SC94831

IN THE SUPREME COURT OF MISSOURI

METROPOLITAN ST. LOUIS SEWER DISTRICT,

Plaintiff / Appellant

vs.

CITY OF BELLEFONTAINE NEIGHBORS, et al.,

Defendant / Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Mark D. Seigel, Circuit Judge, Division 3
13SL-CC03760

SUBSTITUTE RESPONDENT'S BRIEF

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ARGUMENT

The Metropolitan St. Louis Sewer District ("MSD") has concocted two meritless theories in an attempt to hold the City of Bellefontaine Neighbors ("City") responsible for damage caused by a third party to its property. MSD then pleads to this Court that the Missouri Constitution demands that the City be held responsible, lest MSD be without a remedy. MSD asserts this while its claims against three other defendants remained stayed while MSD pursues its meritless theories against the City. MSD would apparently rather puncture the doctrine of sovereign immunity (which it has liberally invoked over the past few decades in order to escape liability) than seek redress from the parties that caused its damage. The Court should decline to neuter sovereign immunity and thereby vest MSD with new rights which would create havoc when it interacts with other political subdivisions.

This cause of action arises from damage that was caused to MSD's property during a street improvement project undertaken by the City. The City's subcontractor Lift Rite, Inc. ("Lift Rite"), with whom the City did not directly contract, pumped concrete-like slurry under the streets and apparently pumped same into MSD's sewer lines. The trial court granted the City's motion to dismiss MSD's claim against the City. MSD amended its petition, purporting to provide more detail about the City's involvement and adding tort claims. The trial court again granted City's motion to dismiss.

As the Court is reviewing the trial court's grant of the City's motion to dismiss for failure to state a claim upon which relief can be granted, the standard of review is *de novo*. "An appellate court reviews a trial court's grant of a motion to dismiss *de novo*. It

will consider only the grounds raised in the motion to dismiss in reviewing the propriety of the trial court's dismissal of a petition, and, in so doing, it will not consider matters outside the pleadings." City of Lake Saint Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. banc 2010) (internal citations omitted). "The petition must contain allegations of fact in support of each essential element of the cause sought to be pleaded. When ruling on the sufficiency of the facts pleaded to state a claim, we must consider whether material and essential allegations have not been made. Where a petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts a motion to dismiss is properly granted." Bramon v. U-Haul, Inc., 945 S.W.2d 676, 679 (Mo. App. E.D. 1997) (internal citations omitted). "Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted." Willamette Indus., Inc. v. Clean Water Comm'n. of State of Mo., 34 S.W.3d 197, 200 (Mo. App. W.D. 2000).

MSD cannot prevail on its inverse condemnation claim because it lacks standing to assert such a claim under the Missouri Constitution. Article I, § 26 of the Missouri Constitution protects private property from being taken without just compensation, but extends no similar protection to public property. Missouri courts have not extended this protection to property owned by political subdivisions. City lacks the power of eminent domain regarding public properties and therefore lacks the requisite ability to inversely condemn MSD's property. Even if such power existed, MSD has not alleged facts which would support MSD's claim that the City caused its damage.

Likewise, MSD's tort claims fail because MSD cannot show that the City caused its damage. On the face of its own petition, MSD pleads that Lift-Rite caused its damage by pumping slurry into its lines. While MSD alleges various aspects in which the City participated, it never connects the dots from City's alleged actions and its damages. Even if it could show causation, City is protected from liability by the doctrine of sovereign immunity. MSD cites no case law in support of its proposition that sovereign immunity is inapplicable in a suit between two public entities. The exception relating to municipalities engaged in a proprietary function (which MSD expressly disavowed in its petition and raises for the first time in this Court) is inapplicable. The street repair project was a governmental function undertaken for the benefit of the public, and sovereign immunity shields the City from liability.

I. THE TRIAL COURT DID NOT ERR IN DISMISSING MSD'S CLAIM FOR INVERSE CONDEMNATION AGAINST THE CITY BECAUSE THE PETITION FAILED TO STATE A CLAIM IN THAT MSD LACKS STANDING AND DID NOT ALLEGE THAT MSD'S PROPERTY WAS TAKEN OR DAMAGED BY THE CITY FOR PUBLIC USE WITHOUT JUST COMPENSATION THROUGH AFFIRMATIVE ACTS BY THE CITY.

