IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2017-IA-00167-SCT

THE PROMENADE D'IBERVILLE, LLC **APPELLANT**

VS.

JEA **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI, SECOND JUDICIAL DISTRICT

BRIEF OF THE APPELLANT THE PROMENADE D'IBERVILLE, LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Plaintiff-Petitioner The Promenade D'Iberville, LLC.
2. Defendant-Respondent JEA (f/k/a the Jacksonville Electric Authority).
3. Kyle S. Moran, Esq., James G. Wyly, III, Esq., Phelps Dunbar LLP, counsel for The Promenade D'Iberville, LLC.
4. J. Jeffrey Landen, Esq., Michael S. Jones, Esq., Murphy Landen Jones PLLC, of counsel for The Promenade D'Iberville, LLC (admitted *pro hac vice* in the trial court.
5. Daniel Knecht, Esq., Graydon Head & Ritchey LLP, of counsel for The Promenade D'Iberville, LLC (admitted *pro hac vice* in the trial court).
6. Tim C. Holleman, Esq., Boyce Holleman & Associates, counsel for CBL & Associates Properties, Inc.
7. Roland F. Samson, III Esq., Samson & Powers, PLLC, counsel for The Promenade D'Iberville, LLC.
8. Joe Sam Owen, Esq., Owen, Galloway & Myers, PLLC, counsel for JEA (f/k/a the Jacksonville Electric Authority).

9. Michael W. Ulmer, Esq., James J. Crongeyer, Jr. Esq., H. Ruston Comley, Esq., Watkins Eager PLLC, counsel for JEA (f/k/a the Jacksonville Electric Authority).

10. Judge Christopher Schmidt, Circuit Court of Harrison County, Second Judicial District.

SO CERTIFIED, this the 11th day of December, 2017.

s/ Kyle S. Moran .....
KYLE S. MORAN,
COUNSEL FOR APPELLANT

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STATEMENT OF THE ISSUES

As the parties neared a trial on the merits, the Circuit Court incorrectly interpreted and extended an intervening U.S. Supreme Court decision, and thereby disrupted the course of six years of litigation by summarily destroying the opportunity for Plaintiff-Appellant The Promenade D'Iberville, LLC, ("Promenade") to pursue an adequate remedy for the damage done to its land by Defendant-Appellee JEA ("JEA"), a foreign community-owned utility.

Accordingly, Promenade presents the following issues for interlocutory review:

1. The Circuit Court erred by applying the U.S. Supreme Court's decision *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (April 19, 2016) ("*Hyatt II*") in a manner beyond that decision's own holding with the effect of implicitly or effectively overruling binding precedents of the Mississippi Supreme Court.

2. Even if the improper extension of *Hyatt II* by the Circuit Court stands, the Full Faith and Credit Clause does not require Mississippi Courts to afford a foreign municipal utility the damages caps provided to Mississippi government entities by the Mississippi Tort Claims Act ("MTCA") when:

    a. The foreign municipal utility failed to timely pursue its alleged immunity defense while participating in the litigation;

    b. Mississippi has a legislated policy towards municipal utilities acting beyond their state's borders to consent to the laws of the affected forum state; and

    c. Sufficient Mississippi policy interests run counter to the application of the caps, including but not limited to Mississippi's interests in protecting its citizens' property and the State's territorial sovereignty from the unapproved importation and deposition of harmful wastes holding a negative value.

3. Promenade should have been allowed to amend its complaint to conform to a change in the law once the Circuit Court extended *Hyatt II* to require a substantial departure from

prior Mississippi precedent regarding the provision of legislated immunities under Miss. Code Ann. § 11-46-1, *et seq.*, to a foreign utility as if it was a Mississippi government entity.

4. Genuine issues of material fact exist regarding the adequacy of Promenade's remedies at law such that it should be allowed to try its claim for injunctive relief on the merits, inasmuch as:

a. The injunctive relief sought is for a physical invasion to land by deleterious agents;

b. The damages at law are artificially restricted to less than 1% of the damages claimed by the unprecedented provision of the MTCA's damages caps to a foreign utility; and

c. An injunction is the only remedy to prevent Promenade from inequitably bearing the risk involved with the excavation, handling, and disposal of the offending waste.

