SC94831

IN THE SUPREME COURT OF MISSOURI

METROPOLITAN ST. LOUIS SEWER DISTRICT
Plaintiff-Appellant

v.

CITY OF BELLEFONTAINE NEIGHBORS, ET AL.
Defendants-Respondents

Appeal from the Circuit Court of St. Louis County
Case No: 13SL-CC03760
The Honorable Mark D. Seigel

SUBSTITUTE BRIEF OF APPELLANT METROPOLITAN ST. LOUIS SEWER DISTRICT

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Metropolitan St. Louis Sewer District ("MSD") filed suit against the City of Bellefontaine Neighbors (the "City") and other defendants seeking to recover for damages to its sewer lines. MSD asserted claims for inverse condemnation, trespass and negligence against the City. On May 22, 2014, the trial court entered a judgment dismissing each of those claims against the City and finding no just reason for delay. LF at 84. On June 27, 2014, MSD filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District. LF at 87.

Jurisdiction was proper in the Court of Appeals, Eastern District, because this action does not involve any matters over which this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. The Circuit Court of St. Louis County is within the territorial jurisdiction of the Court of Appeals. § 477.050, RSMo.

On February 24, 2015, the Court of Appeals transferred this action to this Court pursuant to Missouri Supreme Court Rule 83.02 due to the general interest and importance of the issues on appeal. This Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo. Const. art V, § 10.

STATEMENT OF FACTS

On October 28, 2013, MSD filed this action against the City, Sherrell Construction, Inc. ("Sherrell"), Lift Rite, Inc. ("Lift Rite"), and P.H. Weis & Associates, Inc. d/b/a Weis Design Group ("Weis") in the Circuit Court of St. Louis County seeking damages sustained to MSD's sewer lines during the City's 2009 street improvement and resurfacing project. LF at 1. The City hired Sherrell as general contractor for the project and Weis as engineer. LF at 9. Lift Rite was hired by Sherrell to perform mudjacking services, which involved pumping pressurized, concrete-like slurry into voids beneath the City's streets. LF at 9-10. That slurry was instead pumped into and hardened inside MSD's sewer lines, rendering those lines useless and requiring MSD to replace them. LF at 10.

The original petition asserted a claim for inverse condemnation against the City for damaging MSD's sewer lines. LF at 8-12. On January 21, 2014, the City moved to dismiss that claim. LF at 13-20. The City argued that, because MSD was a political unit rather than a private party, it lacked standing to bring an action for inverse condemnation. LF at 16-17. The City also argued that the petition failed to allege an affirmative act by the City sufficient to state a claim for inverse condemnation. LF at 18-20.

On April 1, 2014, the trial court granted the City's motion. LF at 37.

On May 2, 2014, MSD filed a motion for new trial and, in the alternative, for leave to file an amended petition. LF at 39-48. On May 14, 2014, the trial court entered an order granting MSD leave to file that amended petition. LF at 64.

The amended petition reasserted MSD's claims for inverse condemnation and

added claims for negligence and trespass against the City. The amended petition also included additional allegations of the City's conduct in damaging MSD's sewer lines, including allegations that the City participated in and directed the project by these actions and others:

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". LF at 77-78

On May 21, 2014, the City filed a motion to dismiss the amended petition. The City's arguments with respect to inverse condemnation were identical to its previous arguments. The City further argued that: (a) sovereign immunity barred MSD's tort claims; and (b) the amended petition did not state a claim for negligence or trespass. LF at 68-71.

On May 22, 2014, the trial court, "upon a finding that there is no just reason for delay," granted the City's motion to dismiss and entered judgment in favor of the City. LF at 74.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING MSD'S CLAIM FOR INVERSE CONDEMNATION AGAINST THE CITY BECAUSE THE PETITION STATED A CLAIM IN THAT IT ALLEGED THAT MSD'S PROPERTY WAS TAKEN OR DAMAGED BY THE CITY WITHOUT JUST COMPENSATION THROUGH AFFIRMATIVE ACTS BY THE CITY AND, AS A PROPERTY OWNER, MSD HAS STANDING TO BRING A CLAIM FOR INVERSE CONDEMNATION.