A. Standing

MSD lacks standing to assert an inverse condemnation claim against the City under Article I, § 26 of the Missouri Constitution because it owns no "private property" damaged by the City. MSD was established as public body under Article VI, § 30 of the Missouri Constitution. MSD is a political subdivision of the state of Missouri. Legal File ("LF") at 76. Article I, § 26 of the Missouri Constitution provides "[t]hat private property shall not be taken or damaged for public use without just compensation." As a public body, MSD is not afforded this protection. Missouri courts have declined to extend constitutional rights afforded to private citizens to public entities. This Court should not do so, particularly where MSD can seek relief from other private tortfeasors. "Both state and federal courts have repeatedly held that municipalities and other political subdivisions established by the state are not 'persons' within the protection of the due process and equal protection clauses of the United States Constitution." City of Chesterfield v. Dir. of Revenue, 811 S.W.2d 375, 377 (Mo. banc 1991). See also State ex rel. Brentwood School Dist. v. State Tax Comm'n., 589 S.W.2d 613, 615 (Mo. banc

1979) ("[S]chool districts, as creatures of the state established to perform governmental functions, are not persons within the protections of the due process clause and cannot charge the state with violations of due process."). The concept is the same in this case. MSD cannot assert an inverse condemnation claim because it's property is not "private property" as that term is used in Article I, § 26 of the Missouri Constitution.

A prerequisite to the assertion of an inverse condemnation claim is that the taking party has the power of eminent domain. The State of Missouri has given to the City only limited power of eminent domain and that power does not operate to condemn property devoted to public use. "'The power of eminent domain, or condemnation, has long been recognized in Missouri.' Such power is inherent in the sovereignty of the state. However, the right of eminent domain and condemnation does not inhere naturally in municipalities … or public service corporations. The General Assembly must delegate the right of eminent domain to municipalities in order for them to have the power of condemnation. Statutes delegating the right of eminent domain are strictly construed by the courts." City of Smithville v. St. Luke's Northland Hosp. Corp., 972 S.W.2d 416, 420 (Mo. App. W.D. 1998) (internal citations omitted). City is a fourth-class city of the State of Missouri. LF at 76. The authority of fourth-class cities to condemn property is set forth in § 88.667, RSMo., which provides that "[p]rivate property may be taken by cities of the fourth class, for public use, for the purpose of establishing, opening, widening, extending or altering any street, avenue, alley, wharf, creek, river, watercourse, marketplace, public park, or public square, and for establishing market houses and for any other necessary public purposes." Property already devoted to a public use is not encompassed by this statute.

"[W]here a municipality desires to condemn property devoted to a prior public use for another public use which will totally destroy or materially impair or interfere with the former use, specific statutory authority is required. A municipality's general authority, such as § 88.667, is not sufficient under these circumstances." Id.

The state has declined to delegate the authority to condemn public property to the City. Courts have held that "property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use." City of Blue Springs v. Cent. Dev. Ass'n., 684 S.W.2d 44, 50 (Mo. App. W.D. 1984). MSD alleges in its first amended petition that because of the apparently negligent mudjacking that MSD imputes to the City, "MSD's sewer lines at such locations were temporarily rendered useless, and MSD was forced to repair and/or replace large sections of its sewer lines." LF at 78. Under Missouri law, the City does not have statutory authority to condemn MSD's property because it is public property devoted to public use with which the City cannot materially interfere or impair.

That the City was without authority to condemn MSD's property is critical because if the City lacked the authority to condemn MSD's property for public use, an action inverse condemnation does not lie. That the defendant is vested with the power of eminent domain is a prerequisite for maintaining a suit in inverse condemnation. Clay v. Mo. Highway and Trans. Comm'n., 951 S.W.2d 617, 627 (Mo. App. W.D. 1997) (upholding dismissal of inverse condemnation claim against private entity because it "did not have any governmental powers, such as the power of eminent domain."). MSD cannot show that the City had power to condemn its property and materially impair or

interfere with its operation and use by MSD. City lacked authority to take MSD's sewers for public use. City therefore lacked the power of eminent domain necessary to sustain an action for inverse condemnation.

