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Murky Waters: Barriers to Recovery for Flood Damage from Municipal Waterworks

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Murky Waters: Barriers to Recovery for Flood Damage from Municipal Waterworks

Junior College District v. City of St. Louis[1]

I. INTRODUCTION

The State has long enjoyed an exception to the general rules of negligence liability under the common law doctrine of sovereign immunity. This immunity has been extended to municipal governments in carrying out their role of serving the general public but not in their performance of proprietary functions. In its ruling in *Junior College District v. City of St. Louis*,[2] the Missouri Supreme Court emphasized the narrow interpretation of exceptions to limits on negligence claims against government entities, particularly in relation to a municipality's operations as a provider of water to its citizens.[3] The court further insulated municipal water suppliers by refusing to recognize a duty owed by a municipality to take reasonable measures to stop the flood of water onto private property as a result of a failure in an instrumentality not owned or maintained by the municipality.[4]

II. FACTS AND HOLDING

This case was tried on facts stipulated by the parties.[5] The Junior College District of St. Louis (the "College") built a campus within the City of St. Louis (the "City") in the early 1960s.[6] During construction, the College installed two underground service lines to supply water solely to the College.[7] The first line provided the main water supply for the campus (the "supply line").[8] The second line, located within six feet of the first line, was a fire suppression line (the "fire line").[9] The College connected both lines to the City's water main and installed "stop boxes," which contained shut-off valves capable of discontinuing the flow of water to the water lines.[10] The stop boxes were accessible through manholes located in the right-of-way adjacent to a

1. 149 S.W.3d 442 (Mo. 2004) (en banc).
2. *Id.*
3. *See infra* notes 88-114 and accompanying text.
4. *Id.*
5. *Junior Coll. District*, 149 S.W.3d at 444.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

City street.[11] Subsequent to the installation of the lines, the City sold water to the College for profit, billing the College for water supplied to the College's two water lines.[12] The contract between the College and City governing the supply of water did not include an agreement requiring the City to maintain the lines, a common provision in many residential customer contracts.[13]

At some point between the installation of the water lines and 1987, the City widened the street next to the right-of-way in which the College's stop boxes were located.[14] This change resulted in the stop boxes being located directly beneath the street.[15] In 1987, the City completed additional work on the street including repaving and raising the street's grade.[16] The manhole cover providing access to the supply line was raised to street level at the time of repaving.[17] However, the manhole cover providing access to the College's fire line was not raised and was, thus, paved over by the City.[18] Neither the City Street Department nor the City Water Division provided notice to the College that the manhole had been paved over, nor did either mark the location of the paved-over manhole.[19]

On October 23, 1997, the College's fire line ruptured, causing flooding at the College.[20] Shortly after the line ruptured, maintenance personnel from the College discovered the flooding, accessed the manhole covering the supply line, and shut off the water flowing to that line.[21] Because the break was in the fire line and not the supply line, the flooding continued.[22] Although the College possessed engineering drawings showing the location of the covered manhole containing the fire line's shut-off valve, because the drawings were located in a basement office that had already flooded, they were not available.[23]

The College contacted the City's Water Division for assistance.[24] Water Division employees arrived with engineering drawings showing the location of the shut-off valve, but neither City nor College employees could locate the

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11. *Id.*
12. *Id.*
13. *Id.* at 445.
14. *Id.* at 444
15. *Id.*
16. *Id.*
17. *Id.* Neither party to this action was aware of whether the College, the City, or a third party raised the manhole providing access to the supply line during the repaving in 1987. *Id.*
18. *Id.*
19. *Id.* at 444-45.
20. *Id.* at 445.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

valve.[25] The City employees left the location of the rupture to respond to an unrelated service call, taking the drawings with them.[26] After returning one and a half hours later, the City employees eventually located the fire line through the use of the engineering drawings and a water meter and with the assistance of a private plumber hired by the College.[27] Once the shut-off valve was located, the City employees broke through the pavement to access and shut off the valve, thereby stopping the flow of water approximately five and a half hours after it had begun.[28] The flooding resulted in approximately 500,000 gallons of water escaping onto the College's property.[29]

At the time of repaving in 1987, a St. Louis City ordinance provided that "[s]top boxes over shut off valves on all [water] 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."[30] In 1993, another City ordinance went into effect placing the responsibility for exposing stop boxes covered during street repair or resurfacing on the City's Water Division.[31]

The College filed a three-count petition seeking monetary relief "for property damage resulting from the flooding."[32] One count alleging liability based on noncompliance with the 1993 ordinance was dismissed by the court.[33] After the parties waived trial by jury and submitted a stipulation of facts,[34] the trial court entered judgment for the College on the remaining negligence claims.[35] The trial court found that the City's Street Department, rather than the College, had made the fire line stop box inaccessible and that

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25. *Id.*

26. *Id.*

27. *Id.* at 445.

