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NOTE

It Wasn't Me: How the Doctrines of Sovereign Immunity and Misnomer Frustrate Missouri's Petroleum Cleanup Efforts

City of Harrisonville v. Bd. of Trs. of the Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770 (Mo. 2022) (en banc).

Lauren Elizabeth Fleming[*]

I. INTRODUCTION

Honk! Honk! Crash! You have just been injured in a car accident. The other driver is completely at-fault, but luckily, she was insured. You timely submit your valid claims to her well-known insurance agency, but the agency denies the claim for no apparent reason. While confused and frustrated, you take comfort in the fact that society created insurance companies to address your exact injuries and that the legal system provides remedies for this very situation. Your attorney reassures you that the other driver and her insurance agency will be held accountable, and justice will be served.

But what if it is not? What if major insurance carriers had complete immunity against tort claims, leaving injured third parties with no remedies when these agencies wrongfully refuse to compensate plaintiffs? Or the agencies decided to stop paying out claims altogether? The City of Harrisonville (the "City") and others injured by leaking petroleum storage tanks are now faced with this reality.[1] The Petroleum Storage Tank Insurance Fund ("PSTIF"), which acts as the insurance carrier for gas station owners and other landowners with petroleum storage tanks, has virtually no obligation to pay out claims to its participants.[2] In fact, the

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[1] *See* City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 774–75 (Mo. 2022) (en banc).

[2] *See id.*

Supreme Court of Missouri held that the Board of Trustees of PSTIF (the "Board") is a state entity with sovereign immunity from all tort liability, *including fraud.*[3] This means that when PSTIF refuses to fulfill its sole purpose of providing coverage for the cleanup costs for its insured, those parties are left without a financial remedy.[4] The decades of frustrating litigation and unsatisfying outcome surrounding *City of Harrisonville v. The Board of Trustees of the Missouri Petroleum Storage Tank Insurance Fund* raises significant financial and environmental issues for those affected by petroleum tank contamination and invokes concerns with courts' application of the law.[5]

Part II describes the underlying events giving rise to almost two decades of litigation. Part III discusses the formation and function of PSTIF, as well as relevant case law regarding sovereign immunity and the doctrine of misnomer. Part IV summarizes the Supreme Court of Missouri's holding and ultimate reversal of the $8 million in punitive damages against PSTIF. Finally, Part V provides counterarguments to the high court's decision and questions whether the outcome was justified, ultimately concluding it was not.

II. FACTS AND HOLDING

In 2003, the City discovered a petroleum leak while upgrading its sewer system.[6] The City learned that the leak stemmed from the adjacent gas station's underground storage tank and that the gas station's insurer, PSTIF, had been monitoring the leak for five years.[7] Working with the City to remedy the damage and allow for the sewer-upgrade to continue, PSTIF's environmental engineer recommended the City leave the contaminated soil but install petroleum-resistant sewer pipes in the affected easement.[8]

PSTIF's executive director and third-party administrator promised to reimburse the City for costs associated with the sewer-installation project if the City used its recommended construction company.[9] The City hired the recommended company as instructed, but PSTIF refused to reimburse the costs as agreed.[10] After repeated requests for PSTIF to comply, the

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[3] *See id.* at 778.

[4] MO. REV. STAT. § 319.131.5 (2021).

[5] 665 S.W.3d at 774–75.

[6] *Id.* at 772.

[7] *Id.*

[8] *Id.*

[9] *Id.*; City of Harrisonville v. McCall Serv. Stations, 495 S.W.3d 738, 744–45 (Mo. 2016) (en banc).

[10] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 772.

City sued for fraud and negligent misrepresentation, serving the executive director and naming PSTIF as defendant.[11]

In 2011, a jury awarded the City compensatory damages and $8 million in punitive damages against PSTIF.[12] Following remittitur of the punitive damage award, both parties appealed to the Supreme Court of Missouri.[13] Two years after oral arguments, the court released its majority opinion and three concurrences in *City of Harrisonville v. McCall Serv. Stations*.[14] The majority held that the circuit court erred by entering judgment against PSTIF, because PSTIF was not a legal entity capable of being sued and instead was merely an account, incapable of taking any action.[15] The punitive and compensatory damage awards were therefore incognizable, and the court reversed the $8 million judgment, as it was the only award challenged on appeal.[16]

The court remanded the case, finding the City may have stated a cause of action against PSTIF's Board in its petition.[17] Thus, the City's potential claims against the *Board* may be cognizable, unlike its claims against PSTIF.[18] Because PSTIF failed to raise the argument that the Board was the proper party until after the jury trial, the City was thus

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[11] *Id.* The City also sued the gas station's owner and former owner for nuisance and trespass regarding the migration of petroleum into its easement. *Id.* The City filed suit in 2005. City of Harrisonville v. McCall Serv. Stations, No. WD74429, 2014 WL 705432, at *20 (Mo. Ct. App. Feb. 25, 2014). Additionally, the City of Harrisonville and the Board of PSTIF returned to the Supreme Court of Missouri in October 2023. *See* City of Harrisonville v. Mo. Dep't. of Nat. Res., 2023 WL 8790267 (2023). In connection with this case, the City sought a letter sent to the Missouri Department of Natural Resources by a third-party detailing concerns of misconduct by PSTIF's executive director. *Id* at *1. The City tried to gain access to this letter through Missouri's Sunshine Law and then sued when the State denied the City's request, citing multiple employment-related exceptions to the Sunshine Law. *See id.* The parties litigated this issue to the Missouri Supreme Court, where the court was tasked with deciding, among related issues, whether the letter relates to the hiring, firing, discipline, or promotion of a public employee such that it is a closed record under section 610.021(3) of Missouri's Sunshine Law. *Id.* The court, however, declined to reach the merits of the case, instead choosing to dismiss based on briefing deficiencies. *Id.*

[12] *McCall Serv. Stations*, 495 S.W.3d at 745.