Heins Implement Co. v. Mo. Highway & Transp. Comm'n,
859 S.W.2d 681 (Mo. banc 1993)

Marin Mun. Water Dist. v. City of Mill Valley, 202 Cal.App.3d 1161 (Cal. App. 1988).

United States v. 50 Acres of Land, 105 S.Ct. 451 (1984).

II. THE TRIAL COURT ERRED IN DISMISSING MSD'S CLAIMS OF TRESPASS AND NEGLIGENCE AGAINST THE CITY BECAUSE THE PETITION ALLEGED FACTS SUFFICIENT TO SUPPORT CLAIMS FOR TRESPASS AND NEGLIGENCE IN THAT THE PETITION STATED 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 DOES NOT SHIELD THE CITY (A GOVERNMENTAL ENTITY) FROM LIABILITY FOR TORTIOUS ACTS AGAINST MSD (ANOTHER GOVERNMENTAL ENTITY).

Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. banc 1977)

O'Dell v. School Dist. of Independence, 521 S.W.2d 403 (Mo. banc 1975)

State ex rel. Missouri Highway and Transp. Comm'n v. Dierker,
961 S.W.2d 58 (Mo. banc 1998)

§ 537.600, RSMo

ARGUMENT

The judgment of the circuit court should be reversed because MSD stated a claim for inverse condemnation, trespass and negligence against the City. Taken as true, as they must be on appeal from a dismissal, the allegations of the petition show that the City damaged MSD's property. Like any other property owner, MSD is entitled to a remedy for this damage. The City's assertion that MSD has ***no remedy*** is wholly unsupported by the law; in fact, MSD has a constitutional right to a remedy for damage to its property. Mo. Const. art I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character . . .") (emphasis added).

Inverse condemnation is the remedy available to a property owner where its property is damaged by a condemning authority without just compensation. *See United States v. 50 Acres of Land*, 105 S.Ct. 451 (1984); *Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal.App.3d 1161 (Cal. App. 1988); *City of Keizer v. Lake Labish Water Control Dist.*, 60 P.3d 557 (Or. App. 2002); *see also State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819 (Mo. banc 1994); *State ex rel. Maryland Heights Fire v. Campbell,* 736 S.W.2d 383 (Mo. banc 1987)*; Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681 (Mo. banc 1993). The City has never cited any authority holding that a political unit whose property is damaged should be treated differently than other property owners.

Similarly, the City can point to no authority holding that a political unit is immune from tort claims brought by another political unit. On the contrary, a municipality enjoys

only "such sovereign or governmental tort immunity as existed at common law in the state prior to September 12, 1977." § 537.600, RSMo. That the City cannot demonstrate that political units were immune from torts brought by other political units prior to 1977 means that it cannot invoke the protections of sovereign immunity. Even if sovereign immunity is somehow generally applicable in this context, the City's conduct is exempt from its protections under the proprietary exception.

I. THE TRIAL COURT ERRED IN DISMISSING MSD'S CLAIM FOR INVERSE CONDEMNATION AGAINST THE CITY BECAUSE THE PETITION STATED A CLAIM IN THAT IT ALLEGED THAT MSD'S PROPERTY WAS TAKEN OR DAMAGED BY THE CITY WITHOUT JUST COMPENSATION THROUGH AFFIRMATIVE ACTS BY THE CITY AND, AS A PROPERTY OWNER, MSD HAS STANDING TO BRING A CLAIM FOR INVERSE CONDEMNATION.

The dismissal of MSD's claim for inverse condemnation should be reversed. The facts alleged in the petition show a textbook taking of property without just compensation, and the City's grounds for dismissal were baseless. The Court should reject the City's invitation to hold that a governmental entity is completely without a remedy under the facts of this case.