28. *Id.* at 445-46.

29. *Id.* at 445.

30. Junior Coll. Dist. v. City of St. Louis, No. ED 81496, 2003 WL 22076349, at *4 (Mo. Ct. App. Sept. 9, 2003) (citing various ordinances as recorded at CITY OF ST. LOUIS, MO., REVISED CODE § 23.120.010 (1994)), *rev'd*, 149 S.W.3d 442 (Mo. 2004).

31. *Id.* (citing Ord. 62836 sec. 1, 1993); *see* CITY OF ST. LOUIS, MO., REVISED CODE § 23.04.185 (1994) stating:

> 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.

32. *Junior Coll. Dist.*, 2003 WL 22076349, at *1.

33. *Id.* Noncompliance with an ordinance is not sufficient to support a claim for damages standing alone, but rather is admissible only as evidence of negligence. *Id.*

34. The stipulated facts included agreement that absent sovereign immunity or a determination that the college has the duty to maintain the accessibility and visibility of the valve box, the trial court "must enter judgment against the City for the entirety of the College's damages." *Id.* Damages were also stipulated at $5,825,161. *Id.*

35. The trial court awarded damages in the amount of $8,259,757.30, which consisted of $5,825,161 in principal, plus $2,434,596.30 in prejudgment interest. *Id.*

the City did not show an "act or omission on the part of the College that would show a breach of duty" to maintain access to the stop box.[36] The trial court further found that the 1993 ordinance clearly imposed a duty on the City to make stop boxes accessible when they are covered during street repair or resurfacing.[37]

The City appealed the trial court's judgment to the Missouri Court of Appeals.[38] The City argued that the trial court erred in finding the City owed a duty to the College because the ordinance in effect at the time the street was paved made it the responsibility of the owner of the premises to maintain the stop box's accessibility.[39] Agreeing with the City, the court of appeals held that the trial court erred in awarding judgment on behalf of the College because the 1993 ordinance was not retroactive and did not impose a duty on the City to expose and make accessible stop boxes concealed by street repaving prior to the enactment of the 1993 ordinance.[40] Due to the general interest and importance of the issue, the case was transferred to the Missouri Supreme Court pursuant to Missouri Court Rule 83.02.[41]

The Missouri Supreme Court held that the City's Water Division had no common law duty to keep the shut-off valve accessible or to assist the College in locating the valve and stopping the flow of water because the line and the valve were part of the College's private property.[42] The court further held that the City had not undertaken any duty to the College regarding the maintenance of the water lines or valves through contract, by passing the 1993 ordinance, or otherwise.[43]

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36. *Id.* at *3.

37. *Id.*

38. Junior Coll. Dist. v. City of St. Louis, 149 S.W.3d 442, 446 (Mo. 2004) (en banc).

39. *Junior Coll. Dist.*, 2003 WL 22076349, at *2. The City also raised five other issues on appeal. It argued that the trial court erred in its judgment because (1) the City was protected from liability to the College under the public duty doctrine; (2) no evidence existed regarding the allegedly negligent training or response of City personnel that such training or response was the proximate cause of damages; (3) the award exceeded the $100,000 limit on damages arising out of the City's allegedly defective property set forth in MO. REV. STAT. § 537.610 (1994); (4) the court failed to apportion fault between the parties; and (5) the court awarded prejudgment interest. *Id.* The court of appeals did not rule on these five issues raised by the City. *Id.*

40. *Id.* at *5-6.

41. *Id.* at *6. Missouri Supreme Court Rule 83.02 states that a case "disposed of by an opinion . . . in the court of appeals may be transferred to this Court by order of a majority of the participating judges . . . on their own motion or on application of a party."

42. *Junior Coll. Dist.*, 149 S.W.3d at 449-50.

43. *Id.* at 449.