5. Genuine issues of material fact exist regarding whether JEA breached specific and separate duties resulting in repeated harm to Promenade, such that the number of occurrences should be determined by the fact finder at trial.

STATEMENT OF THE CASE

Promenade is the developer and owner of a shopping center in D'Iberville, Mississippi. With the exception of a few parcel sales to certain retail anchors, Promenade owns and operates the balance of the original 73 acre site, on which it leases space to over 50 commercial tenants.

JEA is a community-owned electric utility, which generates 500,000 annual tons of power plant byproduct waste (a.k.a. "bed ash materials"). JEA developed and funded a plan to remove and market its power plant waste as a construction aggregate to Gulf Coast projects outside of the State of Florida. Approximately 32,000 tons of JEA's power plant waste that was shipped to Mississippi by JEA is under Promenade's shopping center in D'Iberville, Mississippi.

In March 2010, Promenade filed suit against four defendants and several John Does. On April 8, 2010 Promenade filed its First Amended Complaint substituting JEA for "John Doe 1." Promenade alleged that JEA's waste byproducts contain deleterious characteristics, which have damaged Promenade's property, and sought both injunctive relief and tens of millions of dollars in damages.[1]

More than two years after JEA was served, JEA filed for the first time a "Motion to Dismiss for Lack of Subject Matter Jurisdiction" based on an alleged sovereign immunity defense.[2] Although JEA styled its immunity defense as a jurisdictional Motion to Dismiss, JEA did not pursue the defense as such, and engaged in extensive motion practice and discovery across the next two years. JEA did not bring its Motion for a hearing until more than two years after it was filed, months after the close of discovery and more than four years in the case.[3] Following a hearing, the Special Master issued a Report and Recommendation ("Rpt. & Rec.") on May 28, 2015 rejecting JEA's alleged immunity.[4] Relying on this Court's decision in *Church v. Massey,* 697 So. 2d 407 (Miss. 1997), the Special Master also found: "…*JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the Mississippi Tort Claims Act.*"[5] JEA did not file an objection to the Rpt. & Rec. pursuant to Rule 53.

[1] *See* R. 4431-5, Amendment to Complaint. In a subsequent amendment, Promenade specified that JEA's waste effected a physical invasion of Promenade's land in Mississippi. "R." denotes references to the Record, "T." denotes references to the Transcript.
[2] R. 898-904, JEA Motion to Dismiss. (October 1, 2012)
[3] The docket for Case No. A-2402-10-41 (R. 5-152) shows 522 intervening entries before JEA brought its motion for a hearing.
[4] R. 4660-3, Special Master Report and Recommendation.
[5] *Id*., at R. 4663 (emphasis added).

Eleven weeks after the Special Master's Rpt. & Rec., Promenade moved *ore tenus* for its adoption via a proposed order that was expressly unopposed by JEA and adopted by the Court in August 2015.[6] The parties proceeded towards the trial scheduled for October 3, 2016.[7]

Nearly a year after adoption of the Special Master's Rpt. & Rec. by the Court, JEA filed a Motion to Reconsider the August 2015 Order based on the U.S. Supreme Court's April 19, 2016 decision in *Hyatt II*.[8] In briefing and at the hearing on the matter, JEA characterized the *Hyatt II* decision as an "extraordinary" one that caused fundamental change in the law. The Circuit Court indicated it was extending *Hyatt II* to provide certain MTCA immunity to JEA as if JEA were a Mississippi government entity, and two weeks later Promenade filed a Motion for Leave to Amend.[9] The proposed amendment sought to add a claim for inverse condemnation pursuant to Article III, § 17 of the Mississippi Constitution and 42 U.S.C. § 1983, given the Circuit Court's newly stated decision to reverse its own prior ruling on the basis of *Hyatt II.* If JEA was now to be treated like a Mississippi government entity, the proposed inverse condemnation claim restated Promenade's preexisting physical invasion claim as against a government actor.[10]

Although the Circuit Court's subsequent Omnibus Order explicitly extended *Hyatt II* to JEA, the Circuit Court denied Promenade's corresponding request to amend and assigned no reason for such denial.

