IN THE MISSOURI SUPREME COURT

Appeal No. SC 85583

The Junior College District of St. Louis, St. Louis County

Respondent,

vs.

City of St. Louis,

Appellant.

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF STIPULATED AND ADMITTED FACTS

This case was tried under stipulated facts. A copy of the stipulation is attached as an appendix to this brief. Notwithstanding the parties' stipulation, appellant, the City of St. Louis ("City"), has included in its brief a statement of facts that deviates materially from the actual facts stipulated by the parties. Indeed, the City's statement of facts is both incomplete and inaccurate.

For example, the City states that "[t]he trial court made no finding as to any contributory negligence by Plaintiff…" *City Brief* at 16. This misstates the record. To the contrary, the trial court expressly found there was *no contributory negligence* by the College: "City has not articulated any act or omission on the part of College that would constitute a breach of duty." [LF 55].

In addition, the City omits reference to critical stipulated and admitted facts, including, for example, the following two facts:

- **The City operated the water main in Oakland Avenue in its proprietary function. [LF 32].**
- **The principal amount of the damages to which the College is entitled if the City is found liable is $5,825,161. [LF 40].**

Rule 84.04(f) permits respondent, the Junior College District of St. Louis, St. Louis County, Missouri ("College"), to include its own statement of facts if dissatisfied with the accuracy or completeness of that filed by the City. College therefore

submits its statement of stipulated and admitted facts as an alternative to the City's submission. The following facts were either stipulated to by the parties in their joint stipulation of fact [LF 29-42], or admitted by the City in its answer and amended answer or its trial brief filed in the trial court [LF 24-27].

1. Historical facts.

A. A flood damages the College's property.

At 3:00 p.m. on the afternoon of October 23, 1997, a flood broke out at the College's Forest Park campus when an underground water pipe suddenly burst. [LF 30]. Water gushed from the ruptured pipe for ***five hours*** while College and City employees tried to find the shut-off valve. [LF 39]. The problem was that ten years earlier the City had paved over the manhole allowing access to the valve — without marking the spot or notifying the College. [LF 34]. By the time the valve was located, unearthed, and shut off, half a million gallons of water had flooded campus buildings. [LF 39]. The College suffered $6,830,667 in property damage as a result of the catastrophy. [LF 39].

1. Construction of the Forest Park campus water system.

The College, a political subdivision of the State of Missouri, built its Forest Park campus in the early 1960s. [LF 29, 32]. The campus is set along the south side of Oakland Avenue. [LF 32]. During construction, the College had several underground water lines installed to service the campus buildings. [LF 32]. These lines tapped into the City's Oakland Avenue water main line and were located on City property. [LF 30, 33]. The line that later burst, causing the 1997 flood, supplied the campus' fire suppression system. [LF 32-33, 37]. This supply line was located within six feet of another water supply line. [LF 32-33].

The valves controlling the flow of water from the City's water main through the College's supply lines are contained in underground concrete boxes. [LF 33]. These "stop boxes" are accessed through manholes that, at the time of construction, were located along the side of Oakland Avenue outside of the paved portion of the roadway.[2] [LF 33]. The two supply

[2] The joint stipulation of fact refers to stop boxes and shut-off valves. The lid to the stop box is what is commonly referred to as the manhole cover. The manhole leads to the interior of the stop box. The shut-off valve is the large valve or faucet found inside the manhole or stop box. The stop box is also sometimes referred to as the valve box.

lines each had separate shut-off valves and were accessed through separate manholes. [LF 33]. These manholes were also within six feet of each other. [LF 33].

Sometime after construction, but before 1987, the City widened the portion of Oakland Avenue abutting the campus to include the area where the manholes were located. [LF 34]. As a result, the manholes leading to the College's shut-off valves are now located within the paved portion of Oakland Avenue. [LF 34].

2. The College's consumer relationship with the City.

The City is a municipal corporation existing and organized under Missouri statutes. [LF 29]. The City, through its Water Division, distributes and sells water to residential, commercial, and industrial customers. [LF 29]. The College is one of the City's customers. [LF 29, 32]. The City has billed the College on a quarterly basis for water supplied to the Forest Park campus since the campus opened. [LF 33]. The College's service lines are owned by the College and do not supply water to any other customers. [LF 30, 33]. The City stipulated that it supplies water to the College for profit in its proprietary capacity. [LF 32].

3. 1987 Oakland Avenue re-paving: the City conceals the College's shut-off valve.

In 1987, the City repaved the portion of Oakland Avenue abutting the Forest Park campus. [LF 34]. Although the repaving raised the grade of the street, the City did not raise the opening to the stop box containing the shut-off valve to the College's fire suppression system's supply line. [LF 34]. The opening to the stop box could have easily been raised to the new grade by attaching one or more steel collars to the manhole opening. [LF 34].

Instead, the City paved over the existing manhole cover altogether. [LF 34]. The City failed to mark that spot so that the manhole could be found underneath the pavement. [LF 34]. The City also failed to notify the College of what it had done. [LF 34, 37]. The supply line manhole cover — only six feet away — was raised so that it was flush with the pavement at its new grade. [LF 34-35]. The parties' stipulation states that it is "unknown who raised the opening for the supply line following the 1987 re-paving." [LF 34-35].

4. The City's recognition of the need for accessible stop boxes.

The City has enacted several ordinances requiring stop boxes to be accessible and exposed. Chapter 23.12 of the St. Louis City Revised Code, last amended in 1960, provides in part as follows:

> **23.12.010 Repair required.**
>
> Stop boxes over the shut off valves on all service pipes must be kept in repair, exposed and accessible at all times by the agent, owner or occupant of the premises supplied by such service pipes.
>
> **23.12.020 Notice to repair.**
>
> Whenever a stop box or shut off valve is found by the water commissioner to be broken, in need of repairs, covered up or in any way inaccessible, he shall notify the agent, owner or occupant to repair, locate or uncover the stop box or shut off valve within five days. Failure by the agent, owner or occupant to comply with such notice shall be sufficient to warrant for the water commissioner to excavate and shut off the water at the curb or at the main, in his discretion.

[LF 35-36]. The City never gave the College notice that its stop box was covered or inaccessible. [LF 34, 37].

In 1993, the City enacted a new ordinance recognizing that it was the City's duty to restore accessibility whenever the City was responsible for covering a stop box during street work:

> **23.04.185 Stop boxes over shut off valves — Accessibility.**
>
> Notwithstanding the provision of any other ordinance, the Water Division with funds from the Water Division shall, by contract or otherwise, expose, make street level, and make accessible stop boxes over shut off valves whenever the City of St. Louis, by contract or otherwise, is responsible for covering said stop boxes during street repair or resurfacing.

[LF 35].

The City, through its Water Division, issued an internal document called the *Foreman's Manual*. [LF 36, 41-42]. The manual dated May 15, 1990 contains a drawing dated September 1980 depicting the connection between a City water main and a property owner's water supply pipe. [LF 36, 42]. The notation on the September 1980 drawing states: "Concrete Valve Box Furnished, Installed, Owned By The Owner And *Maintained By Water Division* At Owner's Expense." [LF 36-37, 42 (emphasis added)].

The City stipulated that at no time in the ten years before the flood did the City perform any maintenance on the concealed stop box and shut-off valve. The City also stipulated that it did not uncover or mark the location of the concealed stop box. The City never excavated or

shut-off the College's fire line because of the inaccessibility of the shut-off valve. [LF 37]. The College also did not perform any maintenance on the valve or stop box, or uncover or mark the location of the concealed stop box. [LF 37].

There is nothing in the record to suggest that stop boxes or shut-off valves require regular maintenance.

5. The flood: City employees take hours to find a single shut-off valve shown on their own drawings.

The College's fire line ruptured and began flooding the Forest Park campus at 3:00 p.m. [LF 37]. Within minutes the College's maintenance crew discovered the problem and immediately set out for Oakland Avenue to shut off water service to the campus. [LF 37]. The crew went straight to the campus' main entrance, which is the area where the adjoining fire line and supply line valves are located. [LF 37]. They saw the at-grade supply line manhole cover and immediately accessed and shut off that valve by 3:20 p.m. [LF 37-38]. The fire line valve, however, was buried out of sight beneath the street pavement. The maintenance crew did not know of the existence of the concealed valve, and thus did not realize that there was a second valve at that location. [LF 37-38].

The College had a set of engineering drawings prepared by the City Water Division showing the exact layout and location of all shut-off valves tapped into the Oakland Avenue water main. [LF 38]. These drawings were stored in the College's maintenance office located on the basement level of the campus and were inaccessible because of the flood. [LF 38]. The City Water Division had an identical set of these drawings. [LF 38].

City Water Division employees were called and arrived at the campus at 3:25 p.m. [LF 38]. They brought their set of drawings with them. [LF 38]. With the Water Division's assistance, the maintenance crew located and closed all accessible valves on Oakland Avenue in the vicinity of the campus. [LF 38]. Water from the ruptured fire line, however, continued to flood the campus. [LF 38]. Even though the City's drawings accurately depicted the exact location of the concealed shut-off valve, its Water Division employees failed to recognize that the concealed valve even existed. [LF 38].

At 5:00 p.m., while the ruptured pipe continued to gush water into campus buildings, the City's Water Division employees left the scene to service another water main break, taking their drawings for the campus' water system with them. [LF 38]. The Water Division employees returned at 6:30 p.m., an hour and a half later, and resumed their efforts to locate and close the open valve. [LF 38]. They still could not find it. [LF 39]. By this time, the College had hired a private plumbing contractor to assist in the job. [LF 39]. At 8:00 p.m., four and one-half hours after Water Division employees first arrived on the scene, the City's employees finally located the fire line valve using a flow meter. A flow meter is a sound amplifying device that detects the sound of water flowing through underground pipes. [LF 39]. The plumbing contractor then ripped up the pavement concealing the manhole cover and shut off the valve. [LF 39]. The five hour flood came to an immediate stop. [LF 39].

6. The City stipulates to damages.

The College sustained $6,830,667 in property damage from the half-million gallons of water that flooded campus buildings. [LF 39]. Had the stop box not been concealed beneath the pavement, the fire line valve would have been shut off at 3:20 p.m., the same time as the adjoining supply line valve. [LF 39]. Had the valve been promptly closed, the College's damages would have been limited to $1,005,506. [LF 39]. The City stipulated that if it was liable, the College was entitled to $5,825,161 in damages. [LF 39-40].

There is no indication in the record that the stipulated damages figure was the result of negotiation and compromise. Damages were stipulated because there was no evidence or factual basis to dispute them.

2. Procedural facts.

A. The petition for damages.

The College filed a three-count petition against the City for its negligence. [LF 10-16]. The petition alleged that the City "owned, operated and maintained a municipal water distribution system through which it supplied water to the COLLEGE, including the Forest Park campus, for compensation." [LF 11]. The City admitted the truth of this allegation in both its original and first amended answers. [LF 24, 26].

