). Legal File ("L.F.") 8. The Raebel Condemnation ordered that all direct access from the abutting Property to the thruway of Route M was "prohibited or limited." L.F. 8, 30. The Raebel Trust received $494,340.00 in compensation for the Raebel Condemnation. L.F. 30. As a result of the Raebel Condemnation, the Property was thereby landlocked. L.F. 8. Appellant, however, admitted that "there is nothing of record showing that this land is going to be permanently landlocked forever." Transcript ("Tr.") 6.

On or about July 31, 2003, the Raebel Trust conveyed the Property to Mullins Homes, LLC by warranty deed. L.F. 7. On or about September 6, 2013, Mullins Custom Homes, LLC conveyed the Property to Appellant by General Warranty Deed. L.F. 8. The Creekstone Subdivision lies adjacent to the western boundary of the Appellant's Property. L.F. 5.

Separately from the Raebel Trust condemned property owned by MHTC, the MHTC also acquired certain property interests from another property owner for the Route M project. L.F. 9. Thereafter, the MHTC conveyed a portion of its interests in Lot 3 to Respondent Richard Niehaus. L.F. 10. As part of the conveyance, MHTC retained all rights of access from Lot 3 to Route M. L.F. 11. A portion of Creekstone Drive abuts Lot

3. L.F. 10.

After a series of transactions, Respondent Richard Niehaus, Lisa J. Niehaus and Alicia Niehaus (jointly "Respondents Niehaus") now own the portion of Lot 3 which the MHTC conveyed to Respondent Richard Niehaus. L.F. 10 & 11, 12. Respondents Niehaus' property is on a cul-de-sac on Creekstone Drive which is located in the Creekstone Subdivision. The Respondent Creekstone Homeowners' Association ("Creekstone HOA") created Creekstone Drive within the subdivision. L.F. 6, 8-9. For ease of reference, when applicable, Respondents Niehaus and Creekstone HOA shall be jointly referred to as the "Creekstone Respondents."

The Creekstone HOA is an unincorporated association created under the Creekstone plat. The plat was recorded on July 1, 1987 in Plat Book 92, Page 3 of the Jefferson County Records. L.F. 6 & 8. The Declaration of Restrictions and Indenture Creating Homeowners Association and Establishing Restrictions dated July 1, 1987 was recorded on or about July 1, 1987 in Book 0369, Page 1944 of the Jefferson County Records. L.F. 6 & 9. As a result of these documents, Creekstone Drive was platted and created and was further included and referenced in the indenture/declaration concerning the Creekstone HOA and the Creekstone Subdivision. L.F. 9.

Avery sought to connect his 50 or so acres by a private road to Route M or through the Creekstone Respondents' property and MHTC property. To this end, Avery purportedly met with MHTC to discuss access from the Property to Route M or access through Lot 3. Tr. 20 l. 7-9; Tr. 21, l. 2-3. The meeting between Avery and MHTC was "informal," id, but Avery never formally applied for a permit from MHTC for a break in

access. Tr. 19 l., 24-Tr. 21, l. 17. Instead, on or about February 3, 2014, Avery filed suit against Respondent MHTC and the Creekstone Respondents. L.F. 1, 5-27.

In its Petition, Avery demanded that the Court establish a private road by way of strict necessity through MHTC property (Lot 3) and through the property of the Creekstone Respondents. Alternatively, Avery sought direct access from the Property directly to Route M by "breaking access" limited or prohibited by the Raebel Condemnation.

Avery's proposed "private road" through its Property would connect to and through the cul-de-sac of Creekstone Drive after cutting through the portion of Lot 3 owned by MHTC and the portion owned by the Respondents Niehaus. L.F. 14. Creekstone Drive would have to be widened to 40 feet along its entirety to accommodate the increased traffic flow from Appellant's Property. L.F. 15. As proposed, the Property would then have access through Creekstone Drive of Respondent Creekstone HOA. L.F. 2-3, 5-12, 14-15.

Respondent MHTC filed its Motion to Dismiss on March 21, 2014. L.F. 28. MHTC argued that its right of way is not subject to the provisions of Ch. 228, RSMo. concerning establishment of private roads by way of strict necessity and that the Raebel Condemnation had previously and conclusively determined that Avery's direct access to Route M was "prohibited and limited." L.F. 28-31.

Additionally, the Creekstone Respondents filed a Motion to Dismiss on March 27, 2014. L.F. 32-37. The Creekstone Respondents argued that Avery failed to allege an essential element of its claim: that "there is no public road that passes through or alongside" Avery's land. L.F. 33. Avery admits it did not plead and indeed admitted it could not plead this element because Route M passes alongside Avery's land. L.F. 8.

Additionally, the Creekstone Respondents argued that the Raebel Condemnation was *res judicata* which barred Avery's suit since Avery's predecessor in interest had taken nearly $500,000.00 from the Raebel Condemnation for prohibited or limited access to Route M. L.F. 35. The Creekstone Respondents also asserted that the 10-year statute of limitations applies to bars Avery's claims, L.F. 35-36, and that Avery's claims are not ripe for adjudication. L.F. 35-36.

After a hearing on the record on May 30, 2014, the Honorable Nathan B. Stewart, Circuit Judge of Jefferson County, Missouri ("Trial Court"), granted the motions to dismiss, without prejudice. L.F. 58, 59.