Earlier in the case, JEA had moved for and had been denied summary judgment on all of Promenade's claims, including Promenade's claim for physical invasion.[11] Following the

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[6] R. 4982; *see also* T. 956: 23-6, Hearing Transcript (Aug. 13, 2015) ("THE COURT: And Master Simpson entered a recommendation on a motion to dismiss for lack of subject matter jurisdiction, I think, on May 28th. *There's been no objection*.") (emphasis added). A proposed order presented to the Court was signed the following day. (R. 4982).

[7] R. 4992, Order setting trial.

[8] R. 5120-34, JEA Motion to Reconsider.

[9] R. 5684-98, Promenade Motion for Leave to Amend.

[10] *Id.*

[11] *See* R. 4993-6, R. 5289, R. 5290-4, and R. 5821, Orders denying summary judgment to JEA.

expiration of the summary judgment deadlines, and after JEA's Motion for Reconsideration based on *Hyatt II*, JEA moved for partial summary judgment on Promenade's claim for injunctive relief and for partial summary judgment to preclude the consideration of multiple occurrences under the MTCA.

In light of the *Hyatt II*-related motions, the Circuit Court canceled the trial that had been scheduled for October 3, 2016. The Circuit Court then issued its Omnibus Order, which included the following rulings:

- That under *Hyatt II*, the Full Faith and Credit Clause required the Circuit Court to afford JEA immunity to the extent Mississippi agencies are entitled to immunity under Mississippi law;[12]
- That Promenade may not amend its complaint to add a claim for inverse condemnation despite the new application of interstate sovereign immunity under the Full Faith and Credit Clause;[13]
- That JEA is entitled to partial summary judgment on Promenade's claim for injunctive relief; and
- That JEA is entitled to partial summary judgment on Promenade's claim for multiple occurrences under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-15.

Based on these rulings, Promenade's maximum recovery against JEA was inequitably capped by the Circuit Court at $500,000 – a figure dwarfed by the amount expended by Promenade in pursuing its claims against JEA for several years, let alone the millions in damages already done to Promenade's property and the ongoing adverse consequences of the JEA material remaining at the Promenade site.

On February 8, 2017, Promenade petitioned this Court for interlocutory review of the issues presented *supra.*

[12] R. 6406-19, Omnibus Hyatt II Order at 6409.
[13] *Id*. at R. 6414.

STATEMENT OF THE FACTS

The factual background provided in this Statement of Facts involves two distinct timelines: (A) JEA's efforts to manage its power plant waste stream by developing construction products and out-of-state rail markets, and (B) the construction of The Promenade shopping center in D'Iberville, Mississippi. These timelines converge at waste-hydration-pits in Port Bienville, Mississippi, and culminate with the discovery of ongoing subsurface expansion of the hydrated waste materials causing cracking and displacement at the stores and parking lots of the shopping center in Mississippi. Aside from the cost to repair the damage done to the improvements on Promenade's land by the harmful expansion of JEA's waste, the expense of removing and replacing the JEA waste handicaps the marketable value of the land, interfering with the quiet use and enjoyment of Promenade's property.

a. JEA is a community-owned electric utility that is not an arm of the State of Florida.

JEA (formerly known as the Jacksonville Electric Authority) is a "community-owned electric utility located in Jacksonville, Florida."[14] JEA is not an arm of the State of Florida; rather, "JEA is a governmental unit which primarily acts as an instrumentality or an agency *of a municipality*."[15]

JEA's "authority" is territorially limited to its comparatively small service area,[16] JEA is involved in business ventures with in-state and out-of-state private corporations,[17] and JEA does

[14] *See,* Section 21.01 of the Jacksonville Municipal Code (establishing JEA as "a body politic and corporate...repos[ing] in JEA all powers with respect to electric, water, sewer, natural gas, and such other utilities…which…could have been…exercised by the *City of Jacksonville*.") (emphasis added); *see also* R. 6406, Omnibus Order.