[13] *Id.*

[14] *Id.* MISSOURI COURTS, Docket Supreme Court of Missouri, https://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/d598650fe68fd2f286257dab005f47eb?OpenDocument [https://perma.cc/U99V-FC6P] (The docket for February 2015 includes the date of oral argument for *City of Harrisonville v. McCall Serv. Stations*. 495 S.W.3d 738 (Mo. 2016) (en banc)).

[15] *McCall Serv. Stations*, 495 S.W.3d at 752.

[16] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 772.

[17] *McCall Serv. Stations*, 495 S.W.3d at 753.

[18] *Id.*

unable to amend its petition to add or substitute parties.[19] The court, focusing on the "furtherance of justice and fairness," used this fact to further justify its remand instruction.[20]

The three separate concurrences each questioned whether PSTIF's argument—that it was the improper party defendant—was preserved for appeal.[21] Judge Richard Teitelman stated:

> Aside from the fact that this precise issue was not raised in a motion for directed verdict or in the motion for a new trial and, therefore, is waived, an equally fundamental problem is that hundreds of pages of record in this case demonstrate that, since this lawsuit was commenced over a decade ago, the Fund—the "it" that is incapable of action—has managed to retain counsel, answer the petition, file numerous motions and responsive pleadings, participate in discovery, litigate this case through the circuit court, the court of appeals and, ultimately, to this Court. Presumably, the Fund's board of trustees authorized this course of litigation just as it authorized the actions that form the basis of the City's lawsuit.[22]

On remand, the circuit court granted the City's motion to substitute PSTIF for the Board, but at a subsequent hearing regarding the motion, the circuit court ordered the City to file a Second Amended Petition ("SAC") at the Board's request.[23] In response to the City's SAC, the Board moved for summary judgment and asserted the defense of sovereign immunity for the first time. The defense was overruled.[24] The circuit court's order led to five more years of motion practice before various judges in multiple

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[19] *Id.* at 752–53.

[20] *Id.*

[21] *Id.* at 753–54 (Wilson, J. concurring) ("I write separately, however, to address the question of whether the defect in the judgment on which the Court's disposition of this case turns was (or was not) preserved for appellate review . . . . I would hold that the Court has both the authority and the duty to identify and act upon such a fundamental defect regardless of whether or how it was raised below or on appeal."). *Id.* at 759 (Fischer, J. concurring in part) ("In my view, because the Fund failed to present the purely legal defense that it was not authorized to pay punitive damages, or that it was the incorrect party defendant, to the circuit court in either motion for directed verdict, or a motion for JNOV, those claims were waived and therefore not preserved for appellate review.").

[22] *Id.* at 761–62 (Teitelman, J., concurring in part).

[23] Brief of Plaintiff/Appellant at *8–9, City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770 (Mo. 2022) (en banc) (No. SC99273), 2022 WL 1815600.

[24] *See* City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 773 (Mo. 2022) (en banc).

counties, and ultimately concluded in front of Circuit Court Judge Aaron Martin.[25] When Judge Martin asked the parties whether there was any objection to the City's SAC filing, the Board stated an objection.[26] Judge Martin then ruled the City should not have been required to file the SAC.[27] He reasoned that the Supreme Court of Missouri had directed the lower court to review whether the City's *original* claims were cognizable claims against the Board, and thus, the SAC was outside the remand instructions.[28] Accordingly, the court eliminated the past five years of the record post-SAC.[29]

Judge Martin determined PSTIF was a mere misnomer for its Board, and he entered judgment against the Board for $8 million dollars, in accordance with the jury's original verdict and with interest accruing from the judgment date.[30] The Board reasserted sovereign immunity, but the court again overruled its motion to vacate, correct, alter, or amend.[31]

Both parties appealed.[32] Before the Supreme Court of Missouri for the second time, the Board argued that the circuit court erred by entering judgment against it because sovereign immunity barred the City's tort claims.[33] The City claimed interest should accrue from the date of the initial punitive damage award against PSTIF in 2011 instead of the later judgment date against the *Board*, given the substitution was merely a correction of a misnomer.[34]

III. LEGAL BACKGROUND

This Part describes PSTIF's statutory origin, purpose, and prior litigation to which it was a party. It further explains the doctrines of sovereign immunity, misnomer, and law of the case, laying the foundation for the Supreme Court of Missouri's ultimate decision.

A. The Missouri Petroleum Storage Tank Insurance Fund

Missouri's Petroleum Storage Tank Insurance Fund ("PSTIF") provides pollution liability insurance for owners and operators who store

[25] Brief of Plaintiff/Appellant, *supra* note 23, at *3, *9.

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

[29] *Id.* at *9–10.

[30] *Id.* at *10.

[31] City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 773 (Mo. 2022) (en banc).