Thereafter, Appellant appealed the Trial Court's grant of the two motions to dismiss. On April 14, 2015, the Missouri Court of Appeals, Eastern District, affirmed the Judgment of the Circuit Court of Jefferson County. Avery Contracting, LLC v. Richard Niehaus, et al., 2015 WL 1743003, ED 101592 (Mo.App.E.D. April 14, 2015). On June 3, 2015, the Eastern district denied Appellant's Motion for Modification and/or Rehearing and Application for Transfer.

Appellant then filed its Application for Transfer to the Missouri Supreme Court, which this Court sustained on September 22, 2015.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT FAILED TO ALLEGE AN ELEMENT OF ITS CLAIM IN THAT APPELLANT'S PETITION FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE APPELLANT'S PROPERTY, AN ESSENTIAL ELEMENT OF A CLAIM FOR A PRIVATE ROAD BY WAY OF STRICT NECESSITY. *(Responds to Appellant's Point I*).

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

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

Wagemann v. Elder, 28 S.W.3d 351 (Mo App E.D. 2000).

§228.342, RSMo.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS APPELLANT'S PETITION BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA* IN THAT APPELLANT'S PREDECESSOR IN INTEREST IN THE PROPERTY VOLUNTARILY WAIVED ANY DEFENSE TO THE RAEBEL CONDEMNATION AND ACCEPTED THE CONDEMNATION FUNDS

IN EXCHANGE FOR PROHIBITED OR LIMITED ACCESS TO ROUTE M FROM THE PROPERTY. (*Responds to Appellant's Point II).*

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

Kesterson v. State Farm, 242 S.W.3d 712 (Mo. banc 2008).

III. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE APPLICABLE 10 YEAR STATUTE OF LIMITATIONS IN THAT ANY ALLEGED NECESSITY CEASED TO EXIST UPON THE APPELLANT'S PREDECESSOR IN INTEREST VOLUNTARILY ACCEPTING THE CONDEMNATION FUNDS IN 1995. (*Responds to Appellant's Point III).*

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

IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT'S PETITION IS NOT RIPE IN THAT APPELLANT DOES HAVE ACCESS TO AN ABUTTING PUBLIC ROADWAY (ROUTE M) AND APPELLANT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE MHTC. (*Responds to Appellant's Point IV).*

Foster v. State, 352 S.W.3d 357 (Mo. banc 2011).

Kinzenbaw v. Director of Revenue, 62 S.W.3d 49 (Mo. banc 2001).

V. APPELLANT'S FIFTH THROUGH SEVENTH POINTS ON APPEAL SOLELY ADDRESS THE DISMISSAL OF COUNT II OF APPELLANT'S PETITION AND SOLELY ADDRESS RESPONDENT MHTC; THEREFORE, THE CREEKSTONE RESPONDENTS DO NOT FILE A RESPONSE THERETO, BUT JOIN IN THE RESPONSE FILED BY RESPONDENT MHTC. *(Responds to Appellant's Points V through VII).*

VI. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S PETITION BECAUSE A PRIVATE ROAD BY WAY OF STRICT NECESSITY DOES NOT APPLY TO CREEKSTONE SUBDIVISION IN THAT THE SUBDIVISION'S ROADWAY FALLS UNDER THE HOMEOWNER'S ASSOCIATION EXEMPTION OF § 228.341, RSMO. *(Responds to Appellant's Point VIII).*

Hill-Creek Acres Ass'n, Inc. v. Tomerlin, 99 S.W.3d 521 (Mo.App. 2003).

§ 228.341, RSMo.

ARGUMENT

STANDARD OF REVIEW

The Creekstone Respondents agree that this Court's review of the Trial Court's grant of the motions to dismiss the Petition is *de novo*. Conway v. Citimortgage, Inc., 438 S.W.3d 410 (Mo. 2014); citing Ward v. W. County Motor Co., Inc., 403 S.W.3d 82, 84 (Mo. banc 2013). A Motion to Dismiss is a test of the adequacy of the claims asserted. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. banc 1993); Hallquist v. Midden, 196 S.W.3d 601, 603 (Mo.App.E.D. 2006). The motion assumes the averments are true, granting only reasonable inferences therefrom. Id. Factually unsupported conclusions are disregarded. Whipple v. Allen, 324 S.W.3d 447, 449 (Mo.App.E.D. 2010); Jones v. St. Charles County, 181 S.W.3d 197, 200 (Mo.App.E.D. 2005).

Courts do not allow a suit to proceed "without meeting the most minimal level of fact pleading" because it is a "waste to the system and an unjust expense to the parties." State ex rel. Henry v. Bickel, 285 S.W.3d 327, 330 (Mo. banc 2009). Where, as here, a Petition fails to plead the essential facts and elements for recovery, the Trial Court properly granted the motion to dismiss the Petition. Nazeri, 860 S.W.2d at 306; Reinhold v. Fee Fee Trunk Sewer, Inc., 664 S.W.2d 599, 603 (Mo. App. 1984).

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT FAILED TO ALLEGE AN ELEMENT OF ITS CLAIM IN THAT APPELLANT'S PETITION FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE APPELLANT'S PROPERTY, AN ESSENTIAL ELEMENT OF A CLAIM FOR A PRIVATE ROAD BY WAY OF STRICT NECESSITY. *(Responds to Appellant's Point I*).

STANDARD OF REVIEW

As noted above, the Standard of Review is *de novo*.