[15] *Liberty Mut. Ins. Co. v. Fortress Homes & Cmtys. of Fla., LLC*, No. 2003-CA-00856 (Fla. Cir. Ct. Oct. 12, 2004) (emphasis added).

[16] *See, e.g.,* R. 5235, JEA Service Area Map for Water/Sewer/Electric.

[17] *See* R. 5237-5244. JEA's own service area is serviced by a private partnership with private corporation Florida Power and Light in regards to the St. Johns River Power Park. JEA is also involved in

not call on the State of Florida to pay its judgments.[18] Unlike sovereign States and their agencies, JEA does not enjoy Eleventh Amendment immunity, making it subject to the jurisdiction of federal courts. Judgments and settlements owed by JEA are not paid from Florida's public fisc.[19]

Moreover, JEA is neither beholden nor accountable to the State of Florida. "JEA is listed in the city charter as an 'independent agency' of the City of Jacksonville."[20] As an "independent agency" of the city, JEA largely operates without direct oversight from the municipality. The U.S. District Court for the Middle District of Florida recently compared JEA to the Orlando Utilities Commission (the "OUC"): "Like JEA, the Orlando city council 'selects OUC's board members,' but 'the OUC acts independently and beyond the control of the City…Thus, while the OUC may be a public utility designated as part of Orlando's government, it remains a distinct legal entity that operates mostly independent of the city."[21]

Likewise, JEA's activities conducted outside the State of Florida are not subject to Florida's state regulatory agencies. JEA's consultant toxicologist explained that the attractiveness of shipping JEA's waste outside the state of Florida was the ability to avoid the jurisdiction and oversight of the Florida Department of Environmental Protection (the "FDEP"):

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acquiring partial ownership of nuclear facilities maintained by private corporation Duke Energy in South Carolina.

[18] In fact, JEA recently paid a settlement after being sued in the United States District Court for the Middle District of Florida for, among other things, damages caused by the swelling of JEA's so-called combustion byproducts under the Jacksonville Port Authority's terminal pavement. *See, e.g., The Jacksonville Port Authority v. W.G. Yates, et al.*, Case No. 3:12-cv-1227.

[19] In addition to the private insurance JEA has to cover claims (*see, e.g. Cont'l Cas. Co. v. City of Jacksonville, Jacksonville Electric Authority, et al.*, 384 Fed. Appx. 900 (11th Cir. 2010) (suit against private insurer for indemnity and defense in pollution class action)), JEA is also a participant in the City of Jacksonville's Risk Management Plan consisting of pooled self-insurance funds that can be used to satisfy claims and purchase excess insurance coverage.

[20] *Fluid Dynamics Holdings LLC v. Jacksonville*, 2017 U.S. Dist. LEXIS 138671, *6-7 (Aug, 29, 2017) (quoting from Charter of the City of Jacksonville §18.07(d)).

[21] *Id.* at n.6.

> Q. Okay. When – and, again, let's go up to the sentence that says, 'Since the dry material will go out of state, there should be less of an issue for FDEP as well.' Is that a reasonable statement based on your knowledge of FDEP's positions at the time?
>
> A. Yes. And, in fact, we had multiple discussions with DEP that centered around the fact that if we – if JEA decided that they wanted to implement the [Beneficial Use Determination] in Florida, then there were a series of procedures we needed to go through and we knew what those were. I think JEA said, 'What if we want to send it somewhere else?'
>
> I think the pretty quick statement was, 'We don't have any jurisdiction over that.'[22]

Accordingly, JEA is not a "state agency," nor is it funded by the State of Florida. JEA operates independently from the City of Jacksonville, and its actions directed at Promenade in Mississippi were beyond the oversight of the Florida authorities supposedly tasked with regulating JEA's in-state conduct.

b. JEA adopts a plan for "Ash Removal and Marketing."

i. The governing RFP Agreement.