III. LEGAL BACKGROUND

A. Municipalities and the Doctrine of Sovereign Immunity

In order to pursue a negligence claim, a plaintiff must show the following three elements: (1) the defendant had a duty to protect the plaintiff from injury, (2) the defendant failed to perform that duty, and (3) the defendant's failure proximately caused the injury to the plaintiff.[44]

Under the common law, a state and its entities enjoy full immunity from tort liability, including negligence claims, through the doctrine of sovereign immunity.[45] Sovereign immunity was first applied to municipalities in 1788 in *Russell v. Men of Devon*.[46] Because municipalities operate as both a governmental body and a corporation, the complete immunity provided to the State, which operates solely as a governmental body, has not been fully extended to municipalities.[47]

The application of common law sovereign immunity to municipalities is limited to circumstances in which injuries were the result of actions taken by a municipality in its governmental function; thus, the immunity is unavailable to a municipality acting in a proprietary capacity.[48] Governmental functions are those performed for the "common good of all."[49] Proprietary functions, on the other hand, are those performed for the "special benefit or profit of the municipality acting as a corporate entity."[50] In situations where a municipality maintains a specific operation for dual purposes, one governmental and one proprietary, immunity is determined based on the capacity in which the

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44. Lopez v. Three Rivers Elect. Coop., Inc., 26 S.W.3d 151, 155 (Mo. 2000) (en banc).

45. Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. 1996) (en banc). *See generally*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS ch. 25 (W. Page Keeton ed., 5th ed. 1984) (discussing the origins and modern application of governmental immunity to torts).

46. 100 Eng. Rep. 359 (1788); KEETON ET AL., *supra* note 45, at 1051; RESTATEMENT (SECOND) OF TORTS § 895C cmt. c (1977).

47. *Jungerman*, 925 S.W.2d at 204.

48. *Id.*

49. *Id.*; *see, e.g.*, State *ex rel.* Bd. of Trs. v. Russell, 843 S.W.2d 353, 359 (Mo. 1992) (en banc) (operation of a hospital is a governmental function); Dallas v. City of St. Louis, 338 S.W.2d 39, 40 (Mo. 1960) (per curiam) (collection of garbage is a governmental function).

50. *Jungerman*, 149 S.W.2d at 204; *see, e.g.*, Thomas v. City of Kansas City, 92 S.W.3d 92, 101 (Mo. Ct. App. 2002) (operation of a drainage system is a proprietary function); Matthews v. City of Farmington, 828 S.W.2d 693, 695 (Mo. Ct. App. 1992) (operation of a power plant is a proprietary function); Schulz v. City of Brentwood, 725 S.W.2d 157, 160 (Mo. Ct. App. 1987) (operation of a preschool and daycare is a proprietary function).

government was functioning at the time of the alleged tortious conduct.[51] The operation of a municipal water system is one such dual-purpose municipal activity. Missouri courts have held that the operation of a water system for the sale of water to residents is a proprietary function, but the use of the same water system for fighting fires is a governmental function.[52]

In 1977, amid growing criticism of the appropriateness of sovereign immunity, the Missouri Supreme Court reviewed the justifications for the doctrine in *Jones v. State Highway Commission*.[53] The court concluded that:

> [I]t is the proper function of the court in applying the principles of a limited constitutional government to reject the rule of sovereign tort immunity and declare that the government shall be liable for its torts, consistent with the proposition that the government is not, in the American system, all powerful.[54]

The state legislature responded the following year by reenacting sovereign immunity as it existed under the common law prior to the ruling in *Jones* in all cases except those where the state specifically waives the immunity by statute.[55] The legislature's reenactment expressly waived sovereign immunity in Missouri in two instances: where injuries are the result of negligent operation of a motor vehicle by a public employee, and where injuries are caused by a dangerous condition of a public entity's property.[56]

B. Negligence Claims Against a Municipality

Applying common law, as modified by the legislature in 1978, the Missouri Supreme Court has developed a four-step process for analyzing munici-

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51. Theodoro v. City of Herculaneum, 879 S.W.2d 755, 761 (Mo. Ct. App. 1994).

52. *Id.*

53. 557 S.W.2d 225 (Mo. 1977) (en banc), *superseded by* MO. REV. STAT. § 537.600 (2000).

54. *Id.* at 227-28.