[32] *Id.*

[33] *Id.*

[34] *Id.*

petroleum products in tanks across the state, such as gas station owners.[35] It insures over 3,500 properties with at least one active above ground or underground storage tank, in addition to the sites of former tanks.[36] Specifically, state law authorizes PSTIF to cover cleanup costs and third-party claims regarding property damage or bodily injury from petroleum leaks for fund participants between $10,000 and $1 million.[37] The moneys in the fund are primarily collected from "transport load fees" equal to thirty-two dollars assessed on every 8,000 gallons of petroleum brought into the state, and members are additionally charged annual "participation" fees.[38] PSTIF is considered a special trust fund within the state treasury, but moneys in this fund "shall not be deemed to be state funds."[39] Further, the "liability of the petroleum storage tank insurance fund is not the liability of the State of Missouri."[40]

The Missouri Legislature originally founded the Underground Storage Tank Insurance Fund in 1989 after requiring underground storage tank operators to have pollution liability insurance.[41] In 1996, the Missouri Legislature renamed it to PSTIF and created the Board of Trustees to manage the fund and its growth.[42] The Missouri governor appoints the Board's eleven trustees with the advice and consent of the Missouri Senate.[43] The Missouri Legislature deems the Board a Type III agency authorized to appoint a director and necessary employees "who shall be state employees."[44] Type III agencies were created under the Omnibus State Reorganization Act of 1974 "to provide . . . for the most efficient and economical operations possible in the administration of the

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[35] *About PSTIF*, MO. PST INS. FUND (2023), https://www.pstif.org/about-pstif/ [https://perma.cc/8LMR-SB6R]. *See also* William Ford, *Missouri Petroleum Storage Tank Liability to Shift From Tank Owners and Operators to Property Owners*, JD SUPRA (June 8, 2017), https://www.jdsupra.com/legalnews/missouri-petroleum-storage-tank-27735/ [https://perma.cc/JZ5C-2Q5B] (explaining who is liable for petroleum clean-ups).

[36] *About PSTIF*, *supra* note 35.

[37] MO. REV. STAT. § 319.131.4 (2021).

[38] *About PSTIF*, *supra* note 35; MO. REV. STAT. § 319.132.4(1) (2011).

[39] MO. REV. STAT. § 319.129.1 (2022).

[40] *Id.* § 319.131.4 (2021).

[41] *Chronology of Missouri's Tank Fund*, MO. PST INS. FUND, https://www.pstif.org/wp-content/uploads/2019/11/PSTIF-Chronology.pdf [https://perma.cc/KY7S-UND4] (last visited Jan. 5, 2024).

[42] *Id.*

[43] City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 775 (Mo. 2022) (en banc); MO. REV. STAT. § 319.129.4 (2022); *Id.* § 319.129.14; *Board of Trustees*, MO. PST INS. FUND, https://www.pstif.org/about-pstif/board-of-trustees/ [https://perma.cc/MT4C-TQWN] (last visited Jan. 5, 2023).

[44] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 775; MO. REV. STAT. § 319.129.9 (2022).

executive branch of the state government."[45] These agencies are overseen by administrative departments like the Missouri Department of Natural Resources, the agency which supervises the Board regarding its budgeting and reporting.[46]

The Board also partakes in Missouri's annual budget process through the state's Department of Natural Resources.[47] The Board must account to the Missouri Legislature, because it may only spend a portion of its fund as permitted by legislative appropriation.[48] Additionally, the Board has rulemaking authority and must follow the same rulemaking procedures as other state entities.[49] The fund does have an expiration, or "sunset" date, set for December 31, 2030, but this date has been pushed back numerous times.[50] Overall, the Board has significant authority over the cleanup operations of Missouri's thousands of petroleum storage tanks.[51] This role is vital in keeping Missouri land contamination-free and in providing Missourians recourse for expensive property damage and other injuries.[52]

B. The Doctrines of Sovereign Immunity, Misnomer, and Law of the Case

Under Missouri law, public entities are entitled to sovereign immunity from tort claims.[53] This privilege is also known as governmental immunity, and it bars parties from asserting causes of action against the State without the State's consent.[54] It derives from English common law and embodies the idea that "the King can do no wrong."[55] American courts have long followed and expanded the doctrine of sovereign immunity, and this continual application of the doctrine is one of the primary

[45] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 775; *see* Omnibus State Reorganization Act of 1974, App. B, sec. 1.4, MO. REV. STAT. (2016).

[46] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 775.

[47] *Id.*

[48] *Id.*

[49] *Id.*; MO. REV. STAT. § 536.016–025.

[50] MO. REV. STAT. § 318.129.16 (2022).

[51] *See generally About PSTIF*, *supra* note 35.

[52] MO. CODE REGS. tit. 10, § 26-2.010 (2017) ("[The regulation of underground storage tanks] is designed specifically to protect the quality of groundwater in the state as well as to protect human health and the overall quality of the environment.").

[53] Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors, 476 S.W.3d 913, 921 (Mo. 2016) (en banc).

[54] Stacy L. Nagel, Note, *Missouri's Mystifying Doctrine of Sovereign Immunity: The Imposition of Duty under the Dangerous Condition Exception*, 64 MO. L. REV 987, 989 (1999).