JEA combines coal, pet coke, limestone, and other materials during its electric generation process, which annually produces roughly 500,000 tons of solid waste combustion byproducts.[23] During a meeting of JEA executives in December of 2002, JEA identified "the following three options for disposing of this material:

- Spend $40/ton or $28 million/year plus transportation to landfill offsite
- Spend $20/ton or $14 million/year to landfill on a JEA site
- Find suitable user to take material at little cost, no cost, or at plus income[.]"[24]

[22] R. 4590-1, P.R.E. 360-1, Testimony of Dr. Teaf (cited as Ex. H). "P.R.E." denotes references to Promenade's Records Excerpts and include documents that were filed on CD or DVD with the circuit clerk. See R. 4647-4653 / P.R.E. 0001-7 and R. 4577-4583 / P.R.E. 0008-14. These papers were designated for the record on appeal and were submitted on CD with the record on appeal, but have not been numbered. Hereafter, references to exhibits that were filed on CD or DVD are cited in Promenade's Record Excerpts; *see also* P.R.E. 226-8, Excerpted Email from Matt McClure to Christopher Teaf.

[23] *See* R. 6406, Omnibus Order.

[24] R. 4544, P.R.E. 23, Alternative Ash Disposal for NGS Units 1 & 2 (cited as Ex. D).

In furtherance of the third option, JEA solicited outside proposals for "ash removal and marketing."[25]

In 2002, JEA advertised "for interested proposers to remove the byproducts at the Northside Generating Station" in Request for Proposal No. JMS-025-03 (the "RFP"). At JEA, RFPs are required for "formal contracts," which are contracts exceeding $200,000.[26] The RFP was titled "Northside Generating Station Ash Removal."[27] Former co-defendant LA Ash responded with a proposal that promised the "ash removed" would be "all" including JEA's onsite landfill.[28] It identified the potential use as a construction aggregate and suggested JEA install a rail spur at JEA's Northside Generating Station in Jacksonville, Florida for ease of shipment.[29]

Vickie Cavey of JEA presented LA Ash's proposal to the JEA Awards Committee. She identified the services LA Ash would be providing as "Ash Removal and Marketing."[30] She also explained to the Awards Committee that the selection of LA Ash for ash removal and marketing "[w]ill reduce operating costs of byproducts storage area and future avoided costs with respect to landfill."[31] On May 22, 2003, the JEA staff's selection of LA Ash's proposal was approved by the JEA Awards Committee.[32]

ii. Florida issues JEA a restrictive "BUD" causing JEA to look for other means of alleviating the capacity of its Jacksonville landfill.

[25] P.R.E. 24-27, Approved Proposal.
[26] *See* P.R.E. 332-8, Testimony of James Chapman, JEA's Director of Risk Management and author of the JEA Purchasing Code.
[27] P.R.E. 24-27, Approved Proposal.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

To avoid landfilling JEA's waste off-site at high cost, JEA and LA Ash collaborated to seek approval from Florida's Department of Environmental Protection ("FDEP") to hydrate and market JEA's waste as a construction product called EZBase.[33] Eventually, JEA and LA Ash received what is called a "Beneficial Use Determination" ("BUD") from the FDEP. The Florida BUD exempted JEA's hydrated bed ash from its default status as an industrial solid waste in certain limited applications *in Florida*. However, this exemption required that JEA meet three obligations. The BUD stated:

> These materials include industrial byproducts, which are regulated as solid waste unless three conditions are met:
>
> 1. *A majority* of the industrial byproducts are demonstrated to be *sold, used, or reused within one year*;
>
> 2. The industrial byproducts are not managed so as to create a threat of environmental contamination; and
>
> 3. The industrial byproducts are not hazardous wastes. [34]

The use of "majority" in the BUD's first condition above meant that JEA had to demonstrate to the FDEP that at least 51% of JEA's byproducts were "sold, used, or reused" each year. Matt McClure of JEA also testified that the material has to be *beneficially* used to qualify towards the exemption, not just used in some manner.[35]