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010). A court reviews the petition to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause of action that might be adopted in that case. *Id.* In so doing, a court takes a plaintiff's averments as true and liberally grants the plaintiff all reasonable inferences. *Id.*

An appellate court reviews a trial court's granting of a motion to dismiss de novo. *Id.* 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 will not consider matters outside the pleadings. *Id.* The appellate court considers solely whether the grounds raised in the motion supported dismissal. *Id.*

A. MSD, as a property owner, has standing to claim inverse condemnation.

There is no legal authority in Missouri that stands for the proposition that MSD—because it is a political unit that owns property for the public's use—lacks standing to sue the City for inverse condemnation. On the contrary, Missouri law, as well as federal law and the law in other states, suggests that MSD's right to bring an inverse condemnation claim is no different than that of any private property owner.

The Missouri Constitution mandates that "private property shall not be taken or damaged for public use without just compensation." Mo. Const. art I, § 26.

Inverse condemnation is the remedy that assures that property owners "receive just compensation for that which was taken." *Harris v. L.P. & H. Const. Co.*, 441 S.W.2d 377, 381 (Mo. App. 1969); *Clay v. Mo. Highway and Trans. Comm.*, 951 S.W.2d 617, 627 n.2 (Mo. App. 1997) (explaining that inverse condemnation is "a cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of power of eminent domain has been completed"). Inverse condemnation is appropriate "when a condemnor physically accomplished a taking or damaging of private property carried out with none of the procedural or compensatory requirements of a regular eminent domain action." *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819, 824 (Mo. App. 1996); *Clay*, 951 S.W.2d at 627; *State ex. rel City of Blue Springs v. Nixon*, 250 S.W.3d 365, 371 (Mo. banc 2008).

This Court has repeatedly recognized that political units may, under certain circumstances, condemn each other's property. *See State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. banc 1994) ("A significant body of Missouri law has

addressed the issue of when condemnation of public property may occur for a new and different public use."); *see also, State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 385-87 (Mo. banc 1987) (St. Louis County had authority to condemn property owned by Maryland Heights Fire Protection District). The City clearly has the power to condemn MSD's property so long as the existing public use would not be harmed by the City's new and different public use. *Hodge*, 878 S.W.2d at 822. Moreover, the City may exercise the power of eminent domain under section 88.667, and is therefore a condemning authority.

There is thus no dispute that the City is a condemning authority; therefore, it can be liable to MSD for inverse condemnation when, as here, it fails to comply with the requirements of condemning property devoted to an existing public use. *See Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 691 (Mo. banc 1993) (because defendant had power to exercise eminent domain, it was proper to submit claim for property damage against defendant as an inverse condemnation claim), *abrogated in part on other grounds, Southers v. City of Farmington*, 263 S.W.3d 603, 614 n.13 (Mo. banc 2008); *Chiavola*, 931 S.W.2d at 824 (noting that inverse condemnation is the remedy for "an invasion or appropriation of a valuable property right that caused an injury" by a condemning authority).

B. A governmental entity has standing to claim inverse condemnation.

The City's primary argument that MSD lacks standing to seek relief through inverse condemnation relies on the term "private property" appearing in Article I, Section 26 of the Missouri Constitution: "That private property shall not be taken or damaged for

public use without just compensation." There is no Missouri case interpreting this section to exclude property owners that happen to be political units from bringing a claim for inverse condemnation. The courts that have considered the City's argument have rejected it. The City's other argument is that MSD lacks standing to sue in inverse condemnation because the City lacks the power to condemn MSD's property under section 88.667, which gives fourth class cities the authority to take "private property" for a public use. That argument fails because inverse condemnation is not an alternative to eminent domain and does not limit the scope of the property owner's remedy.

The Supreme Court of the United States has determined that the term "private property" in the Takings Clause of the Fifth Amendment of the Constitution of the United States includes "the property of state and local governments." *United States v. 50 Acres of Land*, 105 S.Ct. 451, 455-56 (1984). The Supreme Court reasoned that, when a public entity's land is taken, the loss to the public entity, the persons served by that entity, and to the taxpayers is "no less acute than the loss in a taking of private property." *Id*. at 456. The Supreme Court further held that "the same principles of just compensation presumptively apply to both private and public condemnees." *Id*. at 456.