[55] *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

justifications for retaining the privilege.[56] Another rationale for precluding tort liability suits against the government is that any damage awards paid by the government are ultimately paid by taxpayers, so this privilege safeguards government treasuries and taxpayer dollars.[57]

The Missouri Legislature officially codified the privilege of sovereign immunity after the Supreme Court of Missouri abrogated it from the common law in 1977.[58] The main text of the statute remains the same to this day and states:

> Such sovereign immunity or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, 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 . . . .[59]

The narrow exceptions to this statutory privilege, assuming the plaintiff can prove such an exception, are for negligent operation of a motor vehicle, injuries from dangerous property, and waivers by the government.[60]

Prior to the underlying dispute, PSTIF claimed it was a public entity entitled to sovereign immunity in two separate litigations, *River Fleets, Inc. v. Carter* and *Rees Oil Co. & Rees Petroleum Products, Inc. v. Dir. of Rev*.[61] This claim failed in both cases.[62] In *River Fleets* and *Rees Oil*, the plaintiffs wrongfully paid fees into PSTIF and filed suit, seeking refunds of those payments with interest.[63] Both courts held that PSTIF was not protected by sovereign immunity because the moneys in the fund were not

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[56] *See id.* at 1201–02.

[57] *See id.* at 1216–17; Shane K. Blank, *The King's Court: Demystifying Missouri's Governmental Immunity Doctrines*, 71 J. MO. B. 192, 193 (2015) ("Whether a matter of state dignity or monarchial right, the more pragmatic reason for sovereign immunity's continued existence is that it limits the government's exposure to a specified category of tort claims—thereby indirectly protecting the taxpayer from actions seeking to dip into the governments deep pockets.").

[58] *See* Jones v. State Highway Comm'n, 557 S.W.2d 225, 229 (Mo. 1977); Nagel, *supra* note 54, at 990.

[59] MO. REV. STAT. § 537.600.1 (2005).

[60] *See* State *ex rel.* Blue Springs Sch. Dist. v. Grate, 576 S.W.3d 262, 269 (Mo. Ct. App. 2019).

[61] *See* River Fleets, Inc. v. Carter, 990 S.W.2d 75, 77 (Mo. Ct. App. 1999); Rees Oil Co. v. Dir. of Revenue, 992 S.W.2d 354 (Mo. Ct. App. 1999).

[62] *See Carter*, 990 S.W.2d at 76; *see Rees Oil*, 992 S.W.2d at 358.

[63] *See Carter*, 990 S.W.2d at 76; *see Rees Oil*, 992 S.W.2d at 358.

the State's, the moneys are not transferred into the State's general revenue, and the Missouri Legislature provided the "liability of the . . . fund is not the liability of the state."[64] The courts thus reasoned if PSTIF's liability is not the State's liability, then state immunity cannot apply.[65] Importantly, PSTIF's Board was named as defendant in *River Fleets*, and the *Rees Oil* defendant was Board Chairman, Sam Carter.[66] In these cases, the court did not make the board/fund distinction in its determination that sovereign immunity plainly did not apply, and the court's decision was not limited by the type of suit asserted by the plaintiffs.[67]

More recently, a Missouri appellate court again explained the reasoning behind PSTIF's exclusion from sovereign immunity entitlement in *Estes as Next of Friend for Does v. Bd. of Trustees of the Mo. Public Entity Risk Management Fund* ("MOPERM").[68] In that case, the court analyzed whether MOPERM was a "hybrid governmental entity" entitled to sovereign immunity against tort claims, specifically examining MOPERM's bad faith failure to settle within policy limits and breach of fiduciary duty.[69] To be considered a hybrid governmental entity, the entity must prove it (1) was formed by the government; (2) performs a service traditionally performed by the government; and (3) is controlled by and directly answers to public officials, public entities, or the public.[70] Similar to PSTIF, MOPERM was legislatively created and provides liability coverage for insured risks to participating public entities, their officers, and their employees when engaged in their official duties.[71]

During its analysis, the court used PSTIF as an example for an entity that was not "susceptible" to the hybrid governmental entity test because it is categorized as a "special" rather than state fund.[72] The court stated sovereign immunity could not apply to PSTIF because "legislatively created statewide entities are not 'directly answerable to' the sovereign whose immunity the entity wishes to appropriate when the entity's enabling legislation unequivocally declares that moneys held by the entity are not state funds or that the entity's actions cannot be relied upon to hold

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[64] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 776; MO. REV. STAT. § 319.131.4 (2021); *Carter*, 990 S.W.2d at 77–78; *Rees Oil*, 992 S.W.2d at 358.

[65] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 776.

[66] *See Rees Oil*, 992 S.W.2d at 356; *see Carter*, 990 S.W.2d at 77–78.

[67] *See Rees Oil*, 992 S.W.2d at 358; *see Carter*, 990 S.W.2d at 78.

[68] 623 S.W.3d 678, 702 (Mo. Ct. App. 2021).

[69] *Id.* at 684, 702–03. *See* Stacy v. Truman Med. Ctr., 836 S.W.2d 911, 919 (Mo. 1992) (en banc).

[70] *Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d at 691–703. *See Stacy*, 836 S.W.2d at 919.

[71] *Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d at 688; MO. REV. STAT. § 537.700.1 (1986).

