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 REPLY BRIEF OF APPELLANT METROPOLITAN ST. LOUIS SEWER DISTRICT

Byron E. Francis #23982
Christopher R. LaRose #59612
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, Missouri 63105
(314) 621-5070 (Telephone)
(314) 621-5065 (Facsimile)
bfrancis@armstrongteasdale.com
clarose@armstrongteasdale.com

Attorneys for Appellant
Metropolitan St. Louis Sewer District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The City accuses MSD of attempting to "neuter sovereign immunity" even though MSD regularly invokes its protections. While it is true enough that MSD has invoked sovereign immunity in cases involving tort claims brought *by individuals*, the issue before the Court is whether or not a political unit has a remedy—either for inverse condemnation or in tort—against another political unit for damaging its property. The City refuses to meet that question head on.

The City's brief avoids even mentioning the cases cited by MSD suggesting that political units have the right to bring inverse condemnation claims against other political units. *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). Likewise, the City cannot explain how it can invoke the protections of § 537.600 without first demonstrating that sovereign immunity shielded a political unit from tort claims brought by another political unit at common law prior to 1977.

The City inexplicably claims that this appeal is not about whether or not MSD has a remedy. This is because, according to the City, MSD has asserted claims against other defendants for the same harm. That MSD may one day obtain a judgment against other defendants, however, is irrelevant to the question of whether MSD has a remedy *against the City* for the City's conduct. Moreover, there is no guaranty that MSD will prevail against the other defendants, collect on any judgment it obtains, or ever be made whole.

Rather than deal with the questions presented, the City instead spends most of its brief arguing that the petition failed to adequately plead causation, but cannot cite a

single case where a petition was dismissed on that basis at the pleadings stage. Indeed, viewed in any light, and certainly in the light required by the Court's standard of review of a dismissal, MSD's allegations of fact are clearly sufficient to state a claim for inverse condemnation, trespass and negligence.

The judgment of dismissal should be reversed, and this action should be remanded for trial on the merits.

A. MSD has standing to bring a claim for inverse condemnation.

The City first argues that the protections of Article I, § 26 of the Missouri Constitution do not extend to MSD because that section protects only "private property," but avoids even mentioning the cases that have dealt squarely with that issue. In *50 Acres of Land,* the Supreme Court of the United States held that the term "private property" included "the property of state and local governments" and that "the same principles of just compensation presumptively apply to both private and public condemnees." *United States v. 50 Acres of Land*, 105 S.Ct. 451, 455-56 (1984). Likewise, in *Marin Mun. Water Dist. v. City of Mill Valley*, 202 Cal.App.3d 1161 (Cal. App. 1988), a California court resolved the same argument presented by the City here and held that the plaintiff, a water district, could maintain an inverse condemnation claim against the defendant, a city, regardless of the term "private property" appearing in the takings clause of the California Constitution. The City simply ignores these two cases and makes no attempt to distinguish them.

The City instead relies exclusively on two unrelated cases, *City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375 (Mo. banc 1991) and *State ex rel. Brentwood School Dist. v. State Tax Comm'n*, 589 S.W.2d 613 (Mo. banc. 1979). Resp. Brief at 13. In both those cases, this Court merely held that political units lacked standing to invoke the protections of due process or equal protection under the State and Federal Constitutions. Unlike *50 Acres of Land* and *Marin Mun.*, neither case interpreted the term "private property", or dealt with the concept of whether a political unit is entitled to just compensation.

While the City mentions *St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137 (Mo. banc 2011), it fails to distinguish that case in any meaningful way. In that case, this Court held that public utilities like Laclede Gas are entitled to just compensation when their property is taken by a municipality. The City attempts to distinguish that holding because Laclede Gas is a public utility as defined in § 386.020(43), as opposed to MSD that is a sewer district established pursuant to Article VI, § 30, but fails to articulate why that distinction should matter from a legal or public policy perspective. The City merely states without explanation that Laclede "lacks the essential auspices of a public entity." This is despite the fact that, much like MSD, it is an entity providing utility services to the public for a fee. It would be illogical if Laclede Gas could bring a claim for inverse condemnation against the City while MSD is left without a remedy for the same conduct.

The City also argues that MSD lacks standing because, under § 88.667, the City may only condemn "private property" in an eminent domain proceeding. The City, however, cites no authority that suggests that a landowner's inverse condemnation claim is somehow limited by the condemning power's eminent domain authority. On the contrary, Missouri courts have long held that inverse condemnation is not, as the City's argument presumes, "an alternative to proper condemnation," but rather is the remedy for improper conduct by a condemning authority. *Harris v. L.P. & H Const. Co.*, 441 S.W.2d 377, 381 (Mo. App. 1997); *Clay v. Mo. Highway and Trans. Comm.*, 951 S.W.2d 617, 627 n.2 (Mo. App. 1997).