Counts I and III of the petition alleged common law negligence against the City, asserting various deficiencies in its operation of the water business as it related to the College. [LF 12-13, 15-16]. Count II alleged that the City was negligent for failing to follow § 23.04.185 of the City Code, which requires the City to expose and make accessible stop

boxes over shut-off valves whenever paved over by the City or its contractors. [LF 14]. The trial court dismissed count II, holding that there was no separate cause of action arising from the City's failure to follow its own ordinance. [LF 22]. The trial court held, however, that the ordinance could be relevant and admissible as evidence of the standard of care applicable to the City. [LF 22].

7. The City's answer and affirmative defenses.

The City denied all allegations of negligence and asserted affirmative defenses. [LF 26-27]. The City asserted that it was immune from suit under the sovereign immunity statute, Section 537.600, RSMo.; that it was immune from suit under the public duty doctrine; that the College was contributorily negligent; and that damages were limited to $100,000 under Sections 537.600.1(2) and 537.610.2, RSMo., which creates a limited exception to sovereign immunity for injuries resulting from a dangerous condition of property. [LF 27].

8. The parties submit on stipulated facts.

The parties filed a joint stipulation of fact that both parties agreed stated "all of the facts relevant to the Court's determination of the claims and defenses asserted." [LF 29].

The stipulation also stated the legal issues that the parties agreed were the only issues relevant to a decision in the case, stating:

> If the Court finds that the City had a duty to either (a) to maintain the shut-off valve so that it was both visible and accessible, or (b) to otherwise mark the existence and location of the shut-off valve at its location, or (c) to properly train and equip its Water Division employees to locate, access, and operate shut-

> off valves during flooding emergencies, and that the City breached any of these duties, then the Court must enter judgment against the City for the entirety of the College's damages, unless the Court finds either (a) that the City is immune from liability by reason of sovereign immunity or (b) that the College had a duty to monitor the shut-off valve and restore its access to street grade following the Oakland Avenue repaving and that the College breached this duty. If the Court finds that the City is immune from liability by reason of sovereign immunity, then the Court must enter judgment in favor of the City. If the Court finds that both the City and the College were negligent, then the Court must apportion the College's damages between them based upon their percentages of contributory fault and enter judgment accordingly.

[LF 31-32 (Stipulation No. 7)].

The parties waived a jury trial, submitting the case for a bench trial on the joint stipulation of fact and briefs, without further evidentiary hearing. The parties did not waive argument, however, agreeing to make their arguments by way of trial briefs. [LF 43].

9. The parties' trial briefs and the City's abandonment of two of its pleaded affirmative defenses.

The College contended that the City was not immune from liability because the City was acting in a proprietary capacity in selling water for money. [SLF 84]. The City countered that the College had not alleged a "dangerous condition" of City property, and that the waiver of sovereign immunity provided by Section 537.600.1(2) therefore did not apply. The City also contended that the City, through its Street Department, was acting in a governmental capacity in paving over the stop box. [SLF 90].

The College asked the trial court to find the City liable for the stipulated amount of damages and to award prejudgment interest. [SLF 64]. The City objected to prejudgment interest solely on the ground that the damages were allegedly not liquidated. [SLF 97].

Although the City's answer raised immunity under the public duty doctrine and also asserted limitation of damages under Section 537.610.2, the "dangerous condition" exception to sovereign immunity, as affirmative defenses, the City did not raise or argue either of those defenses in its trial brief. [SLF 89-98]. Indeed, as to its alleged defense of limitations of damages, the City stipulated that if it were found liable, the College would be entitled to recover damages in the principal amount of $5,825,161. [LF 39-40].

Because the City did not raise either of these affirmative defenses in its trial brief, the trial court made no ruling on either the public duty doctrine or limitation of damages. [LF 45-56].

10. Trial court judgment.

The trial court held that the City could not assert sovereign immunity as a defense because it was acting in a proprietary capacity in supplying water to the College for compensation. [LF 53-54]. The trial court held that the City owed the College a duty of care in its supplying of water. [LF 54-55]. The trial court also rejected the City's contention that the College was contributorily negligent. [LF 55]. The trial court therefore awarded damages in the principal amount of $5,825,161, as stipulated by the parties. [LF 39-40, 55-56]. The trial court also awarded the College prejudgment interest in the amount of $2,434,596.30 on the ground that the damages were liquidated, as they were readily ascertainable by computation or determination according to a recognized standard. [LF 55-56].

11. Court of Appeals decision.

The Court of Appeals for the Eastern District held that the trial court erred in finding that the City owed a duty of care to the College. *Junior College District v. City of St. Louis*, No. ED81496 (Mo. App. E.D., Sept. 9, 2003). In a majority opinion authored by Judge Hoff and concurred in by Judge Dowd, the Court of Appeals held that City Code §23.12.010, effective at the time of the 1987 Oakland Avenue repaving, was controlling, thereby making it the College's duty to maintain accessibility to the stop box even though paved over by the City. The Court of Appeals held that City Code § 23.04.185, which became effective in 1993, could not be applied retroactively.

Because the Court of Appeals majority found the ordinance issue to be dispositive, they did not address the other issues raised by the appeal. The Court of Appeals did not address the

issue of whether the City owed the College a common law duty to operate its water business carefully, notwithstanding that a breach of this alleged common law duty was asserted by the College, and accepted by the trial court, as the basis for the City's liability. The Court of Appeals transferred the case to this Court under Rule 83.02 because of its "general interest and importance."

Judge Draper concurred in transfer of the case, but dissented from the majority's rationale. In a separate opinion, Judge Draper found that it was the City's duty to maintain accessibility to the stop boxes, noting that the City had exclusive control over its public streets pursuant to Section 82.190, RSMo. Thus, even had the College learned that the City had rendered its stop valve inaccessible, the College had no right to excavate Oakland Avenue, a public street, to restore accessibility to the stop box.

Judge Draper then considered and rejected the City's remaining contentions, including its contentions that the trial court erred in not finding the City immune under the public duty doctrine; in entering judgment on the College's claims to the extent they were based on evidence of insufficient or improper training of City employees; in failing to limit damages to $100,000 under Section 537.610; and in failing to find the College contributorily negligent.

Judge Draper would have held, however, that the trial court's award of prejudgment interest was erroneous on the ground that Section 408.040, RSMo., provides the exclusive basis for the award of prejudgment interest in a tort case.

STANDARD OF REVIEW

In a court-tried case submitted on stipulated facts, the only question for the appellate court is whether the trial court drew the proper legal conclusions from the stipulated facts. *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 554 (Mo. banc 1989). Furthermore, where the parties stipulate to the issues to be decided by the trial court, the appellate court will not consider additional issues raised on appeal. "There is no inequity in holding [a party] to his bargain and to his stipulation. Indeed, to consider issues beyond those stipulated by the parties before the trial court would itself be inequitable." *Orthotic & Prosthetic Lab, Inc. v. Pott*, 851 S.W.2d 633, 646 (Mo. App. 1993).

This standard of review is applicable to all issues in this appeal.

ARGUMENT

The City's substitute brief is remarkable for the issues it does not address. It does not address the issue of whether the City owed the College a common law duty of care in supplying the College with water for a fee. It does not address the issue of whether the City breached its common law duty of care by paving over the stop box to the College's water line and failing to uncover the stop box and make it accessible. It does not address whether its activities in supplying water for a fee are proprietary activities and thus not protected by sovereign immunity.

The omission of any discussion of these issues is odd. These are the issues on which this case was submitted to the trial court. These are the issues that, decided favorably to the College, formed the basis for the trial court's judgment. These are the issues that are determinative in this appeal.

Instead of addressing these key issues, the City choses to focus its argument on its ordinances and its asserted "public duty" defense. The argument concerning the ordinances is tangential to the controlling issues in this appeal, given that neither the College nor the trial court based the City's liability on the ordinances. The argument concerning the public duty doctrine — an issue not pursued by the City in the trial court, *see* SLF 89-98 — appears to be a transparent attempt to circumvent the fatal defects in the City's sovereign immunity argument. The argument is in any case mistaken and inapplicable.

As demonstrated below, none of the arguments advanced by the City supports reversal of the judgment. The judgment should be affirmed.

1. The trial court correctly held that the City did not enjoy sovereign immunity on the claims asserted by the College because the City is subject to common law liability in its proprietary capacity in that the injuries alleged by the College resulted from the City's negligence in conducting its business of supplying water for a fee.

Municipal corporations like the City of St. Louis exercise both governmental and proprietary functions. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). Municipal corporations have no sovereign immunity for injuries resulting from their proprietary functions. Proprietary functions are those performed for the special benefit or profit of the municipality as a corporate entity. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996). In determining whether an activity is governmental or proprietary, the general nature of the activity is of greater importance than the defendant's specific conduct. *Board of Trustees v. Russell*, 843 S.W.2d 353, 359 (Mo. banc 1992).

A municipality that supplies water to customers for revenue acts in a proprietary capacity. A municipality that supplies water solely for city fire prevention or sanitation or other health purposes acts in a governmental capacity. If, however, the city's water system is used both to generate revenue and to protect public health and safety, "then it is the duty of the city to keep the same as a whole in repair free from danger to others, and, if damage done by defects in or lack of repair of water mains or other appliances used concurrently in both capacities, then the city is liable." *Theodoro v. City of Herculaneum*, 879 S.W.2d 755, 761 (Mo. App. 1994).

Here the stipulated facts establish that the College was injured as a result of the City's proprietary activity of supplying water for a fee. The City bills the College on a quarterly basis for the water it supplies the College, and has done so since the Forest Park campus opened. [LF 33]. The College's water lines are privately owned by the College and are not dedicated to

the public use. [LF 30, 33]. Thus the general nature of the City's activity of supplying water to the College is proprietary, not governmental.[3]

In addition, if these facts are somehow deemed not sufficient to establish that the City's activities in supplying water were proprietary, the City repeatedly admitted that it acted in a proprietary capacity in supplying water to the College. These admissions appear in the City's pleadings; in the parties' stipulations; and in the City's trial brief. In its pleadings, the City

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[3] The City's official reports show the proprietary nature of its water distribution activities: "Although the Waterworks System provides water service to customers within the City on a retail basis, the City also supplies water on a wholesale basis to other surrounding communities.… The increase in both retail and wholesale customers will provide an increase in revenues without substantially increasing the cost of production." *City of St. Louis Consolidated Plan* (1994), *available on the internet* at http://stlouis.missouri.org/government/ ConsPlan/ConPlan5yr/chapIVb.html#water.

admitted in both its original and amended answers the College's allegation that the City provided water to the College for compensation. [LF 11, 24, 26]. In the stipulations, the City agreed that it acted in a proprietary capacity in operating the Oakland Avenue water main. [LF 32]. In its trial brief, the City conceded that: "The Water Division does not enjoy Sovereign Immunity when it is supplying water for consumer use as in the present case." [SLF 90].