55. MO. REV. STAT. §§ 537.600-.650 (2000). *See* Woolard v. City of Kansas City, 831 S.W.2d 200, 202 (Mo. 1992) (en banc); MO. REV. STAT. § 537.600.1 (2000) (sovereign immunity as it existed prior to September 17, 1977, exists in full force "except to the extent waived, abrogated or modified by statutes in effect prior to that date"). For examples of similar rejections of sovereign immunity by courts and subsequent reinstatements by statute, see David W. Case, *From Pruett to Presley: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi*, 63 MISS. L.J. 537 (1994); John A. Gleason & Kenneth Van Winkle, Jr., Comment, *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity*, 55 U. CIN. L. REV. 501 (1986).

56. *See Woolard*, 831 S.W.2d at 202.

pal tort liability.[57] First, the court must determine if the defendant is a "public entity." This determination has been difficult in cases involving "hybrid" entities, which display both public and private characteristics.[58] Although municipalities do have both public and private characteristics, all municipalities are considered public entities for purposes of determining sovereign immunity.[59]

Second, the court must determine whether the injury fits within one of the statutory exemptions for which immunity is specifically waived.[60] If the injury fits within one of these categories, immunity is waived regardless of whether the function is governmental or proprietary but a damage award is subject to statutory caps.[61]

For claims against municipalities that do not fall within one of the two general exceptions to sovereign immunity, the third step requires the court to determine if the activity giving rise to the injury was undertaken as part of the municipality's governmental or proprietary function.[62] Immunity exists for governmental functions, but not for proprietary functions.[63] In *Adam Hat Stores, Inc. v. Kansas City*,[64] the Missouri Supreme Court classified the operation of a water system by a city for the purpose of supplying water to individuals as a proprietary function.[65] In *Adam Hat*, the court held that a city operating a waterworks for profit "assume[d] the same responsibility for its negligence as [a] private supplier of water for profit."[66] Subsequent case law distinguishes the situation presented in *Adam Hat* from situations in which a city supplies water for use in putting out fires. In the later situation, the municipality performs a governmental function and is immune from any liability for its actions.[67]

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57. State *ex rel.* Bd. of Trs. v. Russell, 843 S.W.2d 353, 358-60 (Mo. 1992) (en banc).

58. *Id.* at 358.

59. *See id. See also* MO. REV. STAT. § 537.600 (2000).

60. *Russell*, 843 S.W.2d at 358.

61. *Id.* (referencing MO. REV. STAT. § 537.610.2 (2000), which now provides a statutory cap of $300,000 for any one person in a single accident or occurrence).

62. *Id.*

63. *Id.*

64. 316 S.W.2d 594 (Mo. 1958) (en banc).

65. *Id.* at 597.

66. *Id.*

67. Junior Coll. Dist. v. City of St. Louis, 149 S.W.3d 442, 448 (Mo. 2004) (en banc).

68. *Russell*, 843 S.W.2d at 360.

The final analytical step regarding municipal tort liability involves liability insurance coverage.[68] A municipality may waive immunity, even in instances where it is performing a governmental function and, thus, would be immune from liability for negligence, by carrying liability insurance.[69]

C. Duties Owed by a Municipality Conducting a Proprietary Function

The duties owed to customers of a municipality performing a proprietary function, such as supplying water for consumption, arise from various sources. A duty, the breach of which may suffice to incur liability, can exist at common law.[70] A municipality can expressly assume a duty through a contract with a customer.[71] A duty might also be imposed by a controlling statute or ordinance.[72]

The Missouri Constitution prohibits the enactment of any law that is "retrospective in its operation."[73] As a result, statutes, including those imposing a duty on a municipality acting in a proprietary function, are presumed to operate prospectively unless they fall into one of two exceptions: "(1) where the legislature manifests a clear intent that the statute act retroactively, [or] (2) where the statute is solely procedural or remedial and does not affect the substantive rights of the parties."[74] For the first exception, clear intent that a statute acts retroactively can be shown through express language or "unavoidable implication."[75]

The second exception requires a determination of whether the statute is procedural, remedial or substantive. Substantive law "creates, defines and regulates rights and duties giving rise to a cause of action."[76] Further, substantive law "takes away or impairs a vested right acquired under existing law, creates a new obligation, imposes a new duty, or attaches a new disability to a past transaction."[77] In contrast, "[p]rocedural law . . . prescribes a method of enforcing rights or obtaining redress for their invasion."[78] Remedial laws relate to changes in the appropriate remedy available for the enforcement of an existing right.[79]

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69. *Id.* (referencing MO. REV. STAT. § 537.610 (2000)).