ARGUMENT

The Trial Court properly dismissed Appellant's Petition as to the Creekstone Respondents because Appellant's Petition failed to allege the second element of its cause of action for a private road by way of strict necessity: that no public roads pass through or alongside the Property. Indeed, Appellant admits that it cannot plead the second element of a cause of action for a way by strict necessity because Appellant alleged that its Property is "located adjacent to Relocated Route M in Jefferson County, Missouri." L.F. 12. Because a public road passes alongside the Property, Appellant's claim for a private road by way of strict necessity fails, as a matter of law.

Although the Trial Court's dismissal was without prejudice, Appellant chose instead to appeal to the Eastern District, which affirmed the Trial Court's grant of the motions to dismiss. The transfer to this Court followed.

A. Appellant Failed to Plead the Second Element of a Claim for a Private Road by Way of Strict Necessity.

Avery candidly admits that it failed to plead in its Petition that "no public road passes through or alongside" Appellant's Property because Appellant admits that Route M passes alongside Appellant's Property. L.F. 8. This failure is fatal to Appellant's Petition.

Previously, claims for establishing a private road by way of strict necessity were subject to §228.340, RSMo. In 1991 and 1993, however, §228.340, RSMo was repealed and replaced with §228.342, RSMo. While the statutory language changed, every Missouri case from both before and after the change analyzes the same three elements when a party petitions for a private road by way of strict necessity. Id; see also Hollars v. The Church of God of the Apostolic Faith, Inc., 596 S.W.2d 73 (Mo. App. S.D. 1980); Avery Contracting, LLC v. Richard Niehaus, et al., 2015 WL 1743003 *5, ED 101592 (Mo.App.E.D. April 14, 2015)(collecting cases).

Missouri case law, both before and after the statutory change, requires Plaintiff to allege the same three elements to plead a claim for a private road by way of strict necessity. Plaintiff must plead and prove that: 1) he owns the land; 2) *no public road passes through or alongside the tract of land*; and 3) the private road petitioned for is a way of strict necessity. Wagemann v. Elder, 28 S.W.3d 351 (Mo App E.D. 2000); Baetje v. Eisenbeis, 296 S.W.3d 463 (Mo. App. E.D. 2009); Short v. Southern Union Company, 372 S.W.3d

520 (Mo. App. 2012)[1]; Hollars v. The Church of God of the Apostolic Faith, Inc., 596 S.W.2d 73 (Mo. App. S.D. 1980). Courts have interpreted the third element of strict necessity as "the absence of a reasonably practical way to and from a plaintiff's land that the plaintiff has a legally enforceable right to use."[2] Wagemann, 28 S.W.3d at 355. Of equal importance, courts have clearly held that "mere convenience for the plaintiff does not satisfy the requirement of 'strict necessity.'" Id; citing Wolfe v. Swopes, 955 S.W.2d 600, 602 (Mo. App. S.D. 1997).

In an erudite review and summary of the controlling case law, the Eastern District Court of Appeals explained in the case at bar that "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." Avery Contracting, LLC v. Richard Niehaus, et al, 2015 WL 1743003 *4, ED 101592.

Here, Appellant failed to allege in its Petition that "no public road passes through

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[1] Appellant also cites Short, even quoting the language from the Court's opinion that requires a plaintiff to plead and prove that "he owns the land, that there exist no public roads through or alongside the land and that that private road petitioned for is mandated by strict necessity." 372 S.W.3d at 530.

[2] The issue in this appeal is with Appellant's failure to allege the *second* element of a claim for a private way of necessity. Appellant argues the new language from § 228.342, RSMo should displace the second element of the claim. But Courts have maintained the language in §228.342, RSMo is an interpretation of the element.

or alongside" the Property. Appellant does not allege this because said allegation would be false since Appellant alleges and admits that its property "is located adjacent to Relocated Route M in Jefferson County, Missouri." L.F. 8. This, of course, is fatal to Appellant's claim for establishment of a private road by way of strict necessity.

In an attempt to skirt pleading the required second element, Appellant's Petition alleges that the Property "has no recorded means of ingress or egress," the Property "has no recorded legal right of access" and "there is an absence of a reasonably practical way to and from the [Property]." L.F. at 8 & 14. Although these allegations arguably concern the Appellant's asserted legal interpretation of strict necessity (element three), they do not meet the pleading requirements of §228.342, RSMo., and Missouri case law because the second element of Appellant's claim is completely absent from the Petition. Thus, the Petition does not invoke "substantive principles of law entitling plaintiff to relief" and was properly dismissed by the Trial Court. Bickel, 285 S.W.3d at 329.

In its Substitute Brief, Appellant asserts that Wolfe and Main Street Feeds interpret the second element of a cause of action for a private road by way of strict necessity as requiring "no access." Contrarily, neither case supports Appellant's "reading" of these cases. First, Wolfe discusses solely the third element of a claim for a private road (i.e. "strict necessity"), confirming that strict necessity is, indeed, an element of the claim. Wolfe, 955 S.W.2d at 602. Wolfe did not address the second element or the proper language to present in a petition for the second element. Id.