The stipulated and admitted facts compel the conclusion that the City is subject to common law tort liability for its negligent failure to maintain accessibility to the College's stop box, as well as for its failure to promptly locate the stop box once the flooding began.

> [W]henever a city in its proprietary capacity operates a waterworks system for the purpose of supplying water to individuals, as is admitted in the present case, it must assume the same responsibility for its negligence as any other private supplier of water for profit, and the question of its liability for negligence must be so determined.

Adam Hat Stores, Inc. v. Kansas City, 316 S.W.2d 594, 597 (Mo. banc 1958) (flooding from burst water main).

The imposition of a duty of care upon municipalities that engage in business activities — and the imposition of liability for breach of that duty — is the reason the governmental-proprietary distinction was established in the common law. "The distinction between the governmental and proprietary functions of municipalities was drawn by the courts in order to impose common law liability on municipal corporations…" *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo. 1960). A municipality engaging in proprietary activities thus stands

upon the same footing as a private corporation engaged in the same business. It is therefore responsible, and liable, to the same extent as a private corporation for injuries resulting from negligence while engaging in these activities. *Auslander v. City of St. Louis,* 56 S.W.2d 778, 780 (Mo. banc 1933). This is an ancient rule that has been enforced in this State for many years. *See, e.g., Conner v. City of Nevada,* 86 S.W. 256, 258 (Mo. 1905); *Bullmaster v. City of St. Joseph*, 70 Mo. App. 60 (1897).

If the City had been a private water company, would there be any question that it would be liable for the losses suffered by the College resulting from the City's bungling? As the case law make clear, when it engages in proprietary activities the City should be treated no differently than a private company, notwithstanding that the City enjoys sovereign immunity when engaged in governmental activities. Because the City here engaged in supplying water for a fee, its actions were proprietary and not protected by sovereign immunity.

2. The trial court correctly held that the City had a common law duty to the College to keep the shut-off valve accessible and that the City breached its duty when it paved over and then failed to uncover or mark the location of the stop box housing the shut-off valve, because water suppliers have a common law duty to keep shut-off valves readily accessible in that damage to property is reasonably foreseeable should a shut-off valve not be readily accessible and the water supply line controlled by the valve ruptures.

There is no Missouri case that directly addresses the question of whether a City in the business of supplying water for a fee has a duty to its customers to keep accessible the stop box containing the shut-off valve to the customer's water line. There are many cases, however,

that have held cities liable for damage done as the result of negligence in the operation of their proprietary water supply businesses. In addition, this Court has adopted a standard analysis that is regularly used in all types of tort cases to determine whether a defendant owed a common law duty of care to an injured party.

Some of the cases holding a city liable for neglect in its conduct of its business of supplying water for a fee include:

- *Byrd v. Brown*, 641 S.W.2d 163 (Mo. App. 1982) (en banc): City liable for fire caused by city's water and sewer company workers when attempting to thaw out a customer's frozen supply line using an open flame torch.
- *Adam Hat Stores, Inc. v. Kansas City*, 316 S.W.2d 594 (Mo. banc 1958): City liable for damage to merchandise stored in basement of store when an under-ground water main that supplied a street hydrant burst; approving finding of negligence under *res ipsa loquitur* doctrine.
- *Koch Bros. Bag Co. v. Kansas City*, 315 S.W.2d 743 (Mo. 1958): City liable for property damage resulting from repeated leakage of water from a city hydrant into plaintiff's basement.
- *Lamar v. City of St. Louis*, 746 S.W.2d 160 (Mo. App. 1988) (reversing summary judgment in favor of City): City liable if negligent for injury caused by collapse of ditch being excavated in the course of maintaining and constructing sewers and water mains.

While each case presents unique facts, all are consistent with the imposition of a duty and resulting liability in the present case. The rules applied by this Court in tort cases generally also support the imposition of a duty and liability here.

This Court has repeatedly considered the circumstances giving rise to a duty that can result in negligence liability. Two significant and frequently cited cases are *Hoover's Dairy, Inc. v. Mid-American Dairymen, Inc.*, 700 S.W.2d 426 (Mo. banc 1985), and *Lopez v. Three Rivers Elec. Corp.*, 26 S.W.3d 151 (Mo. banc 2000), which establish that the key consideration in deciding whether a common law duty of care exists is whether it is foreseeable that harm may result from the activity absent such care.

> The duty to exercise care may be a duty imposed by common law under the circumstances of a given case.… It is generally stated that foreseeability that some injury might result from the act complained of normally serves as the paramount factor in determining the existence of a duty. When deciding if some injury was reasonably foreseeable, whether expressly or implicitly, courts examine what the actor knew or should have known. The duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge — or what is deemed in law to be the same thing: opportunity by the exercise of reasonable diligence to acquire knowledge — of the peril which subsequently results in injury.

Hoover's Dairy, 700 S.W.2d at 431-32 (citations and internal quotations omitted).

> [W]hether a duty exists in a given situation depends upon whether a risk was foreseeable. In the absence of a particular relationship recognized by law to create a duty, the concept of foreseeability is paramount in determining whether a duty exists.… Foreseeability for purposes of establishing whether a defendant's conduct created a duty to a plaintiff depends on whether the defendant should have foreseen a risk in a given set of circumstances.…
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> * * *
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> For purposes of determining whether a duty exists, this Court has defined foreseeability as the presence of some probability of likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it. The existence of a mere possibility is insufficient. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment to induce the reasonable mind to take the precautions which would avoid it.

Lopez, 26 S.W.3d at 156 (citations and quotations omitted); *see also Madden v. C&K Barbeque Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. banc 1988) (establishing a duty, not previously recognized in Missouri law, on the part of business owners to protect business invitees against the reasonably foreseeable criminal acts of unknown third persons even absent a "special relationship" between the plaintiff and the defendant).

A municipal corporation exercising a proprietary function owes a duty of reasonable care not to injure private property. *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc.*, 589 S.W.2d 260, 267-68 (Mo. banc 1979) (city liable to property owner for city's

negligence in investigating soil conditions prior to employing contractor to dig tunnel for sewer system where resulting soil movement damaged structures); *Thomas v. City of Kansas City*, 92 S.W.3d 92 (Mo. App. 2002) (city liable to property owner for damages resulting from unreasonable divergence of surface waters in the operation of sewer system); *Fletcher v. City of Independence*, 708 S.W.2d 158, 167 (Mo. App. 1986) (city liable to home owners for repeated sewer backup into basement over a course of 11 years resulting from inadequacy of municipal sewage system); *accord Langhammer v. City of Mexico*, 327 S.W.2d 831, 835 (Mo. 1959) (city liable to woman injured when "well worn path" to city dump collapsed, dropping woman into a field of hot coals lying underground beneath the path); *Allen v. Salina Broadcasting, Inc.*, 630 S.W.2d 225 (Mo. App. 1982) (school district operating a radio station could be liable to farmer allegedly defamed by broadcast stating he was "starving his cattle to death" if farmer can establish that students of the district did not participate in the operation of the station at the time of the broadcast and that the broadcast was therefore proprietary and not governmental).

Here, the City's common law duty of care to its water customers, including the College, arises out of both foreseeability and the business relationship between the parties. As far as foreseeability is concerned, the destructive nature of escaping water is well known. It is foreseeable that any given water supply line may burst. Shut-off valves are placed on water supply lines in anticipation of this eventuality. If a line bursts, the free flowing water may cause great damage to property unless the flow is promptly shut off. If the stop box is concealed, then one will likely not be able to readily stop the flow of water controlled by the shut-off valve

housed in the stop box on the very occasion when one most needs to do so. If, as here, the shut-off valve controls an 8-inch diameter water supply line, it is foreseeable that a great quantity of water will escape while one is searching for a concealed and buried stop box. All of this is perfectly foreseeable — and is especially foreseeable to a corporation in the business of selling water for compensation. These foreseeable risks are some of the reasons why it is so important not to conceal stop boxes and why it is necessary to expose them and make them accessible should they become concealed.

Thus, the harm that occurred here was both foreseeable and "sufficiently serious that ordinary persons would take precautions to avoid it." *Lopez*, 26 S.W.3d at 156. Once the City undertook to sell water to customers, the City was obliged to exercise reasonable care in that undertaking. This reasonable care must include, at its most basic, ensuring that stop boxes remain accessible at all times. Other simple actions by the City that would have avoided the foreseeable harm suffered here would have included uncovering the stop box after paving it over; or, in a lazier mode, informing the College that the City had paved over the stop box and directing the College to uncover it; or, after the fact, responding to the flood by sending Water Division employees capable of promptly locating a concealed stop box within a reasonable period of time. Here, regrettably, the City took no steps to satisfy its duty of care.

The foreseeability of the harm is highlighted by the ordinances the City enacted requiring all stop boxes to be kept accessible. Regardless of whether one considers the ordinance which requires the City to make stop boxes accessible whenever paved-over by the City or its contractors, or the earlier ordinance which purports to place the responsibility to

maintaining accessibility on the adjoining property owner, all of the ordinances have one thing in common — they require that stop boxes be kept accessible. In *Bean v. City of Moberly*, 169 S.W.2d 393 (Mo. 1943), this Court held:

> There is no difference in an ordinance as evidence and other evidence. If it is relevant and material or tends to prove any issue in the case it should be and is receivable in evidence for that purpose.… An ordinance may in and of itself tend to show or charge the city with notice of certain facts.

Bean, 169 S.W.2d at 398. Here the ordinance tends to show that the City knew that stop boxes had to be kept accessible. Thus, the ordinances help establish the foreseeability of the harm and the need for somebody to have the duty to uncover a stop box if it is paved over. As the trial court held: "The ordinances cited, together with the excerpts from the City's *Foreman's Manual*, underscore the need for accessible, exposed stop boxes, placed at street level, as part of the City's duties in providing water for its customers."[4] [LF 54-55].

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[4] The City contends that the ordinance in effect at the time Oakland Avenue was repaved assigned the responsibility for exposing the stop box to the College as the customer supplied by the line. This contention will be addressed later. What is important for this argument is that

the ordinances establish that the standard of care requires stop boxes to be accessible.

Beyond just the foreseeability of the harm, the City also owed a duty of care to the College arising out of the business relationship between them. A duty to exercise care can arise out of a business relationship between two parties. *Hoover's Dairy*, 700 S.W.2d at 432. Once the City undertook to sell water to the College, it was obliged to exercise reasonable care in the business. *See id*. at 432-33, *citing* Restatement (Second) of Torts, § 323.