Similar to Florida, a waste generator may apply for a BUD from Mississippi's Department of Environmental Quality to exempt certain wastes from what otherwise is classified as industrial solid waste. It is undisputed that the waste from JEA that was shipped to Mississippi in 2008 and 2009 *never* received a governing BUD.[36]

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[33] *See* P.R.E. 339-41, Testimony of Vickie Cavey ("that plant was built with the intent on selling the byproduct, and [in 2003] it wasn't in place yet."); *see also* P.R.E. 342-4, Testimony of Mike Brost.
[34] P.R.E. 107-9, EZBase Beneficial Use Project Approval (emphasis added).
[35] P.R.E. 345-52, Testimony of Matt McClure.
[36] Additionally, this Court has held that waste generators have a common law duty to properly dispose of their waste. In *Donald v. AMOCO Prod. Co.*, 735 So. 2d 161, 175 (Miss. 1999), this Court held:

iii. JEA managed its environmental risk by shaping appearances and focusing on out-of-state sales.

Because JEA produced roughly 500,000 tons of so-called byproducts[37] a year, it needed to find markets for at least 250,000 tons. JEA's failure to do so would jeopardize the waste classification of all the materials sold below the 250,000 ton mark.[38]

Accordingly, JEA considered the *appearance* of what was done with JEA's waste very important. As early as 2005, JEA expressed the importance of making it *look* like its waste byproducts were being put to a beneficial use in order to satisfy its onerous BUD obligations. In a 2005 email from JEA's Greg Perrine to other JEA executives, he stated the need to characterize bed ash transactions as sales: "[JEA's] Ed Breza was very concerned that [LA Ash] *has to always be able to say they sold all material*, even if it was for a nominal fee."[39]

Given the limitations placed on the byproducts' use by FDEP, JEA held a risk management meeting where JEA's executives discussed the implications of taking their bed ash products to market both in Florida and outside of Florida.[40] They noted the potential for product liability for failures, and the ineffectiveness of their municipal entity status at limiting their liability for negligence both outside the State of Florida and in cases of gross negligence.[41] Greg Perrine of JEA noted, "[w]ithin Florida our liability is capped[,]" but cautioned "[o]utside Florida…Unlimited liability[.]"[42]

"[generators] have a duty to ensure the safe disposal of their waste. Without such a duty, oil companies and others could hire anyone to remove it and claim their liability has ended. We would all bear the burden of such a rule."

[37] The terms products and byproducts are often used by JEA to describe the waste material left over from the combustion process at its Northside Generating Station. For convenience of reference in this memorandum, Promenade sometimes mirrors that terminology *arguendo*, even though the facts show that the material is actually solid waste and the terms used by JEA are euphemisms.

[38] *See* P.R.E. 345-52, Testimony of Matt McClure.

[39] P.R.E. 353-4, Email from G. Perrine to Susan Hughes, *et al*. (emphasis added).

[40] *See* P.R.E. 355-6, Email from Mike Brost to G. Perrine, *et al*.

[41] *Id*.

[42] *Id*. at Email from G. Perrine to P. Steinbrecher, *et al*.

Further, JEA's Vice President of Electric Generation Systems, Mike Brost, described in an email the need for JEA "to review the overall/general risk/legal issues associated with use of the material for *non-approved uses* in Florida *and for out-of-state sales.*"[43] Roughly a month later, Mike Brost again corresponded about "Out of State Sales" with JEA's Director of Fuels, Jim Myers, writing: "The primary focus needs to be on the ***environmental risk*** side (e.g., the various state DEP/DEQ type organizations), not on the DOT/structural/civil engineering side[.]"[44] Thus, JEA was more concerned with escaping environmental liability than with the performance of its waste as a construction aggregate.

Confronted with these risks, JEA chose to press forward with LA Ash in pursuing out-of-state ash removal and marketing. Moving forward with LA Ash allowed JEA to rely on those LA Ash shipments as "beneficial uses" counting towards JEA's overall need to report "a majority [as] sold, used, or reused within one year."[45] A JEA marketing consultant previously had identified Mississippi as a "Low Barrier to Entry State" for railing the ash byproducts for sale as construction materials.[46] Accordingly, JEA was expressly targeting the State of Mississippi as a destination for the waste byproducts it generated in Florida.