In an extremely similar case from California, a local water district brought an inverse condemnation claim against a city to recover for damage to the district's pipes caused by the collapse of the city's streets. *Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal.App.3d 1161 (Cal. App. 1988). The defendant city argued that inverse condemnation claims arose from the California Constitution, which, like the Missouri Constitution, requires compensation when "private property" is damaged or taken. *Id*. at

1164 n.2. The city argued that the term "private property" demonstrated that inverse condemnation was a remedy solely for private landowners and did not provide for "the taking of public property in an inverse condemnation context." *Id*. at 1164. The court disagreed, holding that the district could state a cause of action for inverse condemnation against the city for its damaged pipes. *Id*. at 1164-65. To hold otherwise, the court noted, would ignore "basic fairness" because "a public entity whose property has been damaged by another public entity suffers no less a taking merely because of its public entity status." *Id* at 1165-66; *see also*, *City of Keizer v. Lake Labish Water Control Dist.*, 60 P.3d 557 (Or. App. 2002) (allowing a city to bring an inverse condemnation claim against a water district); *Texas Dep. of Trans. v. City of Sunset Valley*, 8 S.W.3d 727, 731 (Tx. App. 1999) ("[A] city has standing to bring suit against the State for appropriation of the city's streets.").

There is no basis in Missouri law to distinguish those cases from this one.[1] The reference to "private property" in the Missouri Constitution is nearly identical to that referenced in both the Fifth Amendment of the Constitution of the United States and the

[1] The Court of Appeals distinguished the *Marin Mun. Water* opinion stating that California had a "different legal scheme[] forming the basis of . . . [an] action[] for inverse condemnation." Opinion at 6 n.5. Respectfully, that rationale misstates the opinion, which makes clear that—like Missouri—inverse condemnation claims in California arise out of California's Constitution which, very similar to Missouri, states that: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid." *Marin Mun. Water*, 202 Cal.App.3d at 1164.

California Constitution. In fact, under the *50 Acres of Land* opinion, the federal government would be required to compensate MSD if it damaged MSD's sewer lines. It would be a strange result if the City could avoid paying MSD for an unlawful taking where the federal government would be required to compensate MSD for the same conduct.

Moreover, as noted in the Court of Appeals opinion, this Court previously held in *St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137 (Mo. banc 2011) that a county requiring Laclede Gas—an investor-owned, public utility—to relocate its gas lines without just compensation was an unconstitutional taking of private property. *Id*. at 139. This means that Laclede Gas would have a cause of action against the City had its gas lines been similarly damaged during the City's street project. Although both are public utilities, MSD was created pursuant to "the provisions of Section 30 of Article VI of the Constitution of Missouri" and operates pursuant to its Charter. *See* Charter (Plan) of The Metropolitan St. Louis Sewer District. On the other hand, Laclede Gas operates pursuant to the regulations set forth by the Missouri Public Service Commission. S*ee* http://psc.mo.gov. Notwithstanding those regulatory distinctions, there is no good legal or policy reason that some public utilities should be entitled to just compensation under the Missouri Constitution and others not.

Finally, it is irrelevant, as the City suggested in its motion to dismiss and in its appellate brief, that section 88.667 only allows it to condemn "private property" in an eminent domain proceeding and thus, does not allow it to condemn MSD's sewer lines. This is because inverse condemnation "is not an alternative to proper condemnation."

Harris, 441 S.W.2d at 381. Rather, it is the remedy for "improper conduct" by a condemning entity. *Id*.

MSD has standing to sue the City for inverse condemnation and is entitled to compensation for damage to its sewer lines.

C. The petition stated a claim for inverse condemnation.

MSD's petition contains allegations that state a claim for inverse condemnation. To state such a claim, a plaintiff must allege its property was taken or damaged by the public entity without just compensation. *Zumalt v. Boone County*, 921 S.W.2d 12, 16 (Mo. App. 1996). The property owner is required to plead an affirmative act by the condemnor and cannot base its claim on inaction. *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 370 (Mo. banc 2008).