[72] *Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d at 702.

the state liable."[73] The *Estes* court went on to hold that MOPERM was not entitled to sovereign immunity because it did not perform a service traditionally performed by the government, and it was not controlled by and directly answerable to the public, public officials, or public entities.[74]

The court then analyzed whether the state government had traditionally performed "insuring" generally, comparing MOPERM to the State Legal Expense Fund ("SLEF").[75] The court described SLEF as a state fund the attorney general is authorized to use to defend claims and cover awards against the state and its agencies, officers, and employees while acting in their official capacities, along with other claims from suits that impact state interests.[76] It emphasized that this fund's function was "to promote governmental efficiency and protect state business by protecting employees."[77] The *Estes* court concluded that if SLEF's provision of coverage for the state and its agents was not a traditional function triggering sovereign immunity, then MOPERM's coverage of officers and other employees of public entities was also not.[78]

For entities with both a fund and group or individual in charge of that fund, confusion arises when distinguishing between each component of the entity and determining who to name as parties in lawsuits. The alleged distinction matters because of the misnomer and law of the case doctrines. A misnomer is a mistake concerning a party's name, occurring when an entity serves a summons on the *right party* but with the *wrong name*.[79] The difference between a misnomer and the wrong defendant is whether the identity of the party is clear from the name used.[80] The Missouri Rules of Civil Procedure state that:

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[73] *Id.* at 702–03.

[74] *Id.* at 692–97. The court found:

> [no] situation where our state government has historically performed the service of providing optional liability insurance coverage to public entities, their officers and employees, in exchange for the payment of annual contributions that are tantamount to premiums. We are aware of no such service ever having been undertaken by our state government prior to September 12, 1977, the temporal benchmark before which sovereign immunity as existed at common law in this state is to remain in full force and effect.

Id. at 692.

[75] *Id.* at 692–93.

[76] *Id.* at 693.

[77] *Id.* (quoting Dixon v. Holden, 923 S.W.2d 370, 381 (Mo. Ct. App. 1996)).

[78] *Id.* at 694–95; *Dixon*, 923 S.W.2d at 379.

[79] Johnson v. Delmar Gardens West, Inc., 335 S.W.3d 83, 87 (Mo. Ct. App. 2011).

[80] State *ex rel.* Holzum v. Schneider, 342 S.W.3d 313, 316 (Mo. 2011) (en banc).

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by amendment: (1) has received such *notice* of the institution of the action as will not *prejudice* the party in maintaining the party's defense on the merits and (2) knew or *should have known that*, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[81]

Accordingly, misnomers do not destroy the effectiveness of the original petition, and the correction of the misnamed party relates back to the filing of the petition when it is clear the proper party received notice.[82] Further, state law holds that defendants personally served with process—albeit in the wrong name—are obligated to call attention to such defect or else they waive the misnomer argument.[83]

Like requiring misnamed parties to raise the issue before judgment, parties are also required to raise trial errors before appeal.[84] Parties are bound by the record made at the trial court level and cannot present new evidence at the appellate level, as appellate courts may only review the trial record.[85] Moreover, "the law of the case doctrine . . . provides . . . that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal."[86] The law of the case doctrine applies to all subsequent litigation involving the same issues and facts, and the court's decision is considered the law of the case for all points presented, decided, or, notably, should have been—but were not—raised before adjudication.[87]

Understanding the structure of PSTIF and its prior participation in lawsuits, as well as the doctrines of sovereign immunity, misnomer, and law of the case, are crucial to comprehending the Supreme Court of Missouri's holding, in addition to recognizing why the holding may be problematic.

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[81] MO. R. CIV. P. 55.33(c).

[82] *Johnson*, 335 S.W.3d at 87.

[83] Lawrence-Leiter & Co. v. Patel, 802 S.W.2d 549, 556 (Mo. 1991) (en banc).

[84] *Preserving the Record*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=841 [https://perma.cc/4QPD-2GWW] (last visited Jan. 5, 2024).

[85] *Id.*

[86] Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 61 (Mo. 1999) (en banc) (citing Kansas City v. Keene Corp., 855 S.W.2d 360, 366 (Mo. 1993) (en banc)).

[87] Shahan v. Shahan, 988 S.W.2d 529, 533 (Mo. 1999) (en banc).

IV. INSTANT DECISION

On December 20, 2022, seven months after oral argument in front of the state high court, the *City of Harrisonville* saga finally concluded when the court released its unanimous opinion authored by Judge Patricia Breckenridge.[88] Although the issue on appeal concerned whether PSTIF was a misnomer for the Board, the opinion focused on whether the Board was a state agency entitled to sovereign immunity, finding this issue dispositive.[89] The court determined the City's claims were barred if (1) the Board is a state agency, (2) the Missouri Legislature has not waived sovereign immunity, and (3) the City has not pleaded and proved an exception.[90] The court answered all three questions in the affirmative, signaling the subsequent demise of the City's case against PSTIF.[91]

Relying on the enabling statutes that expressly designated the Board a state agency and related authority, the court held the Board is entitled to sovereign immunity as a state agency, satisfying the first prong of its analysis.[92] The court next addressed the City's argument that the Board cannot be sovereignly immune as the moneys within its fund are not state funds.[93] The court found this argument unpersuasive.[94] The court distinguished the instant case from *River Fleets* and *Rees Oil* based on their disputes and holdings concerning PSTIF, not the Board, and found the underlying dispute was the first time the Board's governmental status was considered.[95] The court also distinguished the instant case from *Estes*, because the Missouri Legislature expressly established that MOPERM was not the State and the litigants never asserted it was a state agency.[96]

The court briefly considered whether PSTIF is a misnomer for the Board and found it was not.[97] The court concluded the Board was not a party to this litigation until it was substituted as a party on remand; thus, its assertion of sovereign immunity was timely and not waived or abandoned, satisfying the second prong.[98] The court also ruled that the

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[88] City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 774–75 (Mo. 2022) (en banc).