The Court of Appeals, in its opinion transferring this case to this Court, appeared to open the door to extending inverse condemnation claims to public entities by citing to St. Charles County v. Laclede Gas Co., 356 S.W.3d 137, 139-40 (Mo. banc 2011). Laclede Gas is distinguishable from the present case in that, while Laclede is a public utility[1], it is not a public body, and its property is not considered public. "Public utilities are economically motivated as are other private enterprises, but they render a public service and, hence, have been subjected historically to detailed governmental regulation, supervised by the judicial system." Charles F. Phillips, Jr., "The Regulation of Public Utilities Theory and Practice, Chapter 1 Public Utilities in the American Economy," REGPU CH1, 2005 WL998363. As a private (though publicly regulated) corporation, Laclede Gas lacks the essential auspices of a public entity and the ruling of Laclede is inapposite to this case.

Because MSD is a public entity, whose property the City lacks authority to condemn under § 88.667, RSMo., the City cannot be liable to MSD in inverse condemnation. City lacks authority to condemn public property. MSD, as a public entity, is not within the class whose property is protected under Article I, § 26 of the Missouri Constitution. This Court should decline to extend this protection afforded to private property to public property.

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[1] See § 386.020(43), RSMo.

B. Causation

MSD's petition did not state a claim against the City in inverse condemnation because it did not allege an affirmative act of the City caused its damage. "Additionally, plaintiff property owners must prove that their damages were caused by the condemning authority's actions or inactions." Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859, 869 (Mo. banc 2008). This case centers around a street improvement project which is referred to in MSD's first amended petition as "the Project." LF at 77. Part of the Project involved a process called mudjacking, in which "pressurized concrete-like slurry is pumped into voids beneath the street." LF at 77. MSD alleged that in its first amended petition that "[d]uring the Project, a significant amount of slurry meant to fill voids under the City's streets was instead pumped into MSD's sewer lines …." LF at 78. MSD lists nine actions or activities allegedly undertaken by City to participate in and direct the Project, to wit:

> 13. The City participated in and directed the Project by, amongst other things:
>
> a. Designating Weis as the City's representative to administer and supervise all aspects of the Project, part of which included *mudjacking services performed by Sherrell and Lift Rite*;
>
> b. Participating in pre-construction conferences and weekly site meetings to schedule work, and approve the use of equipment and procedures;

c. Inspecting and approving work performed by the Sherrell and Lift Rite;

d. Directing the order and timing of work on the Project;

e. Coordinating with MSD and other utilities in an attempt to avoid causing problems to the sewer system and other utilities;

f. Directing Sherrell on concrete specifications;

g. Directing and/or providing input on Weis' and Sherrell's hiring practices;

h. Responding to complaints from residents regarding the Project; and

i. Deciding whether to perform concrete 'slab work'.

Emphasis added. In paragraph 13(a), MSD is clear that the mudjacking was performed by Sherrell Construction, Inc. ("Sherrell") and/or Lift Rite, and not the City. LF at 78. MSD's argument that the City is liable presumes that the City's activities outlined above somehow caused its damage. MSD does not allege that the City's actions described in paragraph 13 were performed negligently or carelessly. It is not alleged, for instance, that City carelessly approved work, negligently ignored a risk it should have foreseen, or directed that inadequate materials or equipment be used. MSD simply alleges that the City took certain actions, that Sherrell and/or Lift Rite pumped slurry into its lines, *ergo*, the City is liable. No allowance is made for the intervening negligence of the City's subcontractors. MSD's pleading reduces the standard for liability to mere participation in

the Project. If the City were to be liable under these facts alleged, it is difficult to imagine any City or (any contractor) avoiding liability for the negligence of any of its subcontractors, regardless of the limited nature of the City's participation in a project (or the extent of the subcontractor's negligence). "Someone who hires an independent contractor generally is not held liable for the acts or omissions of the independent contractor." K.C. 1986 Ltd. P'ship. v. Reade Mfg., 33 F.Supp.2d 820, 827 (W.D. Mo. 1998). Because the City did not pump slurry into MSD's sewer lines, none of the actions allegedly undertaken by the City can be said to have caused MSD's injury.

In determining causation for inverse condemnation claims, the "but for" test is applicable. "The 'but for' test for causation is applicable [in inverse condemnation cases]. 'The 'but for' causation test provides that 'the defendant's conduct is a cause' of the event if the event would not have occurred 'but for' that conduct." Zumalt v. Boone County, 921 S.W.2d 12, 15 (Mo. App. W.D. 1996) (internal citations omitted). None of the nine actions allegedly taken by the City in paragraph 13 of MSD's first amended petition could pass the "but for" test. MSD's damage was caused by slurry being pumped into its lines by Sherrell and/or Lift Rite, as MSD very clearly alleges in paragraph 13(a) of its first amended petition. The City did not cause MSD's damage. But for Sherrell and/or Lift Rite pumping slurry into MSD's lines, MSD would not have been damaged.