In its amended petition, MSD alleged that "the City hired and directed [the other defendants] to perform work on the street project." LF at 80. Beyond hiring the other defendants to work on the project, MSD further alleged that the City directly participated in and directed work on the project. LF at 77. MSD alleged, for example, that the City participated in construction meetings, approved equipment and procedures used by the other defendants, directed the order and timing of work, and determined whether to perform certain work altogether. LF at 77-78. MSD also alleges that the City was involved with coordinating with MSD and other utilities in an attempt to avoid damaging those entities' property during the project. LF at 78. MSD did not, as the City suggested in its motion to dismiss, merely claim that the City failed to act.

That the City hired the other defendants who in turn damaged MSD's property

alone states a claim for inverse condemnation. *Clay v. Missouri Highway and Transp. Comm'n*, 951 S.W.2d 617 (Mo. App. W.D. 1997) (finding a claim for inverse condemnation proper where defendant hired a contractor to perform work that damaged the plaintiff's property). MSD's allegations, however, go further. The amended petition alleges that the City had direct involvement in supervising and directing the project that resulted in the damage to MSD's sewer lines. There is, therefore, no basis for the City's claim that the petition fails to allege affirmative acts.

II. THE TRIAL COURT ERRED IN DISMISSING MSD'S CLAIMS OF TRESPASS AND NEGLIGENCE AGAINST THE CITY BECAUSE THE PETITION ALLEGED FACTS SUFFICIENT TO SUPPORT CLAIMS FOR TRESPASS AND NEGLIGENCE IN THAT THE PETITION STATED 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 DOES NOT SHIELD THE CITY (A GOVERNMENTAL ENTITY) FROM LIABILITY FOR TORTIOUS ACTS AGAINST MSD (ANOTHER GOVERNMENTAL ENTITY).

As with its inverse condemnation arguments, the City can find no support for its assertion that it has a get-out-of-jail-free card to escape liability for its tortious conduct towards MSD. The City is unable to cite any pre-1977 Missouri common law standing for the proposition that sovereign immunity bars tort claims by other political units, which it must to invoke the protections of that doctrine. Moreover, even if sovereign immunity generally applies between governmental units, the common law proprietary exception bars its application to the facts of this case. The dismissal of MSD's tort claims should be reversed.

As noted, the standard of review is de novo. *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. banc 2010).

A. Sovereign immunity does not bar claims brought by another political unit.

Sovereign immunity does not shield the City from MSD's tort claims. Sovereign immunity does not protect one political unit from liability for torts it commits against

another political unit. Moreover, permitting the City to invoke sovereign immunity in this context would leave MSD without a remedy and could create chaos when political units deal with each other in the future, in the event that MSD's inverse condemnation claim is also denied.

The City seeks the protection of Section 537.600—the sovereign immunity statute—but by its plain terms, that statute does not protect the City from claims brought by MSD, or any other political unit. Section 537.600 adopts "such sovereign or governmental tort immunity as existed at common law in the state prior to September 12, 1977." *See Hensley v. Jackson County*, 227 S.W.3d 491, 494 (Mo. banc 2007). This statute must be strictly construed. *State ex rel. Missouri Highway and Transp. Comm'n v. Dierker*, 961 S.W.2d 58, 61 (Mo. banc 1998).

Thus, to invoke sovereign immunity, the City must demonstrate that, prior to September 12, 1977, the common law doctrine protected political units from tort claims by other political units. The common law rule of sovereign immunity has been recognized in Missouri since 1821. *Southers v. City of Farmington*, 263 S.W.3d 603, 609 (Mo. banc 2008). Despite close to two centuries of common law, the City has cited no Missouri case prior to 1977 (or after) where a Missouri court applied sovereign immunity to bar a claim brought by one political unit against another.

The Court of Appeals determined that Section 537.600 was generally applicable to tort claims brought by one political unit against another, reasoning that "sovereign immunity was the rule, not the exception and remains as such" in Missouri. Opinion at 8. Respectfully, the Court of Appeals misstates sovereign immunity law. While it is true

that sovereign immunity has been the rule for almost two hundred years for tort claims brought by *private* parties, it has never been the rule for tort claims brought by other *political* units. If it was, the City should be able to cite to a case demonstrating its application in this context, which it cannot. Thus, under a strict construction of Section 537.600, the City may not rely on sovereign immunity here.