[89] *Id.* at 773–74.

[90] *Id.* at 774–75.

[91] *Id.* at 778.

[92] *Id.* at 775. *See also supra* Part III (describing the history of PSTIF).

[93] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund,* 655 S.W.3d at 775–76.

[94] *Id.* at 776.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 777.

[98] *Id.*; *See also* State *ex rel.* Holzum v. Scheider, 342 S.W.3d 313, 316 (Mo. 2011) (en banc). The court also addressed whether the "law of the case doctrine" barred the relitigation of issues that could have been raised on appeal but were not and

third prong was met, as the City had not pleaded any exceptions.[99] Lastly, the opinion considered whether the law of the case doctrine barred the Board's sovereign immunity claim. The court held it did not because "[t]he issue of whether the board was an agent of the state was not raised at trial, and rightly so because the board was not a party at that time."[100]

Ultimately, the twenty-year lawsuit ended when the court held the Board was entitled to sovereign immunity and reversed the $8 million punitive damage award.[101]

V. COMMENT

The Supreme Court of Missouri rejected the City's misnomer and waiver arguments in holding that the Board of Trustees of PSTIF was entitled to sovereign immunity and, thus, damage awards against it were unauthorized.[102] This outcome raises issues with applying the misnomer doctrine, serving the interests of justice and fairness, and determining how cities and other property owners can protect themselves from petroleum storage tank contamination.

A primary issue presented by the court's decision is that the record strongly supports that PSTIF is a misnomer for the Board and that the Board waived its improper party argument.[103] The law and facts of the case, but particularly the conduct of the Board itself, point to this conclusion. For over fifteen years, the Board defended the suit against the City of Harrisonville.[104] It paid legal counsel and received privileged communications about the litigation that only parties to the lawsuit may receive.[105] The Board's Executive Director even accepted service of the lawsuit in PSTIF's name.[106] Moreover, once the Board was substituted as a party, the legal counsel defending the suit did not change; it remained the same for the entire duration of the litigation.[107] While retaining the same counsel does not necessarily point to the Board and PSTIF being the same party, the fact that PSTIF cannot even be a party signals unity.

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held that it did not. *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 777.

[99] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 778.

[100] *Id.* at 777.

[101] *Id.* at 778.

[102] *Id.*

[103] Response/Reply Brief of Plaintiff/Appellant at *45, City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770 (Mo. 2022) (No. SC99273), 2022 WL 1815603.

[104] *Id.* at *13.

[105] Brief of Plaintiff/Appellant, *supra* note 23, at *16; *see also* Ratcliff v. Sprint Mo., Inc., 261 S.W.3d 534, 546 (Mo. Ct. App. 2008).

[106] Response/Reply Brief of Plaintiff/Appellant, *supra* note 103, at *4.

[107] *Id.* at *2–3.

Because PSTIF is "merely an account" according to the court, it could not have directed its defense.[108] During the entirety of the lawsuit, it was the Board's members directing and controlling the litigation, along with the same legal team.[109]

Moreover, when asked in a pre-substitution deposition if the Board member knew who its legal counsel was working for, the member responded that they were working for the "Fund."[110] When asked to clarify if he meant the Fund or the Board, he agreed they were "one and the same" and recognized the lawsuit was about "a punitive judgment against the *Board*."[111] Another Board member, when asked during a deposition if he would have done anything different had the City initially named the Board as defendant, he replied that he would not.[112]

These statements and the Board's conduct patently indicate that PSTIF is a misnomer for the Board. The Board was clearly on notice of the litigation as it was directing it, and the Board was not prejudiced as it would have handled the litigation in the same way had it been expressly named defendant. Because the Board *knew* that but-for the City's mistake in naming PSTIF, the litigation would have been brought against the Board, both prongs of Missouri's rule regarding misnomer and relation-back are satisfied.[113]

Additionally, the City's naming of PSTIF as initial defendant was reasonable. "PSTIF," not the Board of Trustees of PSTIF, was named as the insurer on the insurance policy between the Board and the Harrisonville gas station in this dispute.[114] This exemplifies how the Board regularly conducted business as PSTIF, rather than the Board, perpetuating the notion that they were one and the same. The most damning fact is that the Board also regularly stated in requests for admission concerning other lawsuits that "the named Petroleum Storage Tank Insurance Fund is a misnomer for the board of trustees responsible for the fund's management."[115] Based on these facts, the Board is arguably at fault for the City's belief that naming PSTIF was proper and that the Board and PSTIF were not different parties.

Another point in support of the fact that the Board and PSTIF were not different parties is that PSTIF was not even a party in the court's eyes,

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[108] City of Harrisonville v. McCall Serv. Stations, 495 S.W.3d 738, 752 (Mo. 2016) (en banc).

[109] *See* City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 772–73 (Mo. 2022) (en banc).

[110] Response/Reply Brief of Plaintiff/Appellant, *supra* note 103, at *7.

[111] *Id.*

[112] *Id.* at *6.

[113] MO. R. CIV. P. 55.33(c).

[114] Response/Reply Brief of Plaintiff/Appellant, *supra* note 103, at *6.