Second, in Main Street Feeds the Court noted that "[n]either plaintiff nor defendants sought, as is permitted by § 228.342, to establish or widen a private road as a way of

necessity." Main Street Feeds v. Hall, 975 S.W.2d 227 (Mo. App. S.D. 1998). Therefore, Main Street Feeds, addressing "easement by implication," does not apply to the case at bar. Simply stated, the Main Street Feeds Court did not address claims for a private road by way of strict necessity under §228.342, RSMo.

Appellant also urges that Anderson supports its claim, however, Anderson supports the Trial Court's grant of the motions to dismiss. Anderson v. Mantel, 49 S.W.3d 760, 762 (Mo. App. S.D. 2001). The Anderson Court held that "in an action for a private road pursuant to section 228.342 RSMo, a 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 for is a way of strict necessity." Id. (emphasis added), citing Hamai v. Witthaus, 965 S.W.2d 379, 382 (Mo. App. 1998).

These cases reiterate the well-established pleading and proof rules in a case in which plaintiff seeks a private road by way of strict necessity under the statute. In the same vein, Anderson further held, just as the Creekstone Respondents have consistently argued, that "strict necessity has been interpreted to mean the absence of a reasonably practical way to and from plaintiff's land that the plaintiff has a legally enforceable right to use." Id. Even the cases upon which Appellant relies heavily agree that "access" is a term that Missouri Courts use to interpret the third element of strict necessity. Appellant is still required to plead and prove the second element of the claim. Appellant has failed to plead the second element because it cannot truthfully plead that "no road runs through or alongside the Property."

Further, Appellant argues that Moss Springs Cemetery controls the case at bar.

Moss Springs Cemetery Ass'n v. Johannes, 970 S.W.2d 372, 376 (Mo. App. S.D. 1998). Rather, Moss Springs Cemetery does not support Appellant's creative and selective reading of the case. In Moss Springs Cemetery, contrary to Appellant's assertions, the Southern District acknowledged the same three elements are required to be pled and proved: 1) ownership of the land, 2) no public road goes through or alongside the tract of land, and 3) the private road petitioned for is a way of strict necessity. Id. The Moss Springs Cemetery Court noted that the second element was proven at trial with testimony from multiple sources stating that there was "no public Route running through or alongside the cemetery." Id. The Court then acknowledged the *critical issue* was whether the road was one of by way of strict necessity "because Appellant does not have a legally enforceable right to use an alternative reasonably practical way." Id. It is crystal clear that the "access to" a public road and the "legally enforceable right" to use a public road are factors used to interpret the element of strict necessity. Those factors do not displace the pleading and proof of the second element of the claim: that no public road goes through or alongside the tract of land.

Appellant has accurately quoted the Raebel Condemnation by stating that it "limited or prohibited the abutter's rights of access to that public road [Route M]." In the Trial Court, Appellant argued Section IV, Article 29 of the Missouri Constitution does not allow the MHTC to prohibit access to a highway, but only to limit it. Tr. 5-6, 8. Appellant also acknowledged that "there is nothing of record showing that this land is going to be permanently landlocked forever." Tr. 6. MHTC stated during argument in the Trial Court that "the access itself is controlled by the Highway Commission to all of its right of way,

that's a part of Highway M. And whether it's -- it determines that it wants to completely prohibit it or limit it, that's within the Highway Commission's purview." Tr. 7.

Appellant has admitted it has access to Route M, albeit a limited right of access, which defeats any claim for a private road by way of strict necessity. Appellant attempts to avoid the actions of its predecessor in interest, without giving the condemnation settlement money back to the State of Missouri and by making the Creekstone Respondents bear the brunt of the inconvenience, loss of value of property, and increased traffic over Creekstone Drive. In the Raebel Condemnation, Appellant's predecessor in interest in the Property, the Raebel Trust, received almost $500,000.00 by consenting to a condemnation of the Property and allowing MHTC to control when and how access to the Property will be allowed. Thus, Appellant still has access to Route M. Importantly, Appellant is charged with constructive notice, even if it did not have actual notice, of the publicly recorded condemnation that occurred well prior to Appellant's purchase of the Property.

Appellant urges that Hollars is inapplicable to the case at issue because it was decided prior to 1991. Hollars v. The Church of God of the Apostolic Faith, Inc., 596 S.W.2d 73 (Mo. App. S.D. 1980). Nonetheless, at a minimum, Hollars is instructive, particularly since all Missouri cases interpret the same elements to a cause of action for a private road by way of strict necessity, both before and after 1991 and the statutory change.[3]

[3]Missouri Courts agree that pre-1991 cases are relevant to the analysis of the current statute. "Cases decided under earlier versions of these statutes provide authority concerning [the strict necessity] requirement." Wolfe v. Swopes, 955 S.W.2d at 602.

In Hollars, the plaintiff owned a parcel of property that was divided by a gorge. Id. at 74. The plaintiff sought a private road by way of strict necessity from the southern portion of his property over his eastern neighbor's land. Id. Such a road would allow plaintiff to travel from the southern part of his property to the public road that ran along the eastern border of his neighbor's property. Id. The Appellate Court reversed the trial court's grant of that request because "there was a public road alongside" the northern border of plaintiff's property. Id at 75.

Here, Appellant did not allege in its Petition that there is no public road that runs alongside its Property, and, therefore, the Trial Court properly dismissed Appellant's Petition for that reason.

B. On its Face, Appellant's Petition Defeats the Third Element of §228.342, RSMo.

Appellant's Petition pleads it is petitioning for a private road by way of strict necessity. Contrarily, the Petition shows that no strict necessity exists. The statute, §228.342, RSMo., requires a plaintiff to establish a private road by way of "strict necessity" by showing there is "no access" from the property to a public road.