70. *Junior Coll. Dist.*, 149 S.W.3d at 455 n.4 (White, C.J., dissenting).

71. *Id.* at 444.

72. Junior Coll. Dist. v. City of St. Louis, No. ED 81496, 2003 WL 22076349, at *4 (Mo. Ct. App. Sept. 9, 2003).

73. MO. CONST. art. I, § 13.

74. Jones by Williams v. Mo. Dep't of Soc. Servs., 966 S.W.2d 324, 327 (Mo. Ct. App. 1998).

75. *Id.*

76. *Id.* at 328.

77. *Id.*

78. *Id.*

79. *Id.*

The Missouri Supreme Court has held that the same general rules of construction applicable to state statutes also apply when construing city ordinances.[80] According to the court, "[t]he cardinal rule for construing ordinances is to ascertain and give effect to the intent of the enacting legislative body."[81] Additionally, when interpreting an ordinance courts should give words their "plain and ordinary meaning" and avoid absurd results.[82]

IV. INSTANT DECISION

A. The Majority Opinion

Judge Stith delivered the majority opinion, joined by Judges Wolff, Price and Limbaugh.[83] The court began by noting that claims involving negligence on the part of a municipality are centered on whether the actions of the municipality relate to its governmental capacity or a proprietary capacity.[84] The court was relieved of the burden of analyzing this issue in the instant case because the parties stipulated to the fact that the delivery of water by the City was a proprietary function.[85] The College did not contend that the lack of access to the shut-off valve covered by the street repaving constituted a dangerous condition of public property.[86] As a result, the court did not specifically address whether a municipality making a shut-off valve inaccessible by repaving a street creates a dangerous public condition that would allow recovery for negligence, regardless of whether such condition was created by the municipality in its proprietary or governmental function.[87] Thus, the situation presented was identical to a situation involving a private supplier of water and required the College to show a duty on behalf of the City.[88]

The College alleged a common law duty on the part of the City to provide access to water line shut-off valves.[89] As evidence of such a duty, the College cited a number of cases finding that a municipality providing water in a proprietary capacity was responsible for water damages resulting from ruptured water lines.[90] Each case cited by the College involved instances where "the water company's own lines or other company property caused the in-

80. State *ex rel.* Teefey v. Bd. of Zoning, 24 S.W.3d 681, 684 (Mo. 2000) (en banc).

81. *Id.*

82. *Id.*

83. Junior Coll. Dist. v. City of St. Louis, 149 S.W.3d 442, 443, 454 (Mo. 2004) (en banc).

84. *Id.* at 448.

85. *Id.* at 448-49.

86. *Id.* at 447.

87. *Id.* at 447-48.

88. *Id.* at 448.

89. *Id.*

90. *Id.* at 449.

jury."[91] Unlike the cases cited by the College, the ruptured line in this instance was the property of the College, as were the stop boxes containing the shut-off valves.[92] The court found that private ownership of the instrumentality that failed and caused damages distinguished this case from previous water line rupture cases.[93] Accordingly, the prior cases failed to impose a duty on the City to repair or maintain privately-owned instrumentality absent a contract requiring such maintenance.[94] As a result, the court found that the City had no common law duty to maintain access to shut-off valves or warn of conditions blocking the access of such valves when the valves were owned by a private party.[95]

The court also rejected the College's attempt to show a duty on the part of the City "to properly train its water division personnel to locate shut-off valves in a timely fashion."[96] The court found that the Water Division employees' response to the College's request for assistance was voluntary.[97] Volunteers are not liable for damages to the party they are assisting unless they increase the risk of harm or harm is suffered due to the detrimental reliance of the party being helped in the voluntary undertaking.[98] Absent such a showing, a "volunteer may abandon his or her assistance without liability."[99] The court found that neither the College nor the City was able to interpret the engineering drawings showing the location of the shut-off valve, that the College possessed its own engineering drawings, and that the College had made no showing that it had abandoned any other option for rectifying the situation as a result of the response by City Water Division personnel.[100] Based on these findings, the court determined that the College was in no worse a position and incurred no additional damages as a result of the assistance of the Water Division personnel than it would have incurred had they not responded to the request for assistance.[101] The court found that the College had failed to show that the City incurred a duty to locate the shut-off valve on account of the response of its Water Division personnel.[102]