MSD is not alleging that the City is vicariously liable for its contractors' actions. MSD has simply alleged that the City supervised and participated in the Project and is thereby liable. Such a holding would conflict with existing case law which holds that, generally, a municipality is not liable for a contractor's work unless the contractor is

engaged in inherently dangerous work. See Saggio v. City of Arnold, 807 S.W.2d 114, 116 (Mo. App. E.D. 1990) ("'Generally, one who contracts with an independent contractor to perform work is not liable for bodily injury caused by the contractor or one of its employees.'" (quoting Barbera v. Brod-Dugan Co., 770 S.W.2d 318, 322 (Mo. App. E.D. 1989))). MSD has not plead that the activities undertaken were inherently dangerous. This Court must judge MSD's allegations regarding the City solely through the prism of: "but for City's actions would MSD have been damaged?" None of the allegations in paragraph 13 of MSD's first amended petition survive such scrutiny.

MSD cites to Clay v. Mo. Highway and Trans. Comm'n., for the proposition that the City is liable in inverse condemnation if its contractors perform work that damages another's property. Clay is inapposite to the present case. Clay involved the strict liability of a contractor engaged in inherently dangerous work with no inquiry as to who was negligent. The trial court in Clay granted judgment in favor of the plaintiff against a contractor for strict liability related to blasting work. Id. at 620. The court also ruled for plaintiff against the Highway and Transportation Commission for inverse condemnation. Id. Plaintiff appealed, claiming that the court erred in dismissing its negligence claim against the Commission. Id. at 627. It does not appear from the opinion in Clay that this Court considered the propriety of an inverse condemnation claim, or addressed the issue of causation. There is no indication that the Commission challenged causation. The Court's opinion regarding the Commission relates only to the impropriety of a negligence claim. Clay does not support the proposition that a governmental entity is liable when its

conduct is limited to supervising a project. That is significant because the MSD's damage was caused by the acts of Sherrill and/or Lift Rite.

While this Court presumes that the factual allegations in the petition are true, no such deference is due to legal conclusions. Willamette, 34 S.W.3d at 200 ("Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted."). In alleging that the City caused its damage, MSD states that "During the course of the Project, significant amounts of slurry meant for use beneath the City's streets were instead pumped into MSD's sewer lines, which rendered them useless and required MSD to incur considerable expense to repair and replace those lines." LF at 80. However, MSD does not connect the dots to explain how the City's actions *caused* its damages. "It is true … that the question of causation is usually for the jury. However, 'under clear and compelling circumstances, the question becomes one of law for the court.'" Koerber By & Through Ellegood v. Alendo Bldg. Co., 846 S.W.2d 729, 731 (Mo. App. E.D. 1992) (internal citations omitted). In this case, there can be no conceivable causal relationship between the damage to MSD's lines and the City's general oversight actions alleged in paragraph 13 of the first amended petition. MSD cannot simply plead that City took a few actions and then baldly assert that those actions caused its damage. A basic inquiry into the logic of the alleged causation is warranted. To say that X "caused" Y is a legal conclusion entitled to no deference from this Court. "As is the case with most petitions, in addition to pleading the alleged facts, the petition before this Court pleads, as facts, elements of the cause of action—negligence, causation, and damages. Such 'facts'/elements are, in

reality, merely legal conclusions." Wollen v. DePaul Health Ctr., 828 S.W.2d 681, 682 (Mo. banc 1992). "In the simple negligence case, the inference from the real pleadings of fact to these legal conclusions is simple and straightforward. A statement that the plaintiff slipped on a patch of ice creates an inference that the ice caused the plaintiff to slip. The inference in this case is not that easy." Wollen, 828 S.W.2d at 682. There is a very simple inference that pumping slurry into MSD's sewer lines caused damage. There is no such inference to be drawn from supervising a public works project. This Court cannot presume that MSD's legal conclusion that the City caused MSD's damage is true. No action of the City alleged in paragraph 13 of the petition caused MSD's damage. The damage was caused by the act of either Sherrell or Lift-Rite, according to paragraph 13(a) of MSD's petition. LF at 78.