JEA's Matt McClure echoed these opportunities to make rail shipments to other states, noting the added benefit of escaping the scrutiny of FDEP:

> We have determined that the market for dry material by rail is much more promising, so we are allocating capital for that option instead. Since the dry material will go out of state, there should be less of an issue for FDEP as well…*After internal discussions, we decided to leave this information out of the attached letter [to FDEP]*.[47]

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[43] *Id.*
[44] P.R.E. 357-8, Email from Mike Brost to Jim Myers (emphasis in original).
[45] P.R.E. 107-9, EZBase Beneficial Use Project Approval (emphasis added).
[46] See R. 4406, By-products Opportunity Analysis by Ducker Worldwide (Aug. 3, 2006), at p. 26 (filed under seal).
[47] P.R.E. 226-8, Email from Matt McClure to Christopher Teaf (emphasis added); *see also* P.R.E. 359-61, Testimony of Dr. Teaf.

The record shows that JEA considered marketing its ash in its home state to be a complicated and expensive process rife with potential liabilities. Because nobody was willing to pay JEA to use its ash on out-of-state projects, JEA paid LA Ash to remove and market its ash outside of Florida in order to create the regulatory perception that there were sufficient "sales" of JEA's waste.

c. JEA's secret vendor.

As a municipal utility, JEA is subject to various purchasing code requirements, such as open bidding. In 2003 JEA had issued a formal Request for Proposals for "Ash Removal and Marketing" and LA Ash's bid had been selected by an official JEA awards committee.[48] Shortly thereafter, JEA and LA Ash had entered into the Byproduct Marketing Agreement in furtherance of the RFP award. The Byproduct Marketing Agreement had been executed pursuant to JEA's formal purchasing code guidelines, requiring approval by the fuels purchasing director and the signature of JEA's then-CEO, James Dickinson.[49] Likewise, the contemplated expenditure was "duly authorized, and provision [was] made for the payment of monies provided therein to be paid" by JEA's Director of Budget Services.[50]

But in the years that followed, JEA took steps to reduce the visibility of its ongoing "Ash Removal and Marketing" relationship with LA Ash under the RFP. In December of 2006, Scott Schultz proposed an adjustment to the ongoing JEA relationship with LA Ash whereby JEA would continue to pay LA Ash to remove and market its bed ash, but would reduce visible association by having LA Ash use LA Ash's own trade names for the JEA material:

> "I have another wild thought…suppose we give [LA Ash] a portion of the BSA where we would pump them the slurried

[48] P.R.E. 24-7, Approved Proposal.
[49] P.R.E. 362-9, Byproduct Marketing Agreement (Sept. 2003), at p. 17.
[50] *Id*. at p. 18.

> material. [LA Ash] would be responsible for processing it into EZBase…[LA Ash] would market the material as CalBase (their trademarked version of the product they produce in LA), and assume all risk.[51]

Schultz then cautioned the recipients of his email, *"I don't want you to answer this proposal in an email*[.]"[52]

Mechanisms for effectuating greater out-of-state ash removal and marketing were then implemented by JEA. JEA completed a $4 million on-site rail spur that allowed the dry bed ash material to be loaded directly into rail cars,[53] and a so-called "hydration facility" was established in Port Bienville where the dry bed ash could be received.