In Wolfe, the appellate court held that the plaintiff failed to prove "strict necessity" because there had been evidence at trial of at least two alternative routes to the plaintiff's property, both accessible by vehicle and in use for many years. Wolfe, 955 S.W.2d at 602. Further, to reiterate, courts have consistently held that "convenience does not satisfy the requirement of strict necessity." Wagemann, 28 S.W.3d at 355, citing Wolfe, 955 S.W.2d at 602.

Here, MHTC controls the access to the public road that passes alongside Appellant's Property by virtue of the Raebel Condemnation. As has been stated previously, Appellant's predecessor in interest received almost $500,000.00 when it consented to the condemnation judgment. Appellant overlooks or ignores the fact that it already has access to a public road that runs alongside the Property, Route M.

Appellant admitted during the arguments before the Trial Court and the Eastern District Court of Appeals that the current access situation to the Property would not last forever, i.e., there is "access," although limited to a public road, Route M. Appellant has judicially admitted what was already a known fact: that the Property is not permanently landlocked, and the private way of "strict" necessity for which Appellant petitions is not a way of strict necessity at all. See generally Hewitt v. Masters, 406 S.W.2d 60, 64 (Mo. 1966); Mitchell Engineering Co. v. Summit Realty Co., 647 S.W.2d 130, 140 (Mo.App. 1982)("judicial admissions").

Rather than petitioning the MHTC to break access[4] to Route M, Appellant seeks to burden the Creekstone Respondents' properties and private road by cutting through Respondents Niehaus' property and connecting to, widening and changing Creekstone Drive, in the Creekstone Subdivision. Appellant knew the access status of the Property

[4] Avery does not need to request a private road by way of strict necessity or to ask that MHTC "create" access to Highway M, because Appellant already has a limited right of access. Appellant is only required to request that access be broken because of the Raebel Condemnation Judgment.

when Appellant purchased it. The Raebel Condemnation was public record when Avery purchased the Property. Therefore, Avery knew that the control over the Property's access to Route M had been prohibited or limited and such access rights were sold to the MHTC, in exchange for $494,340.00, by the Raebel Living Trust at the time of the Raebel Condemnation.

To this end, Missouri courts have found that "self-inflicted harm in land use planning does not entitle one to rezoning." J.R. Green Properties, Inc. v. City of Bridgeton, 825 S.W.2d 684 (Mo. App. E.D. 1992). The reasoning of the Court in J.R. Green Properties applies directly to Appellant. Appellant's alleged "strict necessity" was a self-inflicted harm when Appellant's predecessor in interest failed to appeal the Raebel Condemnation and accepted the condemnation funds in exchange for voluntarily surrendering the right to control the access to Route M. Appellant petitioned in the Trial Court to undo what was done almost 20 years ago by the very same Trial Court. It would be inequitable to allow Appellant to burden its neighboring landowners, the Creekstone Respondents herein, by Appellant creating its own "necessity" when none otherwise existed. See generally Marvin E. Nieberg Real Estate Co. v. St. Louis County, 488 S.W.2d 626 (Mo. 1973)(self-inflicted hardship in the context of eminent domain).

Appellant has argued that it did not cause the "self-inflicted" harm to the Property. However, Appellant purchased the Property with knowledge of the prohibited or limited access to Route M. In the inverse condemnation context, this Court has stated that "for if the damage has already occurred to the land, then the sellers and buyers had at least constructive notice of the damage and could accommodate its effect on the land's value in

negotiating the purchase price." State ex rel. City of Blue Springs v. Nixon, 250 S.W.3d 365, 370 (Mo. banc 2008). In other words, allowing Appellant to purchase the Property, at a lower price, knowing of the prohibited or limited access to Route M and then attempting to burden neighboring landowners under the guise of "strict necessity" would result in a "windfall" for Appellant. Cf. Id.

Taking Appellant's argument to its illogical conclusion, a property owner could sell his right to access an adjoining public road (or a strip of property between the private property and the public road) on Monday and then on Tuesday file a petition against a neighboring property owner to establish a private road by way of strict necessity by arguing it has no "access" to the public road. This "self-inflicted harm" cannot be what the legislature intended in how a plaintiff establishes "strict necessity" under §228.342, RSMo. Similarly, this reasoning is why courts have repeatedly held that "proceedings to acquire a private way over the lands of another are against the common law and the common rights" and must be strictly construed. Anderson, 49 S.W.3d at 765.

Appellant argues that because a specific date and time cannot be pinpointed as to when Appellant will have access to the public road, Route M, nonetheless, it should be allowed to proceed with the private road immediately. Once again, there is "access," not the required "no access" set forth in §228.342, RSMo. Appellant alleges that the MHTC attempt to prohibit or limit access is unconstitutional. It is not unconstitutional. See Missouri Real Estate & Insurance Agency, Inc. v. St. Louis County, 959 S.W.2d 847, 849-50 (Mo.App. E.D. 1997)("The right of an abutting owner to access a public street or highway is a property right and an interest in land which cannot be taken by condemnation

without payment therefor….under the police power of the State the right [to egress and ingress] may be limited to reasonable access under the existing facts and circumstances.").