The likely reason no common law can be found over a nearly 200 year history is because the historical rationales for sovereign immunity (as discussed in the two leading Missouri Supreme Court opinions) do not apply where the plaintiff and defendant are both governmental units of the State. *See O'Dell v. School Dist. Of Independence*, 521 S.W.2d 403 (Mo. banc 1975) (dissent); *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977) (adopting the dissent in *O'Dell*), *abrogated by statute*.

- Costs to the public: A suit against a governmental unit is a suit against the public, and it is unfair for the public to be responsible for those liabilities. *O'Dell*, 521 S.W.2d at 414; *Jones*, 557 S.W.2d at 228. Both the City and MSD, however, are political units of the State, funded by the public. The public is therefore equally burdened if MSD has no recourse to collect against the City for damages caused by the City.
- The king can do no wrong: *Id*. This concept is that the government (or king) is infallible. The logic of this rationale fails where both plaintiff and defendant are governmental units with opposing positions, both incapable of doing wrong.
- Suits against the government promote waste: According to this

justification, public officers should not be permitted to bind the government—and the public at large—without a specific constitutional or statutory grant of power. This is because, should the general rules of respondeat superior be applied to public officers, it would promote "wasteful conduct" and "dissipate public funds." *O'Dell*, 521 S.W.2d at 415; *Jones*, 557 S.W.2d at 228-29. That one political unit has no recourse when another political unit damages its property does much more to encourage wasteful conduct. This case is a perfect example. If there is no risk that the City can be liable for damaging MSD's property, there is no incentive to take reasonable precautions to protect MSD's property in the future, which will likely cause the public to absorb additional damages to MSD's property.

- Undermines government function and financial stability: Governmental units come into contact on a regular basis. If those bodies are permitted to damage each other's property with no fear of repercussions, there is a risk that these units will not work together or work at cross purposes.

These traditional public policy rationales do not compel application of sovereign immunity in an action by another governmental entity. If anything, they require an opposite conclusion. Fairness dictates that MSD, and all political units, have a remedy against other political units for property damage. *See Marin Mun.*, 202 Cal.App.3d 1165-66 ("[A] public entity whose property has been damaged by another public entity suffers no less a taking merely because of its public entity status."); *50 Acres of Land*, 105 S.Ct.

at 455 (noting that the loss to the public entity, the persons served by that entity, and to the taxpayers is "no less acute than the loss in a taking of private property").

Moreover, public utilities must regularly work with municipalities and other political units. MSD must access its sewer pipes by digging beneath municipal property. If the City is correct and MSD has no remedy here, there is nothing to compel MSD when dealing with the City's property in the future to conduct its operations with reasonable diligence or even to repair the City's property after accessing and repairing its sewer pipes. This result would be inefficient, impede improvements by political subdivisions, and unnecessarily create conflicts among governmental entities.

Finally, this Court noted in *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756 (Mo. banc 2010) that there are certain claims that political units should be permitted to bring against other political units where private plaintiffs are not. In that case, one city sued a second city for a declaratory judgment in a boundary dispute. The defendant city moved to dismiss, claiming that it could only be sued in *quo warranto* by a prosecuting attorney or the state attorney general, and the trial court agreed, dismissing the case for failure to state a claim. This Court reversed, holding that *quo warranto* is the exclusive remedy only in actions between an individual litigant and a city, but that rule does not apply between two cities: "To require a directly affected municipality or other similar public corporation to rely on a third party—the attorney general or a county prosecutor—to bring suit over its very boundaries ***would risk leaving it without a remedy*** if the attorney general and prosecutor exercise their discretion not to act. While this is appropriate where an individual litigant is involved, . . . such reasoning does not apply to

the municipality or other public corporation itself, as it has a direct and vital interest in determining its own boundaries." *Id.* at 763 (emphasis added). Similarly, sovereign immunity could leave MSD without a remedy and the rationales for sovereign immunity applied to claims by private individuals do not compel its application here.