The City does not deny that under certain circumstances it can condemn MSD's property. *See State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo.

banc 1994). If the City can condemn MSD's property under any circumstances, it is a condemning authority that can be sued for inverse condemnation when it takes MSD's property improperly. *Heins v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 691 (Mo. banc 1993).

As a result, MSD is entitled to just compensation for its damaged sewer lines, and has standing to sue the City for inverse condemnation.

B. MSD's tort claims are not barred by sovereign immunity.

The City cannot demonstrate that it can invoke the protections of sovereign immunity under § 537.600. By its plain terms, § 537.600 codified only "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). There is simply no way for the City to invoke sovereign immunity without first demonstrating that sovereign immunity as between two governmental units actually existed at common law prior to September 12, 1977. This is not, as the City claims, a "red herring" or an attempt to make the City "prove a negative." On the contrary, similar to a statute of limitations defense, the City must demonstrate that the statute applies to the claims presented in the petition.

Rather than address this fundamental issue, the City instead spends its brief defeating arguments that MSD has not made. MSD is not arguing, as the City states, that "MSD's status as a public entity strips the City of sovereign immunity;" that "sovereign immunity was waived . . . because MSD is a public entity;" or that this Court is being invited to "create another exception to the general rule of sovereign immunity." Resp.

Brief at 25-26. Because sovereign immunity does not apply in the first place, there is no need for this Court to create any exception to, or waiver of, the doctrine.

The City mischaracterizes *Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442 (Mo. banc 2004), claiming it "presumed the general application of sovereign immunity in the absence of a recognized waiver." Resp. Brief at 29. In that case, this Court held that a City could be liable in tort because supplying water was a propriety function and therefore "sovereign immunity principles do not apply." *Id*. at 448-49. It did not presume the general application of sovereign immunity. On the contrary, *Junior College* actually supports MSD's position. Municipalities are not protected by sovereign immunity when performing proprietary functions under the statute because they were not protected by sovereign immunity when performing those functions at common law prior to 1977. *McConnell v. St. Louis County*, 655 S.W.2d 654, 656 (Mo. banc 1983). This case is no different—at common law, sovereign immunity never shielded one sovereign from the tort claims of another sovereign.

The City claims that MSD's argument "rings hollow" because it has invoked the protections of sovereign immunity in the past. Resp. Brief at 27. That MSD has invoked the doctrine is irrelevant. All three cases cited by the City were brought by individual claimants.[1] Whether political units may invoke sovereign immunity in response to claims brought by individuals (rather than other sovereigns) is clearly not the issue before this

[1] In fact, it is because MSD invokes the doctrine of sovereign immunity that it is regularly sued for inverse condemnation, which is the remedy MSD primarily seeks to invoke against the City in this lawsuit.

Court.

Finally, although MSD did not advance the argument at the trial level, the Court of Appeals noted that this Court previously found in *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) that street maintenance was a propriety function not protected by sovereign immunity. The City disagrees with the *Russell* Court and contends that street maintenance should be considered a governmental function. *Russell*, however, is the only case that appears to have addressed the issue, and therefore should be dispositive.

C. MSD pleaded facts that state a claim for relief for each of its three claims.

Rather than confront the primary issues before the Court, the City uses most of its brief arguing that the factual allegations in the petition are inadequate to plead causation. It claims that the petition does not adequately plead that the City was a "but for" or "proximate" cause of the damage to MSD's sewer lines. The City, however, fails to cite even a single case where a petition was dismissed at the pleadings stage on that basis.

When reviewing the sufficiency of the petition, all averments must be taken as true, and MSD is given the benefit of every reasonable inference. *Envirotech v. Thomas,* 259 S.W.3d 577, 585 (Mo. App. 2008).

A petition need not include the phrase "but for" because "causation can be reasonably inferred from [the] allegations." *Id.* at 591. While MSD must plead and prove that the City's actions were a "but for" cause of MSD's property damage, "[i]t is neither an onerous or difficult test for causation." *Thomas v. McKeever's Enter., Inc.,* 388 S.W.3d 206, 212-13 (Mo. App. 2013); *see Indus. Testing Lab., Inc. v. Thermal*

Science, Inc., 953 S.W.2d 144, 147 (Mo. App. 1997) ("Giving the petition its broadest intendment, plaintiff's causation allegation is sufficient."); *Wahl v. Marschalk,* 913 S.W.2d 432, 434 (Mo. App. 1996) (reversing trial court because there was causal nexus pled).