Even if the Court were to conclude that the City's actions were somehow a cause of MSD's damage, the intervening negligence of Sherrell and/or Lift Rite would relieve the City of liability. "In order for a third person's negligence to be an intervening cause insulating the original tort-feasor from liability for his negligence, the intervening negligent act or negligent omission must be of a wholly 'independent', 'distinct', 'successive', 'unrelated' (to use the words quoted above) character." Jordan v. General Growth Development Corp., 675 S.W.2d 901, 903 (Mo. App. W.D. 1984). In this case, the negligent pumping of slurry into MSD's lines is an intervening cause. MSD pointedly does not spell out *how* the City performed any of its acts in a negligent manner. Nor does MSD explain how the damage to its lines resulted from an act of the City. The obvious reason is that the negligent mudjacking by City's contractors was, at the very least, an

intervening act of negligence. Given this intervening negligence, MSD cannot allege that the City caused its damage.

MSD failed to plead an essential element of an inverse condemnation claim. It cannot show that any action of the City caused its damage. MSD has improperly tried to expand a tort claim against private contractors into an inverse condemnation as a means to bring the City (and its taxpayers' money) to the table. This Court should hold that the trial court correctly determined that MSD did not state a claim against the City for inverse condemnation.

II. THE TRIAL COURT DID NOT ERR IN DISMISSING MSD'S CLAIMS OF TRESPASS AND NEGLIGENCE AGAINST THE CITY BECAUSE THE PETITION FAILED TO ALLEGE FACTS SUFFICIENT TO SUPPORT CLAIMS FOR TRESPASS AND NEGLIGENCE IN THAT THE PETITION DID NOT STATE THAT MSD WAS DAMAGED BY THE UNAUTHORIZED ENTRY OF THE CITY ONTO MSD'S PROPERTY AND THAT THE CITY HAD A DUTY NOT TO DO SO BUT BREACHED THAT DUTY, AND SOVEREIGN IMMUNITY SHIELDS THE CITY (A GOVERNMENTAL ENTITY) FROM LIABILITY FOR TORTIOUS ACTS AGAINST MSD (ANOTHER GOVERNMENTAL ENTITY).

A. Sovereign immunity

MSD failed to state claims against the City because it did not adequately allege a waiver of sovereign immunity. "A municipality is completely immune from liability arising from its performance of acts classified as governmental functions, unless a specific exception applies or the municipality specifically waives the immunity." Parish v. Novus Equities Co., 231 S.W.3d 236, 242 (Mo. App. E.D. 2007). "Missouri courts have routinely held that sovereign immunity is not an affirmative defense and that the plaintiff bears the burden of pleading with specificity facts giving rise to an exception to sovereign immunity when suing a public entity." Richardson v. City of St. Louis, 293 S.W.3d 133, 137 (Mo. App. E.D. 2009). In Bennartz v. City of Columbia, 300 S.W.3d 251, 259 (Mo. App. W.D. 2009), the court stated:

> A municipality has sovereign immunity from actions at common law tort in all but four cases: (1) where a plaintiff's injury arises from a public employee's negligent operation of a motor vehicle in the course of his employment (section 537.600.1(1)); (2) where the injury is caused by the dangerous condition of the municipality's property (section 537.600.1(2)); (3) where the injury is caused by the municipality performing a proprietary function as opposed to a governmental function (State ex rel. Board of Trustees of the City of North Kansas City Memorial Hosp., 843 S.W.2d 353, 358 (Mo. banc 1993)); and (4) to the extent the municipality has procured insurance, thereby waiving sovereign immunity up to but not beyond the policy limit and only for acts covered by the policy (section 537.610).

MSD does not assert in its petition that it's claims fall within any of the exceptions listed in § 537.600, RSMo. or Bennartz. MSD alleges that sovereign immunity "does not shield the City from liability [for trespass and/or negligence] for these acts because MSD is a public not private entity." LF at 79-80. MSD cites no case law, and City is not aware of any, that stands for the proposition that the MSD's status as a public entity strips the City of sovereign immunity. MSD even affirmatively alleges in its petition that "Upon information and belief, no other exception to sovereign immunity exists." LF at 79. MSD has rested its entire argument that sovereign immunity was waived on its novel theory that there was no sovereign immunity to be waived because MSD is a public entity, a theory heretofore unrecognized in Missouri jurisprudence.