The court also rejected the College's argument that a duty had been imposed on the City by passage of the 1993 ordinance requiring the Water Division to expose stop boxes containing water line shut-off valves that were cov-

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 444.
96. *Id.* at 450-51.
97. *Id.* at 451.
98. *Id.*
99. *Id.*
100. *Id.* at 452.
101. *Id.*
102. *Id.*

ered during street repaving.[103] In interpreting the ordinance, which fails to expressly state whether it is retrospective or prospective in application, the court focused on the "context in which the ordinance was passed."[104] The court determined that the ordinance was prospective in its application because other ordinances still in effect continued to place a duty upon an owner to maintain access to stop boxes and shut-off valves and because the City had not "undert[aken] a program of locating and making accessible all shut-off valves and stop boxes that previously had been paved over."[104] According to the court, the enormity of the effort that would be required by the City to comply with a retrospective application of such an ordinance prevented interpretation of the ordinance as a voluntary adoption of such an application.[105]

Although not raised by the College, the court rejected the argument that the City had a duty to stop the flow of water at the water main because the water originated from pipes owned by the City.[106] The court reasoned that such a holding would result in liability "for every flooded basement and water-damaged ceiling in commercial or residential properties served by City water" when the water supply was not shut off in a timely manner.[107] Such a proposition, the court believed, would be an uncalled-for expansion of liability for both municipalities and private suppliers of water.[108]

B. The Dissent

Chief Justice White authored the dissent, in which Judge Teitelman concurred.[109] Justice White first acknowledged that the City lacked sovereign immunity because it acts in a proprietary function when supplying water.[110] Justice White also agreed that the trial court erroneously retrospectively applied the 1993 ordinance requiring the Water Division to expose paved-over shut-off valves.[111] Unlike the majority, however, Justice White found that the City had a common law duty to "maintain the [water] delivery system so as not to inflict injury upon private property."[112]

Justice White argued that the City had a duty to maintain access to the shut-off valves.[113] Such a duty was evidenced by the Water Division's fore-

103. *Id.* at 453 (citing Ord. 62836 sec. 1, 1993 as recorded at CITY OF ST. LOUIS, MO., REVISED CODE § 23.04.185 (1994)).
104. *Id.*
104. *Id.*
105. *Id.* at 454.
106. *Id.* at 452.
107. *Id.*
108. *Id.*
109. *Id.* at 454 (White, C.J., dissenting).
110. *Id.* (White, C.J., dissenting).
111. *Id.* at 455 (White, C.J., dissenting).
112. *Id.* at 454-55 (White, C.J., dissenting).
113. *Id.* at 455 (White, C.J., dissenting).

man's manual, which included a schematic of the College's access to the water main with a notation that stated "Concrete Valve Box Maintained by the Water Division At the Expense of the Owner."[114] This duty was breached, Justice White argued, by the City's repaving of the street and failure to provide notice of such repaving.[115] The failure to provide notice, as required by city ordinance, and the City's exclusive control over the roadway under which the stop box was located, absolved the College of any duty to expose the stop box.[116] On the basis of the notations in the foreman's manual and the lack of notice, Justice White concluded that the City had voluntarily assumed and breached a duty to maintain access to the stop box and shut-off valve owned by the College.[117]

Justice White further argued that even though the College technically owned the instrumentality that caused the damage, the City had a duty because it controlled the instrumentality.[118] To support this position, Justice White pointed to a number of city ordinances that dictate the specifications of components of the City's waterworks, place a duty on the City for installation, and set standards on repairs. One such ordinance requires that the City shut off water to any premises where the owner's pipes or attachments are in disrepair.[119] Justice White pointed out that a broken water line obviously is in disrepair and requires maintenance; thus, such a circumstance would impose a duty on the City to discontinue the flow of water to the premises.[120] In addition to control over components such as pipes and valves, Justice White pointed to the fact that the City controlled the "primary instrumentality of its water division, namely the water itself."[121] As a result, it was the City's property that damaged the College's property.[122] The probability or likelihood of harm from escaping water was sufficient that "any ordinary person would have taken precautions to avoid it" and, as a result, Justice White determined that the City had a duty to take measures to avoid such harm.[123]

V. COMMENT

The instant case illustrates significant barriers to the recovery of damages resulting from flooding when water is provided by a municipal water supplier. The court's characterization of the municipal activities resulting in