Appellant's Petition failed to allege the second element of its cause of action, thereby failing to state a claim on which relief could be granted. Taking the facts in Appellant's Petition as true as to the third element of its claim, Appellant cannot prove the existence of a strict necessity because the Petition, on its face, shows that no strict necessity exists, or if one does exist, it was self-imposed. The Trial Court properly dismissed the Petition, and this Court should affirm the Trial Court's judgment in all respects.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS APPELLANT'S PETITION BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA* IN THAT APPELLANT'S PREDECESSOR IN INTEREST IN THE PROPERTY VOLUNTARILY WAIVED ANY DEFENSE TO THE RAEBEL CONDEMNATION AND ACCEPTED THE CONDEMNATION FUNDS IN EXCHANGE FOR PROHIBITED OR LIMITED ACCESS TO ROUTE M FROM THE PROPERTY. (*Responds to Appellant's Point II).*

STANDARD OF REVIEW

As noted above, the Standard of Review is *de novo*.

ARGUMENT

The doctrine of *res judicata* bars Appellant's attempt to undo the 20-plus year old Raebel Condemnation. Appellant argues that the doctrine of *res judicata* is not applicable

in this case because no counterclaim could have been filed by Appellant's predecessor in interest in the condemnation hearing. This argument misses the mark. See generally Gardner v. City of Cape Girardeau, 880 S.W.2d 652, (Mo.App.E.D. 1994)(despite dismissal of a counterclaim in the condemnation case, *res judicata* barred landowners' claim for damages arising out of the same subject matter as the original condemnation case).

The doctrine of *res judicata*, or claim preclusion, prohibits a party from bringing a previously litigated claim or claims that could have been raised in the first action. Kesterson v. State Farm, 242 S.W.3d 712 (Mo. banc 2008), citing Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo. banc 2002). Claim preclusion "precludes a litigant from bringing, in a subsequent lawsuit, claims that *should have been brought* in the first suit." Id. (emphasis added). Therefore, claim preclusion applies to "every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." Id., citing King General Contractors, Inc. v. Reorganized Church, 821 S.W.2d 495, 501 (Mo. banc 1991). Missouri courts have held that once a condemnee has withdrawn a condemnation award that was paid into the court by the condemnor, the condemnee is estopped from asserting any irregularities in the condemnation proceeding. Jackson County v. Hesterberg, 519 S.W.2d 537 (Mo. App. W.D. 1975).

Here, the Raebel Trust, Appellant's predecessor in interest, participated in the 1995 condemnation proceeding, resulting in the Raebel Condemnation. L.F. 33. After the initial condemnation hearing, the Raebel Trust filed but then dismissed its exceptions to the

condemnation award. Id. The Raebel Trust pursued no further defense to the condemnation and withdrew the $494,340 in condemnation funds from the Court. Id. The Raebel Trust filed no appeal to challenge any portion of the condemnation. L.F. 35. Indeed, the Raebel Trust, rather than attempting to save full access to Route M, received nearly half a million dollars and, by doing so, "self-inflected" its access issue. Id. Avery now petitions for a private road by way of strict necessity by challenging the Raebel Condemnation 20 years after the fact.

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, litigating exceptions and/or appealing the decision of the Raebel Condemnation.

III. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE APPLICABLE 10 YEAR STATUTE OF LIMITATIONS IN THAT ANY ALLEGED NECESSITY CEASED TO EXIST UPON THE APPELLANT'S PREDECESSOR IN INTEREST VOLUNTARILY ACCEPTING THE CONDEMNATION FUNDS IN 1995. (*Responds to Appellant's Point III*).

STANDARD OF REVIEW

As noted above, the Standard of Review is *de novo*.

ARGUMENT

Appellant argues that no statute of limitations should apply to its cause of action. The Creekstone Respondents acknowledge the case law cited by Appellant which states the general rule that a way of necessity cannot be extinguished as long as the necessity continues to exist. Short v. Southern Union Company, 372 S.W.3d 520 (Mo. App. W.D. 2012). This general rule, however, is inapplicable in the case at bar. No Missouri case directly addresses the situation where the alleged "necessity" was self-inflicted, such as what happened here. A brief analysis of the law indicates the general 10 year statute of limitations should apply.

Appellant sued Respondents under §§228.341 through 228.473, RSMo. (a statutory claim to establish a private road) and §§527.010 to 527.130, RSMo. (the Declaratory Judgment Act). Section 516.010, RSMo., provides a 10-year statute of limitations for each of these causes of action.

As previously stated, the Jefferson County Court entered the Raebel Condemnation on December 4, 1995, and the Raebel Trust received almost half a million dollars. As of that date, any alleged private road by way of "strict necessity" began and ended immediately. The Raebel Trust had the right to file post-trial motions and/or an appeal of the order of condemnation, but they did not. Indeed, the self-inflicted "necessity" arose in 1995 upon the entry of the condemnation judgment in Raebel Condemnation.

As a result, Plaintiff is well outside the applicable 10 year statute of limitations to request a private road by way of strict necessity. This is particularly true when the alleged "strict necessity" was self-inflicted by the Raebel Trust who received payment in exchange

for the acceptance of the Raebel Condemnation.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE CREEKSTONE RESPONDENTS' MOTION TO DISMISS BECAUSE APPELLANT'S PETITION IS NOT RIPE IN THAT APPELLANT DOES HAVE ACCESS TO AN ABUTTING PUBLIC ROADWAY (ROUTE M) AND APPELLANT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE MHTC. (*Responds to Appellant's Point IV*).