In State ex rel. Mo. Highway and Transp. Comm'n. v. Dierker, 961 S.W.2d 58, 61 (Mo. banc 1998) this Court cites to Richardson v. State Highway & Transp. Comm'n., 863 S.W.2d 876, 882 (Mo. 1993), which states that "[w]aivers of sovereign immunity are, however, strictly construed." "Waiver [of sovereign immunity] cannot be established by inference or implication…." Cromeans v. Morgan Keegan & Co., Inc., 1 F.Supp.3d 994, 996 (W.D. Mo. 2014) (citing Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223, 247 (Mo. banc 2013)). Any ambiguity is resolved against finding a waiver of sovereign immunity. Hendricks v. Curators of Univ. of Missouri, 308 S.W.3d 740, 746 (Mo. App. W.D. 2010). "[S]overeign immunity has been the rule for all public entities unless a certain prescribed exception is applicable." State ex rel. New Liberty Hosp. Dist. v. Pratt, 687 S.W.2d 184, 186 (Mo. banc 1985). MSD cites to no case for its proposition that MSD's status as a public body waives sovereign immunity.

MSD invites this Court to rule that the City's invocation of sovereign immunity would be unjust and to thereby judicially create another exception to the general rule of sovereign immunity set forth in § 537.600. MSD asserts that the Court's refusal to find that sovereign immunity is waived would leave MSD without a remedy. Appellant's Substitute Brief, ("ASB") at 26. It would be of interest to the other parties sued by MSD (P.H. Weis & Associates, Inc. ("Weis"), Sherrell, and Lift Rite) that MSD claims to be without a remedy.[2] It is true that sovereign immunity may limit the number of parties

[2] The trial court, determining that that City's motion to dismiss disposed of a "judicial unit," found no just reason for delay and entered final judgment in favor

MSD is permitted to bring into its suit. However, it is disingenuous and false for MSD to suggest that it would be without a remedy unless the City's taxpayers are made to pay for the tortious acts of private contractors. The "lack of a remedy" ought not persuade this Court to puncture sovereign immunity. Even if the Court were to find merit in the policy arguments put forth by MSD regarding sovereign immunity as and between two public bodies, it need not reach these arguments in this case. Regardless of the Court's determination regarding sovereign immunity, MSD will be able to seek a remedy from three other private entities. MSD must satisfy itself by pursuing the relief from these contractors which it has already sought.

MSD's lament that it would be without a remedy unless sovereign immunity is waived rings hollow in light of MSD's numerous previous invocations of sovereign immunity to escape liability for its mismanagement and misdeeds. See Hummel v. Metro. St. Louis Sewer Dist., 782 S.W.2d 451, 452 (Mo. App. E.D. 1990) (Plaintiff suffered bodily injury when she fell into a hole created by defectively maintained sewer line. Court found MSD to be protected by sovereign immunity); State ex rel. Metro. St. Louis Sewer Dist. v. Sanders, 807 S.W.2d 87, 88 (Mo. banc 1991) (minor suffered serious electrical burns following electrocution by touching crane being used by MSD. Court rejected MSD's sovereign immunity argument, found that exception applied); and

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of City. MSD elected to seek appeal rather than simultaneously continue to pursue its claims against the other defendants. Those claims are stayed pending this Court's ruling.

Koppel v. Metro. St. Louis Sewer Dist., 848 S.W.2d 519, 519 (Mo. App. E.D. 1993) (MSD was immune from liability for property damage resulting when raw sewage backed up into owners' homes). Now that MSD finds the shoe on the other foot, it asks this Court to ignore decades of precedent and create a heretofore unrecognized exception to sovereign immunity. This Court should not carve out a new exception for MSD and instead require it to seek relief from the private tort-feasors and/or their insurers.

The public policy arguments put forth by MSD do not overcome Missouri's decades of jurisprudence on sovereign immunity. "We have held repeatedly that if liability is to arise against a governmental agency for the negligent acts of its servants engaged in a governmental function, this liability, heretofore unknown to the law of this state, must be a creation of the legislative branch of the government. I repeat again that it is not the function of the judiciary to create confusion and instability in well settled law, nor is it within the province of judges to refuse to apply firmly established principles of law simply because those rules do not conform to the individual judge's philosophical notion as to what the law should be. Courts are not arbiters of public policy." Smith v. Consol. Sch. Dist. No. 2, 408 S.W.2d 50, 54-55 (Mo. banc 1966). This has been the posture of this Court prior to September 12, 1977 as well as after. See Bartley v. Special Sch. Dist. of St. Louis County, 649 S.W.2d 864, 866 (Mo. banc 1983). MSD's argument that the City must show a case prior to 1977 which involved two political subdivisions is a red herring. Sovereign immunity has always been the rule, and waivers the exception. MSD cannot shift the burden to the City to demonstrate immunity simply because it has a theory that no other political subdivision has tested before. MSD would have the City