In *Hoover's Dairy*, the business relationship was between a dairy farmer who purchased a milking machine and the seller and installer of the milking machine. When the milking machine was installed, it generated stray voltage in the milking barn, to the annoyance and discomfort of the cattle. This resulted in a reduction in milk production, followed by numerous cases of mastitis (an infection of the udders), and ultimately required destruction of the cattle. The evidence established that the seller and installer knew that stray voltages could be generated by the milking machine even if properly installed. This Court held that, under these circumstances, the seller and installer had a common law duty to check for stray voltages following installation, and were therefore liable to the farmer for the losses resulting from their negligent failure to check for stray voltage. 700 S.W.2d at 433.

The City was negligent in its provision of water services to the College. It paved over the stop box containing the shut-off valve, thereby making the valve inaccessible. It failed to restore accessibility to the stop box. It failed to disclose to the College that it had paved over the stop box. It failed to mark the pavement to indicate that there was a stop box underneath. The trial court did not err in finding that these failures were each individually and collectively

a breach of the City's duty of care. The judgment of the trial court should therefore be affirmed.

3. *Response to City's Point Relied On III:* The City was also negligent in not locating the concealed stop box promptly upon arriving at the scene of the flooding.

In addition to the City's negligence discussed above, the City was also negligent in failing to locate the concealed stop box within a reasonably prompt period after arriving at the scene of the flooding.

When the flood began, the City was immediately notified and employees of the City Water Division appeared promptly on the scene at 3:25 p.m. That was good. Unfortunately, although the City's employees had with them their own engineering drawings showing the location of all of the valves in the area, including the shut-off valve for the ruptured water line, it took the City until 8:00 p.m. to locate the stop box so that the flooding could be stopped. [LF 30, 34-35, 38-39 (Stipulations Nos. 4, 15, 25–27)].

The City was additionally negligent, therefore, regardless of whether the Court views the negligence as arising from: (a) the City's failure to train its employees to read their own engineering drawings and thereby promptly locate the buried stop box; or (b) views it more simply in terms of vicarious liability or *respondeat superior* — the City's employees were negligent in failing to timely locate the buried shut-off valve and this negligence is imputed to the City, their employer. Under *respondeat superior*, an employer is liable for damages attributable to the misconduct of an employee or agent acting within the course and scope of the employment or agency. *McHaffie v. Bunch*, 891 S.W.2d 822, 825 (Mo. banc 1995); *see,*

e.g., Byrd v. Brown, 641 S.W.2d 163 (Mo. App. 1982) (holding City of Cabool liable for negligence by a water and sewer employee who carelessly heated a frozen water supply line with an open-flame torch, thereby causing a fire that damaged plaintiff's building).

As the City itself notes in its substitute brief: "It must be remembered that there are times when an employer's training and supervision of its employees is proper, employees are provided with the proper equipment to do their jobs, but injuries occur as a result of negligence by the employer's individual employees." *City Brief* at 42.

Negligence by the City's employees in the performance of their job, above and beyond any negligence on the part of the City in training and equipping them, comes within the allegations of the petition. "The CITY breached its duties in one or more of the following ways: … F. Otherwise negligently failed to prevent the uncontrolled flow of water from the Oakland main into the basements of the COLLEGE's buildings." [LF 13].

The evidence, moreover, is sufficient to support a finding that the City failed to properly train its employees to locate a concealed stop box in the field. Any reasonably trained Water Division employee would have known, first, that if water is still flowing, it has to be coming from a supply line that has not been shut-off; second, that if they have shut-off all of the supply lines whose stop boxes are visible to them, then there must be another stop box that is not visible; and, third, that if they look at their engineering drawings, they will probably be able to locate any shut-off valves housed in stop boxes that are not visible in plain sight. Inadequate training appears to be the only explanation for the Water Division employees' prolonged inability to perform their jobs at the flood site. In a sense, the analysis is similar to

that underlying the doctrine of *res ipsa loquitor* — if an occurrence does not ordinarily happen if those in charge use due care, and if the cause is unknown to the plaintiff, and if the defendant has superior knowledge of or means of information as to the cause, then the evidence is sufficient to establish a *prima facie* showing of negligence. *See Adam Hat*, 316 S.W.2d at 598.

4. *Response to City's Point Relied On I:* The City's ordinance cannot defeat the City's liability under the common law.

The City contends that its ordinance, § 23.12.010 of the City Code, placed the duty upon the College, and not the City, to make the College's stop box accessible even though it was the City who paved over it. The City concludes that it therefore has no liability to the College by virtue of its ordinance. *City Brief* at 31-35.

The City's argument fails for numerous reasons:

- The common law imposes upon the City, as it does on every seller of water, the duty to make the stop boxes to its customers' lines accessible. The City has no power to override this common law duty through enactment of an ordinance.
- To the extent the ordinance is interpreted as placing on water customers the duty to make accessible stop boxes located in the City's streets, it is contrary to a Missouri statute providing that the City has exclusive control over its streets and public ways. The City has no power to enact an ordinance contrary to State statute.
- The College is a political subdivision of the State and is therefore not subject to the City's ordinances.

Finally, even if the City's ordinance were somehow effective notwithstanding the three issues mentioned above, a subsequently enacted ordinance, § 23.04.185, expressly provides that the City Water Division must expose and make accessible stop boxes whenever the City is responsible for covering them during street repair or resurfacing. Under the ordinary rules

of statutory construction as applied to municipal ordinances, the newer ordinance imposed the duty upon the City to expose the stop box even though the ordinance was enacted after the City resurfaced Oakland Avenue and paved over the stop box.

1. The City has no authority to enact an ordinance overriding the common law.

A municipality's authority to enact ordinances is limited. It cannot enact ordinances that are contrary to law, including the common law. "The city of St. Louis may adopt ordinances, but they must be in harmony with, and subject to, the Constitution and laws of the state." *Corey v. Losse*, 297 S.W. 32, 32 (Mo. 1927) (holding that St. Louis ordinance purporting to impose duty upon landlord to repair premises ineffective as contrary to the common law). "While the General Assembly has authority to enact statutes that override the common law, 'local governments have no such authority to enact ordinances that override the common law.'" *McKinney v. H.M.K.G. & C., Inc.*, Appeal No. WD 62222 (Mo. App. W.D., Nov. 4, 2003), quoting *Mediq PRN Life Support Services, Inc. v. Abrams*, 899 S.W.2d 101, 110 (Mo. App. 1994).

Corey, *Abrams*, and *McKinney* all involve similar circumstances. In each case, a local ordinance purported to impose upon the owner of premises the duty to repair or otherwise keep the premises safe. In *Corey*, the ordinance required owners of tenement houses to maintain all parts of the premises in good repair. 297 S.W. at 32. In *Abrams*, the ordinance provided that the owner was responsible at all times for the safe maintenance of the premise's electrical system. 899 S.W.2d at 109. In *McKinney*, the ordinance imposed a height requirement for guardrails. *McKinney* at ¶ 1.

In each case, the plaintiff was injured as a result of the condition the ordinance was intended to prevent. In *Corey*, the tenant's infant child fell from the apartment's balcony because of a broken bannister. In *Abrams*, neighbors suffered property damage from a fire that started as a result of unsafe electrical wiring that violated the county electrical code. In *McKinney*, the plaintiff was a business invitee at a nightclub who fell off of a ledge whose guardrails were a foot shorter than specified by the ordinance.

In each case, the plaintiffs sought to recover for their injuries from the owners of the premises based on the duty purportedly imposed by the ordinance. In each case, the appellate court — including this Court in *Corey* — rejected each plaintiff's claim, holding that an owner of leased premises has no duty under the common law to maintain or repair the premises absent a contractual agreement to repair or some other exception recognized by the common law.

The appellate courts uniformly and consistently have held that local ordinances cannot shift a duty from the party who has the duty under the common law to another party who, under the common law, does not have the duty. Such a purported revision to the common law is beyond the power of local government. Here, similarly, the City cannot by ordinance take its duty as a supplier of water to keep supply line stop boxes accessible, and shift that duty from itself to its customer, the College. The purported shift of duty is contrary to the common law and is therefore ineffective.

Robinson v. Arnold, 985 S.W.2d 801 (Mo. App. 1998), is on point. In that case, the City of St. Louis passed an ordinance purporting to require landowners to maintain and repair the public sidewalks adjoining their property. Plaintiff tripped and fell on a defective area of

public sidewalk in front of defendants' commercial property and sued defendants for her injuries, citing the ordinance as the source of their alleged duty to her. The appellate court affirmed the dismissal of plaintiff's petition, holding that the City "has the *nondelegable* duty to maintain its public sidewalks and keep them in reasonably safe condition." *Id.* at 803. As for the ordinance: "Such an ordinance in no way creates a legal duty flowing from the landowner to an injured party, and the landowner's liability for failure to comply with such ordinance is limited to the fine or penalty prescribed therein." *Id.*

The City therefore cannot avoid its liability — and impose a multi-million dollar liability upon the College — by passing an ordinance contrary to the common law of this State.

2. The City has no authority to enact an ordinance that conflicts with State statute.

The rule prohibiting a municipality from enacting ordinances that conflict with State law is at least as strong with respect to ordinances that conflict with State statutes as it is with those that conflict with the common law:

> A municipal ordinance must be in harmony with the general law of the state and is void if in conflict. In determining whether an ordinance conflicts with general laws, the test is "whether the ordinance permits that which the statute forbids and prohibits, and vice-versa." The powers granted a municipality must be exercised in a manner not contrary to the public policy of the state and any provisions in conflict with prior or subsequent state statutes must yield.

Morrow v. City of Kansas City, 788 S.W.2d 278, 281 (Mo. banc 1990) (citations omitted).

Here, the ordinance at issue, § 23.12.010, is in direct conflict with a State statue, Section 82.190, RSMo.

The ordinance states:

> **23.12.010 Repair required.**
>
> Stop boxes over the shut off valves on all service pipes must be kept in repair, exposed and accessible at all times by the agent, owner or occupant of the premises supplied by such service pipes.

§ 23.12.010, St. Louis City Code.

The State statute states:

> **82.190. City has exclusive control of public highways. -**
>
> Such city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary notwithstanding.

Section 82.190, RSMo.

The ordinance therefore is in conflict with the statute if the ordinance is interpreted as requiring water customers to maintain stop boxes located in the City's streets and public ways. Such an interpretation of the ordinance would purport to authorize — indeed require — persons other than the City, *i.e.*, the City's water customers, to dig up City streets to locate and make accessible the stop boxes to their water supply lines. Under this interpretation, the ordinance would also presumably authorize water customers to make investigative excavations

of the City's streets to assure themselves that the City had not paved over any stop boxes that might exist but that the customer does not recall or never knew existed, as was the case of the College's second stop box here.