[115] Brief of Plaintiff/Appellant, *supra* note 23, at *17.

but rather a mere account. The lawsuit was litigated for over a decade, but the court found the Board was not a party to the litigation until the substitution in 2016.[116] Furthermore, the Fund is a non-suable entity unable to act and, therefore, not a party. Accordingly, the Board must have been a party to the litigation. Because the City only misnamed the defendant, but the defendant was on notice of the suit and not prejudiced by the misnaming,[117] this appears to be a classic misnomer case. The name-change amendment relates back to the initial proceedings and, thus, sovereign immunity was required to be asserted before the first appeal. Because it was not, the court waived this defense.

This conclusion makes even more sense considering the various opinions coming from the court in *City of Harrisonville v. McCall Serv. Station.*[118] There, three judges explicitly maintained in concurring opinions that the Board's improper party argument was waived, given that it was not raised at trial.[119] Moreover, almost all judges held that, in the interest of "fairness and justice" to the City, the case be remanded for substitution.[120] Given the dispute as to whether the Board's improper party claim was fairly before the court, there certainly must be a question as to whether the sovereign immunity issue was before the court as it was also not raised until appeal. Specifically, the Board did not plead this argument until after the City's Second Amended Petition on remand.[121] Since the Second Amended Petition was later dismissed, the responsive pleading was also dismissed.[122] Given that courts have denied the Board sovereign immunity in prior litigation, the Board knew it was the proper party and did not assert the privilege for over a decade, the untimely assertion was in response to an invalid petition, and the Board waived this defense, the court's reasoning leaves many substantive questions unanswered concerning its ultimate decision.

Moreover, it is hard to justify entitling the Board of PSTIF to sovereign immunity considering the court's prior holdings, the justifications for the privilege, and its practical effects. The court attempts to distinguish earlier decisions holding PSTIF was not entitled to sovereign immunity in its opinion. The court determines that *River Fleets* and *Rees Oil* addressed only whether PSTIF's funds were deemed state

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[116] *Id.* at *8–9.

[117] City of Harrisonville v. McCall Serv. Stations, 495 S.W.3d 738, 752 (Mo. 2016) (en banc).

[118] *Id.*

[119] *Id*. at 754 (Wilson, J., concurring); *id.* at 755 (Fischer, J., concurring in part); *id.* at 757 (Teitelman J., concurring in part).

[120] *Id*. at 754 (Wilson, J., concurring); *id.* at 755 (Fischer, J., concurring in part); *id.* at 757 (Teitelman J., concurring in part).

[121] City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 773 (Mo. 2022) (en banc).

[122] *Id.*

funds and did not consider the Board's liability for its agent's tortious conduct.[123] Given that PSTIF is unable to be sued, and the Board is immune from liability, the court's decision is inconsistent with the prior holdings in *River Fleets* and *Rees Oil*.[124] The Board was also named as defendant in *Rees Oil* and *River Fleets*, and the court repeatedly addressed the Board's claim of sovereign immunity in those cases without distinguishing between the Board and PSTIF.[125]

The court additionally dismissed the applicability of the holding in *Estes*, because MOPERM failed to assert that it was a state agency and state law did not specify it to be the State.[126] Under the reasoning of *Estes,* however, there is no long-standing state tradition of granting sovereign immunity to the administrators of insurance funds consisting of non-state funds that provide coverage for owners, operators, and injured third parties of petroleum storage tanks.[127] There is no evidence supporting the contention that the state government has historically performed this service ever, but certainly not before the 1977 codification into state law. Based on the primary sovereign immunity rationales of upholding tradition and protecting state funds, the court's holding in the instant decision is unjustified on both grounds.

The Board's strongest argument for its sovereign immunity claim, however, is the statutory provision stating its members are state employees.[128] Assuming the Missouri Legislature intended to grant the Board sovereign immunity, this privilege results in disappointing repercussions for Missourians. While owners and operators of petroleum storage tanks are required to pay fees to PSTIF, there are no consequences to PSTIF for refusing to pay out. Even after the jury awarded $8 million in punitive damages against PSTIF and its agents for fraud, the Board continued to employ those same administrators who engaged in the fraudulent conduct. It did not change its behavior.[129] If the $8 million punitive damage award against PSTIF and its agents did not deter the wrongful behavior, query how the Board will behave now that it has complete immunity from damage awards. The court initially remanded

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[123] *Id.* at 776.

[124] *Id*.; River Fleets, Inc. v. Carter, 990 S.W.2d 75, 77 (Mo. Ct. App. 1999); Rees Oil Co. v. Dir. of Revenue, 992 S.W.2d 354 (Mo. Ct. App. 1999).

[125] *See Rees Oil*, 992 S.W.2d at 358 ("[W]e consider the contention of DOR and the Trustees that Rees' suit is barred by sovereign immunity. They argue that because Rees' claim for a refund is a suit against the state, the state must consent to the suit . . . .We disagree.").

[126] *Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund*, 655 S.W.3d at 776.

[127] *See* Estes *ex rel.* Does v. Bd. of Trustees of the Mo. Pub. Entity Risk Mgmt. Fund, 623 S.W.3d 678, 691 (Mo. Ct. App. 2021).

[128] MO. REV. STAT. § 319.129.9 (2022).

[129] Response/Reply Brief of Plaintiff/Appellant, *supra* note 103, at *39.

the case for the furtherance of justice and fairness, but this outcome appears inconsistent with that goal.