STANDARD OF REVIEW

As noted above, the Standard of Review is *de novo*.

ARGUMENT

Appellant's Substitute Brief alleges, without any justification, that the issues presented in Count I of its Petition are issues appropriate for judicial resolution. Contrarily, Appellant failed to exhaust its administrative remedies before the MHTC concerning access to Route M—the public road which passes alongside Appellant's Property. As a result of Appellant's failure to address its issue of access with the MHTC, Appellant's claim is not ripe for adjudication.

Missouri courts hold that "a controversy is ripe when the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a *presently existing conflict*, and to grant specific relief of a conclusive nature." Foster v. State, 352 S.W.3d 357, 360 (Mo. 2011)(emphasis added); see also Mercy Hospitals East Communities v. Missouri Health Facilities Review Committee, 362 S.W.3d

415, 418 (Mo. banc. 2012). The matter before the Trial Court here was not ripe in that the case did not involve a presently existing conflict, but merely a potential conflict. Appellant alleged that the Property had no access to Route M; however, Appellant admitted to the Trial Court that Appellant had never officially and formally inquired of and petitioned the MHTC about access. Tr. 19, l. 24 – Tr. 20, l. 20.

Courts discuss both a burden of proof and a burden of pleading. The burden of pleading "in most instances is simply assigned to the party with the burden of proof." Kinzenbaw v. Director of Revenue, 62 S.W.3d 49 (Mo. 2001). Here, Appellant was the plaintiff in the Trial Court and had the burden of pleading that the Property had no access to Route M and that Appellant attempted to "break access" through the administrative process with the MHTC. In the Petition, and in its Brief, Appellant alleges that it has no "recorded legal right of access" to Route M from the Property. L.F. 13-14. However, at the hearing on Respondent's Motions to Dismiss it became clear that allegation was prematurely made. Tr. 19, l. 24 – Tr. 20, l. 20. As argued in MHTC's Motion to Dismiss, Appellant filed suit against all Respondents without exhausting its administrative remedies in that it failed to submit a written request for MHTC to break the limited access provision of the Raebel Condemnation to allow the Property access directly to Route M. See MHTC Motion to Dismiss; Tr. 20, l. 3-9.

Indeed, Appellant's counsel stated in the Trial Court hearing that instead of applying for access to Route M, Appellant participated in some unidentified "informal discussions as far as I am concerned." Tr. 20, l. 8. Like MHTC in its Motion to Dismiss, the Creekstone Respondents argued in the Trial Court, L.F. 36, and reiterate that position now, that if

Appellant were to apply and obtain access from the Property to Route M, or some alternative route, Appellant's alleged "strict necessity" will no longer exist, if it ever did in the first place. The Trial Court agreed when it noted that "if there is administrative remedy, then you have to exhaust that before you sue them anyway." Tr. 20, l. 13-15. Appellant prematurely filed its lawsuit, and the Trial Court correctly dismissed Appellant's Petition, without prejudice, to allow Appellant to file its request for access with Respondent MHTC. The case is not ripe for judicial review. Mercy Hospitals East Communities v. Missouri Health Facilities Review Committee, 362 S.W.3d 415, 418 (Mo. banc 2012).

V. APPELLANT'S FIFTH THROUGH SEVENTH POINTS ON APPEAL SOLELY ADDRESS THE DISMISSAL OF COUNT II OF APPELLANT'S PETITION WHICH WERE ADDRESSED SOLELY TO RESPONDENT MHTC; THEREFORE, THE CREEKSTONE RESPONDENTS DO NOT FILE A RESPONSE THERETO, BUT JOIN IN THE RESPONSE FILED BY RESPONDENT MHTC. *(Responds to Appellant's Points V through VII).*

The Trial Court granted Respondent MHTC's Motion to Dismiss Count II of the Appellant's Petition. Count II of the Petition was directed solely against Respondent MHTC and the Creekstone Respondents join in and incorporate by reference herein the Brief of Respondent MHTC addressing Appellant's Points V through VII.

VI. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S PETITION BECAUSE A PRIVATE ROAD BY WAY OF STRICT NECESSITY DOES NOT APPLY TO CREEKSTONE SUBDIVISION IN THAT THE SUBDIVISION'S ROADWAY FALLS UNDER THE HOMEOWNER'S ASSOCIATION EXEMPTION OF § 228.341, RSMO. *(Responds to Appellant's Point VIII).*

STANDARD OF REVIEW

As noted above, the Standard of Review is *de novo*.

ARGUMENT

Appellant's attempt to force upon the Creekstone Respondents a connecting private road from Appellant's Property to and through Creekstone Drive within the Creekstone Subdivision fails for another reason. Under §228.341, RSMo., Appellant cannot make a claim for a private road by way of strict necessity to and tied through the Creekstone subdivision, regardless of Appellant's claim of "no access" to Route M. Section 228.341, RSMo. creates an "exemption" from claims of a private road by way of strict necessity for roads platted by a homeowner's association or referenced in a homeowner's association declaration or indenture. Such situation is present in the case at bar.

Section 228.341, RSMo. provides, in pertinent part:

> "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."