In short, the statute gives the City exclusive control over its streets, including Oakland Avenue. The ordinance purports to give other persons, the City's water customers, a degree of control over the streets inconsistent with the City's exclusive control. The inconsistency is patent.

Now the City may attempt to argue that inherent in its exclusive control is the power to delegate that control, that is, to generally authorize water customers to dig up the streets to make their stop boxes accessible. In other words, the City may argue that an element of its exclusive control is the power to give up a portion of that control. Such an argument would be inconsistent with the clear language of the statute. The statute does not give the City the power to grant other persons partial control over its streets. The only authority that the statute grants the City to give up or diminish its exclusive power over its streets is the authority to give up its power entirely by vacating or abandoning the public way. "Such city … shall have exclusive power, by ordinance, *to vacate or abandon* any public highway, street, avenue, alley or public place, or part thereof…" Section 82.190 (emphasis added). In short, the statute does not allow the City to take a half-way position of partial exclusive control — exclusive control is an all or nothing proposition.

Consequently, the ordinance is invalid because it is contrary to State statute.[5]

3. The City has no authority to enact an ordinance imposing upon the College, a subdivision of the State, the duty to monitor the City's streets and make accessible its stop boxes if paved over by the City.

The College is a Junior College District formed pursuant to Section 178.770, *et seq*., RSMo. As such, it is a body corporate and a subdivision of the State. *Id.*

"The state and its agencies are not within the purview of a statute unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles or interests of the state would be divested or diminished." *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 888 (Mo. 1960). Ordinances enacted by cities are of a lesser dignity than statutes passed by the

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[5] Alternatively, one could attempt to save the ordinance by reading it as requiring water customers to make their stop boxes accessible so long as they are not within a street or public way exclusively controlled by the City. This interpretation would harmonize the ordinance with the statute. *State ex rel. Teefey v. Board of Zoning Adjustment*, 24 S.W.3d 681, 685 (Mo. banc 2000).

General Assembly and signed by the governor. Consequently, the foregoing rule must apply with at least equal force to immunize state agencies from the impositions of local ordinances.

While most cases holding political subdivisions to be immune from local ordinances arise in the area of zoning ordinances, *see, e.g., City of Washington v. Warren County*, 899 S.W.2d 863 (Mo. banc 1995) (city exempt from county zoning ordinance purporting to limit city's ability to expand its airport); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896 (Mo. banc 1957) (school district exempt from city zoning ordinance purporting to bar erection of a schoolhouse), such immunity from local impositions have also been upheld in other areas of governmental activity, *see Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984) (Director of Revenue exempt from paying recording fees imposed by county recorder of deeds for the recordation of instruments).

The City's ordinance here does not "clearly manifest" by its express terms an intention to require the State or its political subdivisions to monitor the City's street repairs to ensure that the stop boxes to the lines supplying water to their government facilities are not paved over. Nor does it clearly manifest an intention to require *the State or its subdivisions* to make accessible stop boxes paved over by the City. Thus, even assuming the City had the power to impose such a duty on the State or its subdivisions — which it does not — it has not done so here under the rule stated in *Askew*. Furthermore, imposing such a duty on the State or its subdivisions, including the College, would severely negatively impact their important governmental work. *Accord Dorlon v. City of Springfield*, 843 S.W.2d 934, 938 (Mo. App. 1992).

In *Dorlon*, the appellate court held that a State university was immune for suit for injuries resulting from a defective condition of sidewalks abutting the university campus, even if the university had a potential or actual ownership interest in the land underlying the sidewalks. The court held that it would impose an intolerable burden on important governmental activities to "require public entities to be constantly alert" to potential dangers arising on public ways adjoining their facilities and controlled by the local city. *Id.*

It is the job of the College to educate the adult population. It is the job of the City to maintain the public ways and, to the extent it chooses to engage in the water supply business, to use reasonable care in that operation. The City's ordinance purporting to impose a duty of constant vigilance on its customers and to make stop boxes paved over by the City accessible simply cannot apply to the College, a statutory and Constitutional subdivision of the State. *See Missouri Constitution*, Article IX, Sections 1(b) & 9(b).

4. Assuming that the City's ordinances are determinative, which they are not, a proper interpretation establishes that the ordinances placed the duty on the City, not the College, to make the stop box accessible prior to the flood.

There are two City ordinances primarily at issue:

23.12.010 Repair required.

Stop boxes over the shut off valves on all service pipes must be kept in repair, exposed and accessible at all times by the agent, owner or occupant of the premises supplied by such service pipes.

23.04.185 Stop boxes over shut off valves — Accessibility.

> Notwithstanding the provision of any other ordinance, the Water Division with funds from the Water Division shall, by contract or otherwise, expose, make street level, and make accessible stop boxes over shut off valves whenever the City of St. Louis, by contract or otherwise, is responsible for covering said stop boxes during street repair or resurfacing.

If one assumes for the purpose of argument that the City ordinances are determinative on the issues on this appeal, which they are not, then the Court needs to construe these two conflicting ordinances to determine which one controls.

> In construing city ordinances, an appellate court applies the same general rules of construction as are applicable to state statutes. The cardinal rule for construing ordinances is to ascertain and give effect to the intent of the enacting legislative body. Words contained in an ordinance should be given their plain and ordinary meaning and should be interpreted to avoid absurd results.

State ex rel. Teefey v. Board of Zoning Adjustment, 24 S.W.3d 681, 684 (Mo. banc 2000). "[W]here the same subject matter is addressed in general terms in one statute and in specific terms in another, and there is a 'necessary repugnancy' between statutes, the more specific statute controls over the more general." *Robinson v. Health Midwest Development Group*, 58 S.W.3d 519, 522 (Mo. banc 2001). Furthermore, "the later statute prevails if inconsistencies appear between them…" *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. banc 1977).

Here, § 23.04.185 is both more specific and more recent than § 23.12.010. § 23.12.010 was enacted before the College's stop box was paved over in 1987 and applies to all stop boxes generally. § 23.04.185 was enacted in 1993 — after the stop box was paved over but four years before the flood — and is more specific, applying only to those stop boxes that the City is responsible for covering up during street repair or resurfacing. In addition, § 23.04.185 states that it applies "[n]otwithstanding the provision of any other ordinance…," a trumping provision not found in § 23.12.010.

§ 23.04.185 applies here notwithstanding that the City paved over the stop box before the enactment of the ordinance. The ordinance states that the City Water Department has responsibility for making the stop box accessible "*whenever* the City of St. Louis … is responsible for covering said stop boxes during street repair or resurfacing." § 23.04.185 (emphasis added).

The word 'whenever,' has a few closely-related dictionary definitions. Used as an adverb, 'whenever' means: "1. At whatever time. 2. When." Used as a conjunctive, 'whenever' means: "1. At whatever time that: *We can leave whenever you're ready.* 2. Every time that: *The child smiles whenever the puppy appears." The American Heritage Dictionary of the English Language* (4th ed. 2000). In the case law, 'whenever' enjoys similar meanings. It can mean 'at whatever time' or sometimes even 'if'. *State ex rel. Kansas City v. School District*, 62 S.W.2d 813, 817 (Mo. 1933) ("But very frequently the word 'when' and sometimes the word 'whenever' express a contingency").

Whichever specific definition is used, however, in the context of the plain and ordinary meaning of the ordinance, the City Water Division has the obligation to make stop boxes accessible *if* they were covered up by the City, *at whatever time* they were covered up by the City, without regard to whether they were covered up by the City before or after enactment of the ordinance. *See Gilford v. State Tax Commission*, 229 A.2d 691 (N.H. 1967).

Gilford concerned interpretation of a New Hampshire statute that stated:

> *Whenever the state acquires* any real property in a town or city for public recreational or park purposes the state shall annually pay to the town or city where such property is situate[d] a sum equal to the taxes which would have been assessed against such property had such property remained taxable, basing such payments upon the assessed value of the property for the year prior to the year of acquisition at the current local rate of taxation applicable for the year in which payment is made, until and including the year the property is opened to the public for recreational or park use…

Gilford, 229 A.2d at 692 (emphasis added by court). The issue in *Gilford* was whether the statute applied to property acquired by the State before the statute was enacted. The New Hampshire Supreme Court held that the statute applied to property acquired prior to its enactment:

> The phrase in the statute "whenever the state acquires any real property" is broad enough to include past as well as future acquisitions by the State for public recreational or park purposes.… The word "whenever" in context is broad in its

application and would normally mean "at whatever time" the State acquires real property for public recreational or park purposes.

Id. at 693; *see also Chiapetta v. Jordan*, 16 So. 2d 641 (Fla. 1943) (on rehearing en banc), where the Florida Supreme Court considered the use of the word "whenever" in a statute providing for the award of attorney's fees in post-divorce child custody proceedings. Noting that the word "whenever" means "at whatever time," "no matter when," "at any or all times," and "in any or every instance in which," *id*. at 644, the Court en banc ***rejected*** the contention of a single justice that "whenever" meant "whenever after the passage of this Act." *See id*. at 646 (Brown, J., concurring specially).

Thus, under the general rules of statutory construction, § 23.04.185 requires the City Water Division to restore access to any stop box covered up in the course of street work, even if the street work was completed prior to the ordinance's enactment. The ordinance places the duty on the City, not on the water customer.

The City objects, however, that such an interpretation would result in a retrospective application of § 23.04.185 prohibited by the Missouri Constitution, Article I, Section 13. The City's objection is misplaced, however. Application of § 23.04.185 to the facts of this case would not be a retrospective application of law within the meaning of the Constitutional prohibition.

Article I, Section 13 of the Missouri Constitution, a provision of our State Bill of Rights, states: "That no *ex post facto* law, nor law impairing the obligation of contracts, or

retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

This Constitutional provision has been interpreted and applied in numerous appellate decisions. These decisions make clear what is and what is not a "law … retrospective in its operation":

> It is well-settled that the constitutional prohibition against laws that operate retrospectively applies if the law in question impairs some vested right or affects past transactions to the substantial prejudice of the parties. A "vested right" has been defined as a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another, but it must be something more than a mere expectation based upon an anticipated continuance of the existing law. Furthermore, as this Court has recognized, the word "vested" means fixed, accrued, settled or absolute.

La-Z-Boy Chair Co. v. Director of Economic Development, 983 S.W.2d 523, 525 (Mo. banc 1999) (citations and internal quotations omitted) (holding that business that had constructed manufacturing plant in an enterprise zone in anticipation of receipt of tax credits had no "vested right" in continuation of tax credit program).

> "Retroactive" or "retrospective" laws are generally defined, from a legal viewpoint, as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new

> disability in respect to transactions or considerations already past. But it has been held specifically that a statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation. It is said to be retroactive only when it is applied to rights acquired prior to its enactment.

Barbieri v. Morris, 315 S.W.2d 711, 714 (Mo. 1958) (citations and internal quotations omitted; "habitual violator" status could lawfully be imposed based upon convictions received prior to date of enactment of habitual violator statute).