attempt to prove a negative. It reasons that because the City did not cite a case showing immunity as and between two public bodies, no immunity exists. The City suggests to this Court that the absence of case law directly on point is indicative of the lack of support for MSD's position. Case law examining sovereign immunity focuses on when a public body may be sued without regard to the identity of the plaintiff. To shift the analysis from the nature of the conduct to the nature of the plaintiff would be a fundamental (and unnecessary) alteration to the doctrine of sovereign immunity. If MSD intends to demonstrate that a municipality lacks sovereign immunity when sued by another public body, it retains the burden to show a waiver. None exists in Missouri law.

Junior College Dist. of St. Louis v. City of St. Louis, 149 S.W.3d 442 (Mo. banc 2004) is one of the few reported case involving sovereign immunity in a suit involving two governmental entities. The suit involved an assertion by Junior College District, a political subdivision, that the City, a municipality, was negligent for damages caused by a burst water pipe. Id. at 443-444. While the Court ultimately determined that an exception to sovereign immunity applied (City was engaged in a proprietary function by supplying water), it is noteworthy that this Court presumed the general application of sovereign immunity in the absence of a recognized waiver. In construing the proprietary/governmental distinction pertinent to sovereign immunity, the Court left no doubt that a governmental entity must still plead a recognized exception to sovereign immunity when suing another governmental entity. See also Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918, 923 (Mo. banc 1995) (State was protected from suit for money judgment by school district because of sovereign immunity.); Bd. of Educ. City of St.

Louis v. State, 134 S.W.3d 689, 693 (Mo. App. E.D. 2004) ("The doctrine of sovereign immunity precludes suit against the government without its consent.").

Missouri courts have repeatedly declined to create new exceptions to sovereign immunity, even when presented with "outrageous" conduct by a governmental body. See Brooks v. City of Sugar Creek, 340 S.W.3d 201, 207 (Mo. App. W.D. 2011) (A patrolman arrested a friend of his supervisor for driving while intoxicated and was fired. The Court found that the City was protected from suit by the patrolman by sovereign immunity.); Bennartz, 300 S.W.3d at 257 (Whistleblower's claims against municipality for wrongful termination "do not fall within any exception to municipal sovereign immunity recognized by the courts of Missouri."). This Court should not create a new exception to sovereign immunity simply because MSD chose to seek relief from a municipality while delaying their recovery from the contractors that committed the tortious acts.

While the Court of Appeals, in its opinion transferring the case to this Court, rejected MSD's argument, it found that sovereign immunity was waived because the City was engaged in a proprietary function, even though MSD had expressly disclaimed this argument as a basis for waiving sovereign immunity. The Court of Appeals stated that "Missouri courts have found that improvement and maintenance of city streets are proprietary functions of municipalities." ED101713, p. 10. However, there is ample reason to consider a city's act of filling voids beneath the street to be a governmental function.

In Counts v. Morrison-Knudsen, Inc., 663 S.W.2d 357, 361-63 (Mo. App. S.D. 1983), the court stated that:

> A governmental duty is one which is performed for the common good of all. A proprietary duty is one which is performed for the special benefit or profit of the city as a corporate entity. A city may be held liable for torts arising out of the performance of proprietary functions but no recovery is allowed for torts arising out of the performance of governmental functions. Whether a city, under a given set of facts, is performing a proprietary or governmental function is not always easy to determine and indeed several cases have commented upon the 'maze of inconsistency' in the reported decisions.