The provision is plain and unambiguous. Section 228.342, RSMo., simply does not allow Appellant's attempt to tie its Property into Creekstone Drive, a subdivision road included in the recorded plat and indentures/declarations of the Creekstone HOA. The statute exempts the Creekstone Respondents from either establishment of a private road or widening of the Creekstone Drive within the Creekstone Subdivision.

Appellant, however, claims that the "homeowner's association" exemption of §228.341, RSMo. does not apply by asserting what Appellant "believes" the legislature meant. L.F. 39-40. Although difficult to decipher, it appears Appellant argues that despite the sweeping exemptions of §228.341, RSMo., the exemption applies solely to issues of a "maintenance order" under §228.369, RSMo. If the legislature intended that only §228.369 "maintenance orders" were exempted as to homeowner's associations, it would have said so. The legislature clearly exempted the entirety of §§228.341 to 228.374, RSMo. as applied to subdivision roads platted by homeowner's associations or referenced in indentures/declarations of the homeowner's associations.

In an alternative argument, Appellant asserts that whether the "road petitioned for by appellant can be described by metes and bounds without any reference to any subdivision plat, declaration or indenture" cannot be decided by the Court. Whatever this means, it is contrary to the Appellant's Petition which seeks a declaration allowing Appellant to tie its private road into the "cul-de-sac" bowl of Creekstone Drive. L.F. 14. Appellant further demands that Creekstone Drive be widened to 40 feet for the entirety of the street, to accommodate the Appellant's private road. L.F. 15. Regardless of any

speculative "metes and bounds" Appellant refers to, Appellant states that its private road would "run over the same general location as the road known as Creekstone Drive." Id.

The statutory exemption does not parse words—"nothing" means "nothing"—meaning there cannot be any access to or through Creekstone Drive or widening of Creekstone Drive, created by plat and referenced in the indentures/declarations for the Creekstone HOA. Curiously, in its argument concerning §228.342, RSMo., Appellant chastises both the Creekstone Respondents and the Eastern District Court of Appeals for an "absurd and unreasonable" interpretation arguing that the "plain" language rationale applies. In a twist, Appellant ignores the "plain" language of §228.341, RSMo. and substitutes Appellant's rewrite of the statute. (Substitute Brief at pp. 47-48).

The legislature's intention is clear from the language of the statute: Appellant cannot "tie" its private road into Creekstone Drive, widen Creekstone Drive, and take subdivision property subject to the Creekstone HOA's plat and referenced in the indentures/declaration. L.F. 6-10. The reasoning for such a sweeping exemption for homeowner's association streets is sensible given the nature of subdivision roads and homeowner's associations. Through plats, indentures and declarations, homeowner's associations provide for private creation and control of common property, including roads. See generally T. Tryniecki, 18 Real Estate Law-Transactions ch. 22 (Thompson-West 2005). The indentures/declarations create and provide for private administration of the common grounds and maintenance of streets. Id. at §22.4.

Likewise, subdivision roads are generally "self-contained," private ways of ingress and egress, limiting traffic to the subdivision residents and guests. Often, subdivisions

have only one entrance, with many streets ending in cul-de-sacs. The legislature certainly recognized the unique nature of subdivision streets and homeowner's associations by exempting them from claims of a private road by way of "strict necessity" which would alter the nature and character of the private subdivision and the roads serving the subdivision.

In an analogous situation, concerning the creating of an "emergency roadway easement" through subdivision streets created by a homeowner's association, the Court acknowledged the unique character and nature of subdivision streets. In effect, tying another road into and widening Creekstone Drive amounts to an impermissible "change in the quality and nature of the traffic using the drive." Hill-Creek Acres Ass'n, Inc. v. Tomerlin, 99 S.W.3d 521,527 (Mo.App.2003)(rejected an emergency roadway easement for use of neighboring subdivision's private roads). As the Tomerlin Court noted, when considering subdivision roads created by a homeowner's association, there cannot be an additional burden on the homeowner's exclusive rights to use roads within the subdivision. Id. at 526. This reasoning surely supports the legislature's grant of a sweeping exemption in §228.341, RSMo., from the creation of private roads by way of "strict necessity" that would disturb, alter or change the roads created by homeowner's associations.

As a result, the sweeping exemption of §228.341, RSMo., for subdivision roads created by homeowner's associations by plat or indenture/declaration, bars Appellant's claims for a private road by way of "strict necessity" to and through Creekstone Drive.

CONCLUSION

For the foregoing reasons, this Court should affirm in all respects the Trial Court's grant of the Motion to Dismiss Appellant's Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with Rule 55.03, Missouri Supreme Court Rules of Civil Procedure and the type-volume limitation of Rule 84.06(b), Missouri Supreme Court Rules of Civil Procedure. This Brief was prepared in Microsoft Word 2010, Version 14.0.6129.500 (32-bit) and contains 8,383 words, excluding those portions of the Brief listed in Rule 84.06(b)(the cover, the table of contents, table of authorities, the signature block, the certificate of service and appendix). The font is New Times Roman, proportional spacing, 13-point type. Pursuant to Rule 84.06(g), I further certify that this Brief was scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of the foregoing Substitute Brief with attached Appendix was sent this 2nd day of November 2015 to the attorney of record for Appellant and the attorney of record for co-Respondent via the Court's electronic filing system and one hard copy was mailed this 2nd day of November 2015 by U.S. Mail, Postage Prepaid, First-Class to the attorney of record for the Appellant and the attorney of record for co-respondent:

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