Key to the Court's decisions is the concept of "vested rights." *Unless at the time of § 23.04.185's enactment the City had a vested right to leave buried stop boxes buried, its retrospective-law argument must fail*. The City had no vested right to leave buried stop boxes buried; therefore, application of § 23.04.185 does not violate the Missouri Constitution. *See Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm'n*, 702 S.W.2d 77 (Mo. banc 1985) (hazardous waste license could be conditioned on conduct engaged in prior to enactment of hazardous waste licensing statute). "[T]his Court holds that taxpayer did not have a vested right … therefore, there is no violation of the constitutional prohibition against retrospective laws." *La-Z-Boy Chair*, 983 S.W.2d at 525-26.

Bliss involved an appeal from a denial of a license to transport hazardous waste. The statute prohibited issuance of a license to any person found "to habitually engage in or to have

habitually engaged in hazardous waste management practices which post a threat to the health of humans or the environment…" 702 S.W.2d at 80. Appellant had engaged in such practices *prior to* the enactment of the licensing statute, and was denied a license on that basis. This Court rejected appellant's argument that a statute that conditioned appellant's license on events that occurred prior to the statute's enactment violated the Missouri Constitution's proscription against retrospective laws. This Court held that the statute did not punish appellant for its past conduct, and that appellant had no vested interest in the licensing law remaining unchanged. Indeed, the appellant had at most only a mere expectation that the existing law would remain unchanged. This expectation did not rise to the level of a vested interest. *Id*. at 81-82.

> A vested right … must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.

Beatty v. State Tax Commission, 912 S.W.2d 492, 496 (Mo. banc 1995) (holding that when a purported right is contingent upon the happening of an uncertain event, the right is not vested). "It can be assumed without misgiving that there is no vested right in any remedy for a tort yet to happen…" *Simpson v. Kilcher*, 749 S.W.2d 386, 390 (Mo. banc 1988).

Under Missouri law, "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment…" Section 516.100, RSMo.

Applying these established legal principles to the stipulated facts demonstrates that the City did not have a vested right in leaving the College's stop box buried under the pavement at the time that the new ordinance, § 23.04.185, was enacted. *At the time of the enactment, the flood was still four years in the future*. To the extent that the City contends that there had been a breach of duty on the part of the College for non-compliance with the old ordinance, it was a "technical breach" only, as that phrase is used in Section 516.100. No rights or defenses to liability were vested or accrued until the water line ruptured and the flood damages were sustained. Until damages were sustained, the City had no vested right in the continuance of an ordinance requiring the College, rather than the City, to make the stop box accessible.

The City cannot assert that it is unfair to apply the ordinance to it under the facts of this case. It was the City that paved over the stop box. It was the City that enacted the ordinance four years before the water supply line rupture that damaged the College. It was the City that chose to engage in the proprietary business of supplying water for compensation. The City received the financial benefits from its water business and therefore had the economic incentive to fix the situation, and it had enough time — four years — to satisfy the obligations it had imposed upon itself through its own ordinance. There is simply no unfairness in making the City liable for the damage resulting from its own breach of duty.

Nor can the City reasonably assert that it would be "absurd" to require it to expose and make accessible the stop boxes it paved over prior to its enactment of § 23.04.185. While it will require some work on the part of the City to "conduct a review of every single City street paved prior to 1993 to determine whether any stop boxes are located underneath," *City Brief*

at 34, it is not absurd to require the City to make this effort. The City can look at its detailed Water Division engineering plans to count the number of stop boxes that should be within the roadway of each street, and then send crews out to count manholes. It will take some time and there may be an expense associated with it, but it is not absurd to require it. *The City is in the water business*. It is not unexpected that a business will, from time to time, have to engage in a recall of defective product or review past work for errors that need to be corrected.

Indeed, another St. Louis area public utility has been engaged in just such a review program for the past several years. The Laclede Gas Company supplies natural gas to homes and industry in the St. Louis area. Some of Laclede's copper service lines to its customers suffered corrosion; some of the corroded copper lines failed, leading to incidents such as explosions and fires. *In the Matter of the Adequacy of Laclede Gas Company's Service Line Replacement Program and Leak Survey Procedure*, PSC Case No. GO-99-155, "Order Establishing Case," *available on the internet* at http://psc.missouri.gov/orders/ 10309155.htm; *see also* "Gas Co. Pays $8M For Man's Death in Explosion," *Missouri Lawyers Weekly* (Dec. 4, 2000) (text available on publication's internet archive). As a result of the corrosion, the leaking of natural gas, and the risk of further destructive incidents, Laclede entered into an agreement with the Public Service Commission ("PSC") to survey its gas lines for leaks and to replace copper gas lines located in areas of known actively corrosive environments. *See Order Establishing Case*. After additional explosions, and some consumer deaths, moreover, Laclede entered into an additional agreement with the PSC to replace all of its copper gas lines. *See Gas Co. Pays $8M.*

Obviously, the situation here is not directly comparable to the situation involving Laclede. Natural gas is more dangerous than water. Nevertheless, the Laclede situation does show that if the facilities of a public utility are in some way defective, it is not absurd to require the utility to survey its facilities and correct the defects.

Indeed, it is the City's alternative that is absurd. If, as the City proposes, its water customers are responsible for monitoring the streets in front of their homes and business to ensure that the City has not paved over the manholes — and, further, that its water customers are responsible for exposing and making accessible any stop boxes that the City may have paved over prior to 1993 — the result will be total chaos. Residents will be marching up and down the City's streets and public ways, metal detectors in one hand, pick-axes in the other, searching for manholes. If a water customer thinks that the stop box is buried in a particular area of the street, out comes the pick-axe — or jackhammer or backhoe — and up comes the pavement. What will the water customer find? Will it be the stop box? Perhaps it will be a Laclede gas line or an Amren power line or an SBC fiber optic data cable. Perhaps it will only be a "dry hole," leaving the water customer to move on and dig up some other part of the street.

5. *Response to City's Point Relied On II:* The "public duty" doctrine is inapplicable and thus does not defeat the City's liability.

The City asserts that it can escape liability in this case under the "public duty" doctrine, a doctrine closely related to sovereign immunity. The City's public duty defense, however, fails for many of the same reasons that the City cannot assert sovereign immunity. The City's duty to operate its water supply business is not a governmental duty and it is not owed to the general

public. Moreover, here the duty was clearly owed to the College and no one else. The College's water supply lines and its stop boxes are owned by the College and do not supply water to any other water customers. [LF 30, 33]. No other water customer — let alone the general public — had any direct interest in the matter.

As a preliminary matter, however, the Court should note that the City did not present its "public duty" defense to the trial court. While the defense was pled — the relevant pleading states in its entirety that, "Defendant City is immune from suit under the public duty doctrine" [LF 27] — no facts relevant to the defense were stated in the parties' stipulation of facts. [LF 29-40]. In the portion of the stipulation stating the issues being asserted by the parties, the only immunity-type defense mentioned by the City was sovereign immunity pursuant to Section 537.600. [LF 31, 32]. There are no facts in the stipulation stating that the City owed any duty to the general public in any respect relevant to this case. [*See* LF 29-40]. Similarly, the City's trial brief — which served as its argument to trial court in this case — was equally silent as to the putative public duty defense. It is not mentioned at all. [SLF 89-98].

The public duty defense was therefore abandoned by the City at trial. It is now too late for the City to urge that defense as a ground for reversal. The point is therefore waived. "An issue that was not expressly presented or decided on by a trial court is not preserved for us to review." *Jos. A. Bank Clothiers, Inc. v. Brodsky*, 950 S.W.2d 297, 304 (Mo. App. 1997); *Ebeling v. Fred J. Swaine Manufacturing Co.*, 209 S.W.2d 892, 895 (Mo. 1948) (an appellate court cannot consider points not raised or decided below.

Consequently, the City's second point relied on can be denied without reaching the merits. If the merits are reached, however, the point should still be denied.

This Court's most recent analysis of the "public duty" doctrine established that this defense is not available to the City here. In *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. banc 1996), plaintiff was arrested by the Raytown Police. When taken into custody, his personal property, including a wallet containing $1,171 and a gold Rolex watch, were taken by the police for inventorying and storage. The officers were careless in their handling of his property, and Jungerman's watch was lost. *Id.* at 204. Jungerman sued the city and obtained a substantial verdict. The trial court granted the city judgment notwithstanding the verdict based on the public duty doctrine. *Id.*

This Court reversed. In reaching its decision, the Court first performed an extensive analysis of the general nature of the immunity available to municipalities under Missouri law:

> The term "sovereign immunity" does not strictly apply to the immunity possessed by municipalities. Under common law, true sovereign immunity applies only to the state and its entities, preempting all tort liability. This full immunity never applied to municipalities. **Rather, municipal corporations have a more limited immunity only for governmental functions, those performed for the common good of all. Municipalities have no immunity for torts while performing proprietary functions**, those performed for the special benefit or profit of the municipality acting as a corporate entity.

Jungerman, 925 S.W.2d at 204 (citations omitted; emphasis added). The Court then focused on the specifics of the public duty defense:

> By the public duty doctrine, a public employee is not civilly liable — even for breach of a ministerial duty — if that duty is owed to the general public rather than to a particular individual. This doctrine, first adopted in *Parker v. Sherman*, 456 S.W.2d 577, 579 (Mo. 1970), applies equally to protect public officers in their individual capacities, and the municipalities for which they work.
>
> A duty is owed to particular individuals for the performance of ministerial duties in which a private individual has a special, direct, and distinctive interest. **Such an interest exists when injury to a particular, identifiable individual is reasonably foreseeable as a result of an official's breach of duty.** Whether an individual has such a private interest depends on the facts of each case, not on broad pronouncements about the usual status of relevant functions.

Id. at 205 (citations and internal quotations omitted; emphasis added).

While this Court in *Jungerman* acknowledged that the inventorying of an arrestee's property may serve public purposes, its primary purpose is to account for the arrestee's property so that all lawful property not kept as evidence is returned to him or her upon release. *Id.* at 206. Consequently, the person arrested has "a special, direct, and distinct interest" in the proper handling of his property, and "injury to him as a distinct, identifiable individual was foreseeable from a breach of the duty to inventory and secure his watch." *Id.*

This Court's holding in *Jungerman* is consistent with the Court's holdings in other cases raising the public duty defense. In *Stacy v. Truman Medical Center*, 836 S.W.2d 911, 921 (Mo. banc 1992), the Court held the public duty doctrine only applies in "situations where there is clearly no duty owed to a particular individual." In *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 538 (Mo. banc 1988), the Court held that the public duty doctrine applied to protect a park superintendent from liability for a drowning blamed on inadequate safety measures at the Johnson Shut-Ins State Park, noting that his "duty regarding safety measures was owed to the public at large rather than to the decedent in particular, for the decedent's interest in the safety of the park was indirect and indistinct from that of the public as a whole." *Id.* Similarly, in *Green v. Denison*, 738 S.W.2d 861, 866 (Mo. banc 1987), this Court held that the duty of the police involved in a shoot-out with a gunman was owed to the general public, any one of whom might be injured in the fracas, and not to the individuals who were unfortunate enough to actually be shot.