114. *Id.* (White, C.J., dissenting).
115. *Id.* (White, C.J., dissenting).
116. *Id.* at 457 (White, C.J., dissenting).
117. *Id.* (White, C.J., dissenting).
118. *Id.* at 456-57 (White, C.J., dissenting).
119. *Id.* at 456 (White, C.J., dissenting).
120. *Id.* (White, C.J., dissenting).
121. *Id.* (White, C.J., dissenting).
122. *Id.* at 456-57 (White, C.J., dissenting).
123. *Id.* at 457 (White, C.J., dissenting).

damage to the College as governmental and immune from tort liability was proper under current law. The strong reluctance on behalf of the court to impose duties on water providers absent an express assumption of such a duty, either contractually or via statute, was also proper. The court's failure to find any duty of water providers to limit damages caused by water escaping their system due to defects in property owned by private parties, however, creates a precedent that fails to protect water customers from excessive flood damage. The court should have recognized a common law duty for water providers to take reasonable measures to discontinue service to private parties once notice has been provided that a defect in the customer's line has created a flood situation.

The governmental versus proprietary function differentiation applied to municipalities is an unclear distinction that can have a significant impact on the outcome of a dispute. As the instant case illustrates, even in situations where both parties agree that a municipal activity is a proprietary function, issues of differentiation between governmental and proprietary functions that impact the analysis of liability may still arise. In an effort to avoid the immunity provided to a municipality's performance of a governmental function, the College applied considerable measures to characterize the negligence of the City in terms of actions other than the City's paving of streets.

Regardless of the characterization provided by the College, the paving of the street was undeniably the activity that resulted in the lack of access to the shut-off valve. By refusing to recognize the subtle distinctions proposed by the College, the court provided some clarity to an otherwise imprecise method of determining liability and upheld the proposition that the "particular defendant's conduct is often less important than the generic nature of the activity."[124] Clear lines of demarcation between activities serve to provide municipalities the ability to anticipate areas where possible liability may occur and thereby properly protect against incurring losses. This ability to anticipate and protect against areas of liability benefits the public as a whole by reducing the size of judgments that must be paid out of the public treasury.

The United States Supreme Court has referred to the distinction between governmental and proprietary functions as a "quagmire that has long plagued the law of municipal corporations."[125] While this may be true, Missouri courts will continue to be responsible for interpreting this distinction in order to implement "the legislature's intent to reenact sovereign immunity as the rule with only limited exceptions."[126] The appropriateness of recognizing sovereign immunity as a bar to recovery may continue to be a subject for debate in the legislature, but for now, modification of the doctrine of sover-

124. State *ex rel.* Bd. of Trs. v. Russell, 843 S.W.2d 353, 359 (Mo. 1992) (en banc).

125. Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

126. State *ex rel.* St. Louis Housing Auth. v. Gaertner, 695 S.W.2d 460, 463 (Mo. 1985) (en banc).

eign immunity is beyond the reach of the judiciary. Until such time as the legislature reevaluates the application of sovereign immunity in Missouri, the court takes the proper position by strictly interpreting any waiver of immunity by a municipality.

The court in the instant case also properly determined that no duty to mark or expose water shut-off valves was imposed on the City in its proprietary capacity. The City did not assume this responsibility via contract; a common practice when supplying water to residential properties. Additionally, at the time the shut-off valve was covered, City ordinances had explicitly imposed the duty to maintain access to the valve on the property owner. Indisputably, the 1993 ordinance, which shifted the duty of maintaining access to valves from the property owner to the City, did not apply in this situation because it is prospective in application. Indeed, interpretation of the ordinance as applying a duty retrospectively would be overly burdensome to the City. Other city ordinances referenced by Justice White simply do not create an assumption of an express duty to maintain shut-off valve access. Because the duty of maintaining shut-off valve access was explicitly placed on a particular party under one municipal ordinance, it seems unreasonable to infer an assumed duty on a different party by virtue of other ordinances that do not directly address the issue. Furthermore, in light of the express imposition of the duty on private landowners, there is no valid argument that an ordinary person would have a reasonable belief that the duty rested in any person other than the private landowner.