MSD must simply show that the City's conduct was "a cause of the event if the event would not have occurred 'but for' that conduct." *Thomas,* 388 S.W.3d at 212. It is settled that "but for" causation is generally a jury question. *Id.* at 212.

The City inexplicably argues that because the petition alleges that Sherrell Construction and Lift Rite contributed to causing the same injury, the City's actions could not have caused MSD's damage. But it is settled that MSD is not required to show that the City's actions were "the exclusive cause" of the harm. *Id.* at 213. Where—as is alleged here—there are multiple defendants that contributed to cause the same harm, MSD must show only that the City's actions caused or contributed to cause that harm. *Id.* This is because "but for" causation is present even if: (a) the City's actions combines with the other defendants' acts or any other independent, intervening causes; and (b) the City's conduct alone would not have damaged MSD's sewer lines. *Wagner v. Bondex Int'l, Inc.,* 368 S.W.3d 340, 350 (Mo. App. 2012).

The petition is replete with allegations that the City participated in and directed work on all aspects of the street improvement project, and those actions caused concrete slurry to enter and harden in MSD's sewer pipes thereby causing damage to those pipes. L.F. at 77-78. The petition contains specific allegations detailing the City's extensive involvement in the project, including: participating in construction meetings; approving

the use of particular equipment, specifications and procedures; directing the timing of when work was to be performed; and determining whether particular work would be performed at all. L.F. at 78.

The petition even alleges that the City was responsible for coordinating with MSD and other utilities to prevent the exact type of harm that was caused here. L.F. at 78. The petition goes on to allege that the City's actions designing, implementing and constructing the project were negligent. L.F. at 80. It does not require a major inferential leap from those allegations to conclude that the City's actions were a "but for" cause of MSD's damages. For instance, if the City had properly coordinated with MSD to avoid damaging MSD's sewer lines, MSD sewer lines would not have been damaged. Or, had the City not directed the other defendants to perform slab work at the location it chose, the damage would not have occurred.

The City's argument that it is somehow significant that there are no allegations that City employees actually pumped slurry into MSD's sewer lines is nonsensical. This is true because both the City and the defendants can both be a cause of MSD's damages—each for their own conduct. And the City's claim that the allegations against it are merely "supervisory" mischaracterizes the petition.

The City's new proximate cause argument, raised for the first time before this Court, is that the actions of Sherrell and Lift Rite were intervening causes such that they severed the City's liability. The City is therefore arguing that the petition fails to allege proximate cause. *Simonian v. Gevers Heating & Air Conditioning, Inc.*, 957 S.W.2d 472, 475 (Mo. App. 1997). Like "but for" causation, "[w]hether proximate cause exists is

usually a jury question." *Id*. In *Simonian*, the Court found that, in determining whether the plaintiff had pleaded proximate cause, it could not "consider plaintiff's allegations against [the other defendant], which defendant argue[d] constitute[d] an intervening cause, in determining whether [the petition] state[ed] a cause of action [against the moving party]." *Id*. at 476. Even if the Court could consider whether an intervening cause exists from allegations in the petition for purposes of a motion to dismiss, it is impossible to say, drawing all reasonably inferences in favor of MSD, that the City's negligent acts in planning and implementing all aspects of the Project were not "an efficient cause which sets in motion of chain of circumstances leading to" MSD's property damage. *Id*.

Finally, the City argues that there is no allegation in the petition that the City caused an unauthorized entry into the sewer lines or that its breaches of duty caused damage to MSD. Both claims are inaccurate. L.F. at 78 ("Defendants, while performing work on the Project, caused slurry to enter and harden in several of MSD's sewer lines located in the City."), 79 ("Defendants breached their duties of care by causing slurry . . . to enter MSD's sewer lines, which rendered them useless and required MSD to incur considerable expense to repair and replace.").

CONCLUSION

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,

/s/ Christopher R. LaRose
Byron E. Francis #23982
Christopher R. LaRose #59612
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, Missouri 63105
(314) 621-5070 (Telephone)
(314) 621-5065 (Facsimile)
bfrancis@armstrongteasdale.com
clarose@armstrongteasdale.com

Attorneys for Appellant
Metropolitan St. Louis Sewer District

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on May 29, 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 2944, excluding the cover, the signature block, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Christopher R. LaRose