Heins Implement Co. v. Missouri Hwy. & Transp. Comm'n, 859 S.W.2d 681 (Mo. banc 1993), is not to the contrary. In that case, a culvert under a highway bypass was not designed to handle the normal overflows from a nearby creek, leading to flooding of nearby properties. The plaintiff landowners sued, among others, the highway employee who designed the bypass. The trial court granted the highway employee summary judgment under the public duty doctrine, and this Court affirmed. The Court held that the duty to properly design and construct highways properly runs to the public at large and not to any particular individuals. *Id.* at 694-95.

Heins raises an issue, however, in one respect. The landowners argued that they were owed a "special duty" in the design and construction of the bypass because their lands were located close by and therefore were more likely to be impacted if there was an error. The Court rejected the argument, holding that Missouri has not recognized a "special duty exception" to the public duty doctrine. *Id.*

At first glance it might appear that this holding is inconsistent with the subsequent holding in *Jungerman*, and the other cases cited above, that the public duty defense does not apply when there is a duty owed to a particular individual. The decisions are easily reconciled, however. "Nearby landowners" is a rather amorphous group — how nearby do they have to be, and does this duty just apply to those who are uphill of the highway or does it also include those who are downhill? The person or persons to whom the duty would be owed in *Heins* is uncertain. In contrast, in the cases like *Jungerman* and *Stacy*, the duty is owed to a specific, easily identifiable person — the person whose property was inventoried, or the person whose hospital room caught fire. Similarly, in the present case, the duty is owed to a specific, easily identified person — the person whose stop box was paved over and made inaccessible. This person, the College, was the only person to whom the duty was owed, and its interest in the matter was special, direct, and distinct, and the injury it suffered was foreseeable and distinct from that which would be suffered by any other member of the public.

In short, the public duty doctrine does not relieve the City of liability here because, first, the water business is not a governmental activity and the duties that arise out of it are not duties owed to the public and, second, even if the City has duties to the public in the

undertaking of its proprietary water business, it owed an individualized duty to the College that was special, direct, and distinct from that owed to the general public.[6]

6. *Response to City's Point Relied On IV:* This case does not involve a defective condition of property within the scope of Section 537.600, RSMo., and the College's claim is therefore not subject to the $100,000 damage limitation stated in Section 537.610, RSMo.

The City contends that the College's losses, to the extent that they can be blamed on the City at all, resulted from the dangerous condition of the City's property. The City contends, therefore, that the losses come within the express statutory waiver of sovereign immunity in Section 537.600, RSMo, and are therefore subject to the $100,000 damage limitation in

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[6] The City cites a number of other public duty cases not discussed in the argument above. These cases stand for the unremarkable proposition that police officers and fire fighters in the pursuit of criminals or attempting to extinguish fires do not have liability to members of the public injured in the course of their performance of these clearly governmental tasks. The College does not disagree with these decisions, which are irrelevant to the case at hand.

Section 537.610, RSMo. *City Brief* at 45-48. The City is wrong. The City waived this defense and is wrong on the merits because there was no "dangerous condition" of the City's property within the meaning of the statute.

1. The City waived the issue because at trial the City contended that there was no dangerous condition of property here. It now takes the exact opposite position.

Although the City asserted Section 537.610, as an affirmative defense in its amended answer [LF 27], it abandoned that defense at trial. The City's trial brief nowhere cites Section 537.610, let alone asserts that any damages cap applies. [SLF 89-98]. For these reasons, the point is waived. *Ebeling*, 209 S.W.2d at 895.

There is another compelling reason to consider the point waived. The City's argument is inconsistent with its position at trial. The City stipulated that if it was liable, it was liable for the *full* amount of the College's damages — $5,825,161 — except for any reduction for comparative fault. [LF 39-40]. The City should be precluded from now arguing that those damages should be capped at some lower amount. A stipulation is a judicial admission and constitutes an abandonment of any contention to the contrary. *Sears, Roebuck & Co. v. Hupert*, 352 S.W.2d 382, 385 (Mo. App. 1961). When parties enter into stipulations, they cannot be heard to say on appeal that the facts or issues are other than those stipulated. *Id.; see also Buckner v. Buckner*,912 S.W.2d 65, 70 (Mo. App. 1995) (stipulations are controlling and conclusive, and courts are bound to enforce them); *Orthotic & Prosthetic Lab, Inc.*, 851 S.W.2d at 643 n.5, 646 (declining to consider issues and arguments not stated in the parties' joint stipulation).

The City has also reversed its position on another point. Before the damages cap of Section 537.610.2 can be invoked, there must first be a waiver of sovereign immunity under Section 537.600.1, through, in the present case, a dangerous condition of the public entity's property. *See* Section 537.600.1(1) and (2). The City's unwavering position throughout trial, however, was that the danger condition of property exception to sovereign immunity did not apply:

- "[T]he City has the protection of § 537.600 RSMo. [because plaintiff's claims] do not fit within any of the exceptions contained in that statute nor has plaintiff alleged any exception." [SLF 90].
- "[P]laintiff has not alleged a dangerous condition of property … as an exception to § 537.600 RSMo." [SLF 90].
- "[P]laintiff has not alleged a dangerous condition in the City's right-of-way." [SLF 92].
- "City contends that … Plaintiff has failed to allege a dangerous condition within the exception to sovereign immunity under § 537.600.1(2)…" [LF 18].
- "City contends that College does not allege a dangerous condition on property, an exception to sovereign immunity under § 537.600 RSMo." [LF 49].

While the vigor with which the City opposed the idea that the College's losses were caused by a dangerous condition of property was odd, given that the College never alleged that

there was any such dangerous condition, the City nevertheless made it very clear that there was no dangerous condition of property here. The College cannot dispute this point. The dangerous condition of property exception to sovereign immunity is completely inapplicable here, as the stipulated facts make clear.

On appeal, however, its vociferous denials at trial notwithstanding, the City has decided to flip its case on its head and allege a dangerous condition of property on the hope that it might have some luck with a damages cap argument. This is a complete reversal of the City's position at trial and should not be permitted. A party cannot take a position on appeal directly contrary to or inconsistent with the one it took at trial. *Bland v. IMCO Recycling, Inc.*, 67 S.W.3d 673, 682 (Mo. App. 2002); *Galaxy Steel & Tube, Inc. v. Douglass Coal & Wrecking, Inc.*, 928 S.W.2d 420, 423 (Mo. App. 1996). Such machinations are frivolous and should not be considered by this Court. *Swanigan v. Crockett,* 713 S.W.2d 41, 43 (Mo. App. 1986) (assertion on appeal of a position diametrically opposite of the one taken at trial is frivolous).

2. There is nothing in the record to support application of the "dangerous condition" waiver of sovereign immunity.

Even if the City were in a position to reverse its position on this issue, its argument still fails. The City cannot show the College's damages flow from a dangerous condition of the City's property. Thus, there is no basis for invoking the damages cap of Section 537.610.

Section 537.600.1 provides that sovereign immunity is expressly waived in two instances, regardless of whether the municipality was acting in a governmental or proprietary capacity. *Wollard v. City of Kansas City,* 831 S.W.2d 200, 202 (Mo. banc 1992). Where

liability is imposed pursuant to either of these statutory waivers, Section 537.610.2 provides that damages shall be limited. The City now contends that if it is liable, it is actually liable under the "dangerous condition" statutory exception to sovereign immunity and thus damages are limited to the statutory cap amount. *City Brief* at 45-48.

The "dangerous condition" exception provides as follows:

> Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977 … shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances: …(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred.…

Section 537.600.1(2), RSMo.

To satisfy the "dangerous condition" exception, a plaintiff must plead and prove four elements: (1) a dangerous condition of property owned by the defendant public entity; (2) the dangerous condition directly caused plaintiff's injury; (3) the dangerous condition created a reasonably foreseeable risk of the kind of harm incurred; and (4) a public employee negligently created the condition or had actual or constructive notice of the condition in time to protect against the dangerous condition. Section 537.600.1(2); *Williams v. Missouri Highway &*

Transportation Commission, 16 S.W.3d 605, 610 (Mo. App. 2000). A public entity has no liability for injuries caused by the dangerous condition of property owned by someone else, even if the public entity is responsible for regulating or supervising the property. *State ex rel. Division of Motor Carrier & Railroad Safety*, 91 S.W.3d 612, 616 (Mo. banc 2002).

The term "dangerous condition" refers to intrinsic defects in the physical condition of property owned by the defendant public entity or the dangerous positioning of various items of property. *Alexander v. State*, 756 S.W.2d 539, 541-542 (Mo. banc 1988). "The Supreme Court [in *Alexander*] expressly rejected the notion that the failure to perform an intangible act, whether it be a failure to supervise or a failure to warn, could constitute a dangerous condition of the property for the purpose of waiving sovereign immunity." *Tillison v. Boyer*, 939 S.W.2d 471, 473 (Mo. App. 1996). "In its holding, our Supreme Court declared that the test for a dangerous condition was that the condition was dangerous because its existence, without intervention by third parties, posed a physical threat to plaintiff." *Necker v. City of Bridgeton*, 938 S.W.2d 651, 655 (Mo. App. 1997), citing *Alexander*, 756 S.W.2d at 542.

Here, the City's negligence is precisely the "failure to perform an intangible act" that the Court held does not constitute a "dangerous condition" of property. The City paved over the stop box, failed to notify the College of its actions, and failed to mark the location of the stop box. The City's argument on appeal is that the 1987 repaving caused Oakland Avenue to be in a dangerous condition. What the argument misses, however, is that a paved-over manhole does not render the property defective so that its physical condition was dangerous to College. The condition of the City's street posed no "physical threat" to plaintiff , and there is no allegation

or evidence that the street itself was defective. *The problem here was not the condition of the City's property, the street, which was perfectly safe, but the concealment of the stop box lying beneath the surface of the property. The stop box, however, was the property of the College, not the City*. [LF 30, 33]. Thus, the stop box was not the property of the defendant public entity, the City, and any "danger" posed by it falls outside the scope of Section 537.610.2. *Russell*, 91 S.W.3d at 616.

Statutory provisions that waive sovereign immunity are strictly construed. *Bartley v. Special School District*, 649 S.W.2d 864, 868 (Mo. banc 1983); *Claxton v. City of Rolla*, 900 S.W.2d 635, 636 (Mo. App. 1995). Construing Section 537.600.1(2) strictly, the City's attempt to shoehorn the facts into a "dangerous condition" of property should be rejected.