Russell, which was cited by the Court of Appeals in its opinion as support for the proposition that maintaining streets is proprietary, related to the liability of a city-owned hospital for medical malpractice. The reference to maintaining city streets as being proprietary has nothing to do with the underlying facts of the case and is dicta. Id. at 359. While certain activities involving cleaning city streets has previously been held to be proprietary (snow removal in Myers v. Palmyra, 355 S.W.2d 17 (Mo. banc 1962), street sweeping in Davis v. City of St. Louis, 612 S.W.2d 812 (Mo. App. E.D. 1981)), the inquiry for the court is whether the service is being performed for the common good of all rather than for the corporate benefit of the City. "Rather than examining the motives of the city employees who were performing the function, the analysis focuses on the motives of the legislature that conferred the power upon all municipalities." Russell, 843

S.W.2d at 359. In this case, filling voids beneath the street to ensure the public's safety is the essence of a governmental function undertaken for the common good of all. It requires no great stretch of the imagination to see the benefit to the public in having the roads adequately supported from below. Mitigating voids beneath the street is an activity distinct from street sweeping or snow removal. Section 26(d) of Article VI of the Missouri Constitution authorizes cities to accrue debt for "extending and improving the streets." That section is titled "Additional indebtedness of cities for public improvements. The Constitution's classification of street improvements as "public improvements" speaks to the fundamental duty of cities to provide a safe and healthy means for the public to travel. Cities do not profit by improving its roads. Indeed, roads are a huge responsibility for any municipality. It is hard to argue that ensuring that the roads are safe is a private or corporate benefit to the City itself. It is much more properly classified as a benefit to all who travel in or through a city. Inasmuch as MSD expressly disclaimed the proprietary exception to sovereign immunity in its petition, it should not be able to now assert it in this Court. This Court should find that MSD's tort claims are barred because no exception to sovereign immunity applies.

B. Trespass and Negligence

Even if the Court were to find that sovereign immunity is waived, MSD has still not stated a claim against the City for trespass or negligence. "Trespass is the unauthorized entry by a person upon land of another." Muir v. Ruder, 945 S.W.2d 33, 35 (Mo. App. E.D. 1997). MSD has not alleged that any of the actions taken by the City effected a trespass onto its property. MSD does not allege that City pumped slurry into its

lines. In fact, MSD is very careful *not* to allege that. Paragraph 14 of the first amended petition states that "[d]uring the Project, a significant amount of slurry meant to fill voids under the City's streets was instead pumped into MSD's sewer lines at several locations throughout the City." LF at 78. MSD uses the passive voice because it does not base its claims against the City on the premise that a City employee damaged its property. MSD is very clear that the City's purported liability is based *solely* on City's participation in and alleged direction of the Project, as set forth in paragraph 13 of its first amended petition. LF at 77-78. In paragraph 13(a) of its petition, MSD clearly states that the pumping of slurry was done by Sherrell and/or Lift Rite. LF at 78. Accordingly, MSD has chosen to cleverly word its allegations in an attempt to argue that City's purported supervisory activities caused its damage. MSD has not shown any nexus between City's actions and MSD's damage. In short, City did not cause a trespass into MSD's property. According to MSD's own petition, Sherrell and/or Lift Rite caused its damage by pumping slurry into its lines. "Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. banc 1993). City hereby incorporates by reference Section B of Point I of this brief herein as it is equally relevant to the causation argument regarding trespass. Because MSD has failed to adequately allege that the City caused its damage, MSD has not stated a claim for trespass by the City.

Similarly, MSD did not state a claim for negligence by the City. "The claimant must establish the elements of a negligence claim—that is, duty, breach of duty, and causation." Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881, 886 (Mo. banc 1983). In paragraph 28 of its first amended petition, MSD alleges that all Defendants were negligent because "[w]hile performing work on the Project, Defendants breached their duties of care by causing slurry meant for use beneath the City's roads to enter MSD's sewer lines, which rendered them useless and required MSD to incur considerable expense to repair and replace." LF at 79. MSD again uses the passive voice to obscure the fact that it does not allege that any City employee pumped slurry into its sewer lines. No explanation is given as to how any of City's actions were negligent. MSD does not explain the causal connection between the actions allegedly taken by the City and the damage to its property. MSD simply asks this Court to assume that the City was negligent because another defendant caused damage to MSD's property. City hereby incorporates by reference Section B of Point I of this brief herein as it is equally relevant to the causation argument regarding negligence. This Court should find that MSD did not adequately allege that the City was negligent.

CONCLUSION

This Court should affirm the trial court's judgment dismissing Appellant's petition, as it relates to Respondent City of Bellefontaine Neighbors, deny the relief sought in Appellant's appeal, and assess any and all costs to Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel for the parties were served with the foregoing via the Missouri electronic filing system.

/s/ *Brian J. Malone*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,799, excluding the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that this electronic brief was scanned for viruses and found to be virus-free.

/s/ Brian J. Malone