While the court's analysis of liability for a municipality's paving operation and assumptions of duty based on applicable ordinances was correct, its failure to recognize a duty to stop flooding upon notice of the condition leaves the City with little obligation to protect consumer citizens. Justice White argued that such a duty is appropriate on the basis that the City was in control of the water that caused the damage and had the ability to end the flooding upon notice of the situation.[127] Thus, Justice White argued, any ordinary person would have taken precautions to end the flooding upon notice and, therefore, this duty should be imposed on a water provider.[128] The court refused to acknowledge such a duty, reasoning that it would cause water providers to be "liable for every flooded basement and water-damaged ceiling in commercial or residential properties served [by the provider's] water."[129] This rationale is overstated. A duty to take reasonable measures to end flooding occurring as a result of broken pipes or other equipment belonging to a customer would provide customers protection from excessive damage and would not be overly burdensome to water providers, provided that such a duty and any potential liability arose only *after* notice had been given to the water supplier.

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127. *Junior Coll. Dist.*, 149 S.W.3d at 456-57 (White, C.J., dissenting).
128. *Id.* (White, C.J., dissenting).
129. *Id.* at 452.

Support for the imposition of a duty to discontinue water service to a property experiencing flooding as a result of a break in pipes or equipment owned by the customer exists in the duties applied to providers of natural gas in Missouri. The Missouri Supreme Court has held that suppliers of natural gas are not insurers of injuries resulting from leaks or defects in gas distribution systems owned by its customers.[130] Even so, the court has held:

> [A]s a general rule, [a gas supplier] may be guilty of negligence if a leak or other defect in the pipes or an appliance of a customer causes injuries to persons or property, provided the supplier or distributor has sufficient notice of such leak or defect, and having such notice (a) negligently inspects or negligently repairs; (b) agrees and assumes to inspect and repair, and then fails to do so; (c) refuses to inspect and repair knowing a dangerous conditon exists, and with such knowledge *fails to shut off its gas until the owner can have his defective pipes or appliance properly repaired.*[131]

Placing such a duty upon gas suppliers is reasonable "in view of the highly dangerous character of the gas and its tendency to escape."[132] While the volatile nature of natural gas makes the likelihood of injury to persons and property resulting from gas leaks arguably greater than that resulting from water leaks, adoption of a similar duty for water providers would be proper. Escaping water can result in significant property damages, as seen in the instant case. Additionally, water, like natural gas, has the tendency to escape its supply system. The difference in the likelihood of damages would be addressed in the determination of what is a reasonable response to flooding as opposed to a reasonable response to a gas leak. For example, if a gas leak occurs in a single residence, the potential damage and injury which would result from an explosion would require shutting off the gas supply even if such action would result in loss of service to multiple residents and businesses in the community. In a similar situation involving flooding from a water leak, shutting off service may not be reasonable if the damage to affected residents and businesses would outweigh the damage caused by the actual flooding. However, in situations where the damage from flooding may be alleviated by a supplier discontinuing service without imposing significant damage on others, no rational basis exists for excusing the supplier from an obligation to take such actions.

Application of such a duty would not subject municipalities to the broad liability contemplated by the court; rather, a municipality would assume liability only when its response to shutting off the supply of water causing

130. Fields v. Mo. Power & Light Co., 374 S.W.2d 17, 22 (Mo. 1964).
131. *Id.* at 22-23 (emphasis added).
132. Wood v. Gas Service Co., 245 F.2d 653, 655 (8th Cir. 1957).

damage was unreasonable under the circumstances. This rule would also prevent the possibility of a water provider indefinitely refusing to discontinue the flow of water causing damages to a customer's property. Under the holding in the instant case, such a refusal by the water provider could occur with no apparent possibility of recourse, provided the flooding occurred in pipes or other equipment owned by the customer. Adoption of a duty owed by water providers similar to that owed by gas providers is a reasonable compromise that would provide limits on municipalities' and private water suppliers' potential liability while protecting citizens from the substantial damages likely to result from large-scale flooding.

VI. CONCLUSION

The Missouri Supreme Court's ruling in *Junior College District v. City of St. Louis* illustrates the broad barriers to recovery of damages from a municipal water provider under existing state law. While the court's analysis of liability under theories of sovereign immunity and implied duties is sound, its holding that a water provider has no duty to mitigate damages to a customer by discontinuing service when flooding occurs as a result of breaks in a customer's property fails to impose a proper obligation on water providers. Adoption of duties similar to those of gas providers would simultaneously limit liability for water suppliers and provide protection against excessive flood damage for customers.

JASON D. SAPP