7. *Response to City's Point Relied On V:* The trial court did not err in not apportioning fault between the parties because under the stipulated facts the College did not breach any duty of care and therefore was not contributorily negligent.

The City's contributory fault argument lacks merit and should be rejected for a number of reasons. Because of the scattershot nature of the City's contentions, it is easiest to deal with them contention by contention.

Contention: The rupture of the water pipe is what caused the flood and the College's damages.

Response: The parties' stipulation establishes the initial damage caused by the rupture is not attributable to the City. Consequently, the College absorbed the initial $1,005,506 of flood-related damages. [LF 39]. As already stated, the parties' stipulation also provides that the

College "suffered additional flood-related damages of $5,825,161 as a result of the additional flow of water during the period from 3:20 p.m. through 8:30 p.m." [LF 40]. This additional damage was not proximately caused by the initial rupture but by the inability to promptly locate and close the concealed shut-off valve. [LF 39-40]. The damages awarded against the City are only those damages attributable to the City pursuant to the stipulated fact that, "[i]f the valve to the fire line had been located and closed at or about 3:20 p.m., as it would have been had the valve not been concealed by the pavement, the College's flood-related damages would have been limited to $1,005,506." [LF 39].

Contention: The College had a duty under § 23.12.010 of the City Ordinances to make sure its stop box was accessible, and the College's failure to comply with the ordinance was negligence *per se*.

Response: As discussed in detail above at pages 45 to 53, the City's ordinance attempted to impose a duty upon the College inconsistent with the common law and State statute, and with the College's status as a subdivisioni of the State, and therefore the ordinance was ineffective to impose such a duty on the College. *See, e.g., Robinson v. Arnold* 985 S.W.2d 801 (Mo. App. 1998) (no liability for landowner under negligence *per se* theory notwithstanding ordinance that purports to place on landowner the duty to maintain adjoining sidewalks). Furthermore, § 23.12.010 is not a safety ordinance and, therefore, its violation cannot give rise to a claim of negligence *per se*. *Lowdermilk v. Vescovo Building & Realty Co., Inc.*, 91 S.W.3d 617, 629 (Mo. App. 2002).

Contention: The trial court did not address the City's contention that the College was guilty of negligence and that fault should be approprtioned.

Response: The trial court did address the issue. The Order and Judgment stated: "City has not articulated any act or omission on the part of College that would constitute a breach of duty." [LF 55]. This was the correct conclusion.

Contention: The College had a duty to maintain the shut-off valve and its failure to do so was negligent.

Response: This contention is not based on any evidence in the record. There is nothing in the record to support the contention that any part of the water supply system, pipes or valves, require regular maintenance. There is no factual support for the assertion, and thus the City's contention violates the applicable standard of review. Indeed, *Adam Hat Stores* suggests that one ordinarily does not maintain these systems. As reported in that decision, cast iron water pipes have "a minimum duration expectancy of 100 years or more, and some are known to have been in service for more than 300 years. Following installation, there is no method of inspection other than to take the piping out of the ground. Engineers never recommend its replacement because of age." *Id*., 316 S.W.2d at597.

Contention: The College was better situated than the City to know that its stop box had been paved over, and it was negligent in not attempting to keep track of its location.

Response: It cannot seriously be contended that it is the City's residents have the - responsibility to monitor the City's paving projects — to count the manholes before and after the project. The City has not cited any authority for this novel proposition. The City has

exclusive control over its streets. The public has a right to expect that the City will exercise this control with a reasonable degree of competence. It is not foreseeable that in the normal course of events the resurfacing of a street will result in the permanent paving over of a manhole. The College was not negligent in not monitoring the construction.

8. *Response to City's Point Relied On VI:* The trial court did not err in awarding the College prejudgment interest.

"Generally, prejudgment interest *must* be awarded on liquidated claims." *21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858, 871 (Mo. App. 1995) (emphasis added). "In order to be liquidated so as to allow interest, the claim must be fixed and determined or readily determinable, but it is sufficient if it is ascertainable by computation." *Bolivar Insulation v. R. Logsdon Builders, Inc.*, 929 S.W.2d 232, 236 (Mo. App. 1996), quoting *Schnucks Markets, Inc. v. Cassilly*, 724 S.W.2d 664, 668 (Mo. App. 1987).

Although prejudgment interest is generally not allowed in tort cases, there are many situations in which it is allowed. For example, this Court has held that prejudgment interest is allowed "where the only contested issue is liability and the defendant does not dispute the dollar amount of damages…" *Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 8 (Mo. banc 1986), *citing Hawkingson Tread Tire Service Co. v. Indiana Lumbermens Mutual Ins. Co.*, 324 S.W.2d 24 (Mo. 1951). "[W]here a defendant contests only the issue of liability the plaintiff's claim is considered liquidated even though the amount of ultimate liability remains to be determined." *Sharaga v. Auto Owners Mut. Ins.*, 831 S.W.2d 248, 254 (Mo. App. 1992).

The reason for permitting prejudgment interest on liquidated claims — which includes claims where only liability and not damages are contested — is straightforward. In claims with unliquidated damages, prejudgment interest is generally not permitted because "where the person liable does not know the amount he owes he should not be considered in default because of failure to pay." *Id*., *citing Fohn v. Title Ins. Co*., 529 S.W.2d 1 (Mo. banc 1975). If a defendant, however, does not contest damages but defends solely on liability then the defendant *is aware* of the amount he allegedly owes. In that case, if liability is established, then the plaintiff ought to receive prejudgment interest to compensate him fully for the true cost of his money damages. *Id.*

In this case, the parties disputed liability but not damages. It was undisputed that the College suffered $6,830,667 in total losses from the flood. [LF 39]. Of this only $5,825,161 was attributable to the City. [LF 39-40]. The rest, $1,005,506, would have been suffered regardless of the City's acts or omissions. These losses were suffered in the first 20 minutes of the flood. It was undisputed that the City bore no responsibility for this amount. [LF 30, 39].

These very precise and undisputed damage figures were not the product of negotiations, but rather were the undisputed facts. The parties stipulated to these facts, and further stipulated that the amount of damages was not an issue for the trial court. [LF 31-32 (stipulation 7)]. This case presents the classic example of a case where prejudgement interest is proper because "the only contested issue is liability and the defendant does not dispute the dollar amount of damages...." *Catron*, 723 S.W.2d at 8.

Indeed, this case is stronger than those relied upon in *Catron* because here the City actually stipulated to the College's damages; it did not merely not contest damages. No damage amount could be more "fixed and determined" than a damage amount to which the parties have stipulated.

The City relies on case law from the Courts of Appeals holding that prejudgment interest is not recoverable in tort cases unless the defendant's conduct benefitted the defendant. *See, e.g., Vogel v. A.G. Edwards & Sons,* 801 S.W.2d 746, 757 (Mo. App. 1990); *Ritter Landscaping v. Meeks*, 950 S.W.2d 495, 496 (Mo. App. 1997). The Court of Appeals's holdings are a misinterpretation of the case law and contradicts this Court's opinions. The origin of the so-called "rule" is *Kenney v. Hann & St. Joseph R.R.*, 63 Mo. 99, 102 (Mo. 1876). In that negligence case, the Court disallowed prejudgment interest because there was no statutory authority permitting interest. The Court stated that unlike the statute for conversion which allowed for prejudgment interest if the defendant benefitted from the conversion, no analogous statute existed for negligence or any other tort. Some courts have incorrectly interpreted *Kenney* to mean that in tort cases no prejudgment interest is allowed unless the defendant benefitted from the tort. *See, e.g., Gerst v. St. Louis*, 84 S.W. 34, 39 (Mo. 1904); *Vogel*, 801 S.W.2d at 757; *Ritter Landscaping*, 950 S.W.2d at 496.

The courts' transformation of *Kenney's* insistence that there be statutory authority for awarding prejudgment interest, a concept since discarded, into a requirement that there be some benefit to the defendant from the underlying tort before a court can award prejudgment interest, is unwarranted. This Court has been clear that in addition to the statutory authority

provided in Section 408.040 for tort cases and Section 408.020 for civil cases, there are numerous other bases for awarding prejudgment interest, *e.g.*, when a liquidated claim is countered with an unliquidated counterclaim; when the only contested issue is liability; when the underlying action is a condemnation; when the amount of damages is ascertainable by a mathematical calculation. *Catron*, 723 S.W.2d at 8; *see also K-Smith Truck Lines v. Coffman*, 770 S.W.2d 393, 399 (Mo. App. 1989) (awarding prejudgment interest on tort claim independent of Section 408.040); *Salmon v. Brookshire*, 301 S.W.2d 48, 54 (Mo. App. 1957) (holding that measure of damages in a fraud case includes prejudgment interest).

The City's professed concern that parties will refuse to stipulate to damages for fear that the stipulation would convert an unliquidated claim into a liquidated amount, and thus improperly incur prejudgment interest, is misplaced. The reason the College is entitled to prejudgment interest is because the City could not dispute the damages incurred by the College. The stipulation is *evidence* of the City's inability to dispute damages, but it is not the reason why the College is entitled to prejudgment interest. Furthermore, to the extent that parties in future cases may feel hesitant to stipulate to damages, the parties may stipulate that damages are unliquidated and that the stipulated damages was a negotiated term. They can even stipulate that prejudgment interest will not be awarded. If the damages figure is really the result of negotiations, and not simply a hard, cold fact, the defendant will have the bargaining power to require that some such additional term be added to the stipulation. The plaintiff, moreover, will have no ground to object to such a further stipulation because the plaintiff under such circumstances would not be able to receive prejudgment interest if he or she had to prove

up damages at trial. The City's professed concern for future defendants entering into stipulations is therefore misplaced.

The trial court properly awarded prejudgment interest of $2,434,596.30.[7]

CONCLUSION

The Court should affirm the judgment to College of damages in the stipulated principal sum of $5,825,161, plus prejudgment interest in the amount of $2,434,596.30, for total damages of $8,259,757.30, plus post-judgment interest running from June 14, 2002.

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[7] Prejudgment interest was awarded for the period from the date of the flood, October 23, 1997, through the date of judgment, June 14, 2002. [LF 56]. If for any reason the College's damages are deemed not liquidated prior to execution of the stipulations, they certainly were liquidated at that point. The stipulations were signed December 28, 2001. The period from December 28, 2001 through June 14, 2002 was 168 days. Prejudgment interest for that shorter period, at the rate of $1,436.34 per day, is $241,305.12.

Post-judgment interest on this sum is $743,378.15 per year, or $2,036.65 per day. Total post-judgment interest through the scheduled date of argument, December 3, 2003, a period of one year and 172 days, equals $1,093,681.90.

Respectfully submitted,

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