Because there is no common law prior to 1977 (or after) barring tort claims by another political unit and public policy does not favor its application here, the trial court should be reversed with respect to MSD's tort claims.

B. The proprietary exception to sovereign immunity is applicable.

Even if sovereign immunity generally bars torts against the City brought by another political body, as noted by the Court of Appeals, maintenance and improvements of streets are, according to this Court, proprietary functions, which implicate a common law exception to sovereign immunity.

In addition to the statutory exceptions stated in Section 537.600, municipalities remain subject to the "governmental/proprietary" exception. *State ex. rel. Bd. Of Trustees of City of N. Kan. City Mem'l Hosp. v. Russell*, 843 S.W.2d 353, 358-59 (Mo. banc. 1992). This is because prior to the enactment of Section 537.600, Missouri common law recognized that "municipalities were not protected by sovereign immunity for torts arising from their proprietary functions but were protected from such torts arising from their governmental functions." *McConnell v. St. Louis County*, 655 S.W.2d 654, 656 (Mo. banc 1983). This exception applies only to municipalities and does not apply to the State or its political subdivisions (like MSD). *Id*.

Application of this exception depends on the character of the act performed. *Allen*

v. Salina Broadcasting, Inc., 630 S.W.2d 225, 228 (Mo. banc 1982). While the distinction between governmental and proprietary duties is "sometimes obscure," generally an act performed "for the common good of all" is governmental. *Aiello v. St. Louis Community College*, 830 S.W.2d 556, 558 (Mo. banc. 1992). By contrast, an "act[] performed for the special benefit of the municipal corporation" is proprietary "in that it provides local necessities and conveniences to [the municipality's] own citizens." *Id*. This Court previously noted that "laying out, building, and maintaining city streets are proprietary functions." *Russel*, 843 S.W.2d at 359. Thus, even if sovereign immunity applies to MSD's tort claims against the City, the tortious conduct alleged against the City arose during a street resurfacing project. Thus, sovereign immunity is unavailable to the City for the torts it committed in connection with this proprietary function.

C. The petition states a claim for trespass.

A claim of trespass rests on the unauthorized entry of the defendant onto the property of the plaintiff regardless of the amount of force used or amount of damage done. *Grossman v. St. John*, 323 S.W.3d 831, 834 (Mo. App. 2010).

The petition alleges that the defendants, including the City, caused concrete slurry to enter and harden in MSD's sewer lines, that those sewer lines were damaged as a result, and that this entry was done without MSD's consent. As set forth in the preceding section, the petition contains detailed allegations about the City's role in directing and supervising this unauthorized entry that led to the destruction of MSD's sewer lines. The City inexplicably argues that MSD only alleged facts attempting to hold it liable for the tortious acts of the other defendants. This is not accurate. The petition plainly states a

claim for trespass based on the City's own acts.

D. The petition states a claim for negligence.

To plead negligence, the petition must include allegations that the City had a legal duty to conform to a particular duty of care, breached that duty, and as a result of that breach, caused damage to MSD's property. *Hoover Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 726 (Mo. 1985). The petition alleges that, while the city was performing work on the Project, it had a duty to design, implement, and construct the project in a professional and workmanlike manner. But, when performing work on the project (including the acts described in section I(C) of this brief and in the petition), the City failed to exercise reasonable care which led to damage to MSD's sewer lines. MSD is not alleging that the City is liable for the negligent acts of its contractors as stated in the City's motion to dismiss. The allegations very clearly state a claim for negligence against the City for its own conduct.

CONCLUSION

There is no legal basis for finding that MSD lacks standing to sue the City for inverse condemnation. As a property owner, MSD has the same rights as any other property owner whose property is damaged by a condemning authority such as the City. Moreover, sovereign immunity did not exist at common law in this context prior to 1977; thus, sovereign immunity does not shield the City from tort liability here, and even if it did, the proprietary exception applies.

For the forgoing reasons, the judgment of the circuit court should be reversed and the matter should be remanded for a resolution of the dispute between the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on April 6, 2015.

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 5,992, excluding the cover, the signature block, and this certificate.

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/s/ Christopher R. LaRose