Additionally, when imagining if other insurance entities, like those insuring car accidents, could wrongfully deny claims, completely ignore those they insure, or intentionally induce third parties to cover the damage themselves with the deceitful promise of reimbursement, this result is illogical. Not only does it defeat the purpose of requiring petroleum storage tank owners and operators to obtain insurance, but the Board's power also seriously harms the environment and Missouri residents as contamination goes unremedied.

These concerns have already been realized. During the years of litigation, the Board received multiple letters from the Federal Environmental Protection Agency stating that its repeated wrongdoing put human lives at risk, and the Missouri Department of Natural Resources complained that the Board was obstructing cleanup efforts.[130] Statements from Kansas City residents of a predominantly Black neighborhood sickened by a petroleum storage tank further emphasize the consequences of the Board's unaccountability.

One resident stated: "My father died of multiple myeloma, my sister died of Leukemia, and we had the fire department come to our house in 2007 and 2008 because we smelled gas in the basement, and they said it was gasoline coming from the sewer."[131] Another resident stated: "My mother died of colon cancer, I have had pancreatic cancer, I discovered recently that my daughter had cancer."[132] The owner of the gas station responsible for the leak paid into PSTIF and entered into a settlement in 2016 with its affected neighbors, but the owner told his state representative that PSTIF is in charge of the remainder of the contamination cleanup.[133] The Department of Natural Resources is believed to have known about the leak since 2009, and as of 2016, PSTIF had "balked" on its responsibilities to remedy the deadly contamination.[134] State Representative Brandon Ellington stated: "It's literally like a cap of silence that they're trying to

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[130] *Id*. at *2.

[131] Dave D'Marko, *Inner City Oil Gas Leak: 'There's No Guarantee That it's Going to be Cleaned and Redeveloped at all'*, FOX4 (Oct. 6, 2016, 10:08 PM), https://fox4kc.com/news/inner-city-oil-gas-leak-theres-no-guarantee-that-its-going-to-be-cleaned-and-redeveloped-at-all/ [https://perma.cc/RP22-7XGU].

[132] *Id.*; Jason Taylor, *State Rep Seeking Relief for KC Neighborhood Plagued with Deadly Contamination*, MISSOURINET (Apr. 3, 2017), https://www.missourinet.com/2017/04/03/state-rep-seeking-relief-for-kc-neighborhood-plagued-with-deadly-contamination/ [https://perma.cc/BHV9-YRLC].

[133] D'Marko, *supra* note 131; Tim Curtis, *Ellington Calls out Koster, DNR Over Response to Gas Leak*, THE MO. TIMES (June 10, 2016), https://themissouritimes.com/ellington-calls-out-koster-dnr-over-response-to-gas-leak/ [https://perma.cc/3MZE-BUGF].

[134] D'Marko, *supra* note 131; Taylor, *supra* note 132.

place over this contamination issue [a]nd that's the craziest thing I've ever seen in my life as far as bureaucracies and state and city departments being knowledgeable, but not wanting to admit anything or wanting to get involved with anything."[135]

In the end, owners of petroleum storage tanks and real property owners near those tanks should monitor this Supreme Court of Missouri decision when determining how to pursue contamination cleanup costs since damages awards are now off the table for the Board's misconduct and the Board, not PSTIF, is the proper defendant. Further, the Board's conduct in this case raises questions about the use of a trust at all. Those in the petroleum industry may be well-advised to consider alternative insurance arrangements, and cities may want to be more proactive in requiring gas stations and other storage tank owners to indemnify cities for damages. One suggestion for cities is requiring new gas station owners to set and secure bonds for future contamination. Knowing courts cannot hold PSTIF liable and insurance payouts may never be dispersed, rational actors should bargain amongst themselves so that monetary recoveries and environmental cleanups remain an option, which is in the best interest of Missourians.

VI. CONCLUSION

Ultimately, the Supreme Court of Missouri's recognition of sovereign immunity for the PSTIF Board invalidated over twenty years of litigation and an $8 million punitive damages award.[136] This conclusion raises serious issues for owners and operators of petroleum storage tanks and those injured by their contamination as courts cannot hold the Board accountable for its decisions regarding pay outs. Without these guaranteed insurance settlements, the beautiful state of Missouri will suffer delays in cleanup operations or completely unremedied petroleum leaks, harming the environment and state residents.

Accordingly, those affected by petroleum leaks must recognize that the Board, not PSTIF, is the proper defendant when pursuing settlement claims; failing to name the Board will result in dismissal of the claim. Even if the Board is properly named, however, these claims may still go unredressed as litigants have no way to challenge the Board's unbridled authority over PSTIF and its settlement decisions. This result is particularly alarming considering the Board has already gotten away with fraud while conducting cleanup operations, even before the Board was aware it was sovereignly immune. To prepare for inevitable petroleum leaks and subsequent disputes with the Board, the thousands of Missouri

[135] Taylor, *supra* note 132.

[136] City of Harrisonville v. Bd. of Trs. of Mo. Petrol. Storage Tank Ins. Fund, 655 S.W.3d 770, 776 (Mo. 2022) (en banc).

owners and operators of petroleum storage tanks and their neighbors should seek alternative insurance arrangements so that these dangerous environmental events are remedied in a timely fashion. Given that the state's insurance system for petroleum leaks can fail without consequence, the responsibility of keeping Missouri safe and clean falls to its citizens.