In October of 2007, LA Ash's CEO emailed Schultz and discussed how out-of-state shipments could effectuate the removal of 500 tons of JEA's bed ash a day. Mr. Livengood stated, "We have continued to work on other solutions like the Port Bienville process facility as I told you on the phone…Please read Jesse's letter for the details but it allows us to give you a price to take a guaranteed 500 tons a day to Port Bienville[.]"[54] Jesse Hite's letter, attached to Livengood's email, contains a detailed plan for JEA to subsidize the shipment of JEA bed ash to Port Bienville, Mississippi for hydration and resale in the surrounding Mississippi markets:

> During the staff meeting today we discussed Port Bienville in Mississippi and what opportunities there are in that area. This will be an ash processing facility to produce hydrated material for the recovery work needed after the hurricane [Katrina].
> ***

[51] P.R.E. 380-2, Email from Scott Schultz to Thomas Clayton. Although Scott Schultz used the term "CalBase" in this email, LA Ash subsequently decided at a meeting in May 2007 to market the JEA materials under the term "OPF" or "Outperform" rather than "CalBase." *See* P.R.E. 424-7, Marketing Minutes (May 29, 2007).

[52] *Id.* (emphasis added).

[53] *See* P.R.E. 390-417 at slide 29 (Byproduct Loadout Plan…Install rail under silos to allow direct loading of dry product into rail cars...4.0 million dollars"); *see also* P.R.E. 418-420, Testimony of Ted Hobson.

[54] P.R.E. 318-22, Email from G. Livengood to S. Schultz.

> This facility allows us to make a profitable hydrated material product and would be able to guarantee 500 tons a day to JEA.[55]

JEA's Director of Byproducts, Scott Schultz forwarded this email, along with the attached letter from Jesse Hite, to nearly everyone on the JEA Byproducts "Marketing" team.[56]

LA Ash sales meeting minutes recorded a meeting between JEA's Scott Schultz and LA Ash's Tommy Stewart on December 6, 2007: "The discussions centered on movement of dry bed ash by rail and truck. It was generally a promising meeting with both parties agreeing to continue to work toward movement of ash in a win-win situation…**Tommy gave Scott an overview of our plans for Port Bienville. Scott is amenable to paying a higher subsidy.**"[57] Minutes from JEA's meetings during this same timeframe show that the "promising" outlook for moving JEA bed ash to Mississippi was mutual. Soon after LA Ash recorded its December 6, 2007 minutes, JEA's Scott Schultz noted during a January 2008 JEA Fuels Meeting that "Non-local EZBase sales are picking up due to some utilization in the Mississippi area for Katrina damaged roadways."[58]

Despite ongoing pressure from environmental agencies for what JEA characterized as LA Ash's mistakes, Scott Schultz rationalized continuing the JEA/LA Ash relationship by listing more than a dozen benefits to JEA, including: "50% of our bed ash is 'excess' which has to be managed in some application other than EZBase."[59] He further explained, "The current method of utilizing excess bed ash is to hydrate and either landfill ($25.00 per ton) or use in very limited

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[55] *Id*. at P.R.E. 319, 320.
[56] *See Id.*, (forwarded to Robb Mack, Roger Emery, Lindsay Schopp, Matt McClure, and Dr. Mike Jackson).
[57] P.R.E. 323, LA Ash Sales Minutes (Dec. 8, 2007) (emphasis supplied); *see also* P.R.E. 324, Email from T. Stewart to S. Schultz.
[58] *See* P.R.E. 325-8, Email from L. Schopp to S. Schultz forwarding Fuel and Purchased Power Committee Meeting Minutes.
[59] P.R.E. 329-31, Email from S. Schultz to T. Hobson.

and specialized road applications…My goal is to only produce slurried EZBase (inexpensive), and rail out excess bed ash (inexpensive upon rail upgrades)."[60]

The evolving plan to remove bed ash that was discussed by JEA and LA Ash in early 2008 was crystalized in an email to LA Ash from JEA's Scott Schultz on February 5, 2008.[61] JEA's Scott Schultz referred to the agreement as a "side arrangement" between JEA and LA Ash.[62] The agreement contained the following key terms:

- "LA Ash will allocate 50 rail cars exclusively to JEA."
- "JEA will load the cars with bed ash."
- "The initial discussed destination is the Port Bienville plant. LA Ash may send to other locations. Any utilization, storage or disposal of ash in Florida will only be by the consent of JEA, and if required, in conjunction with FDEP."
- "JEA will pay LA Ash $2,100.00 per loaded car."[63]

Tommy Stewart responded, "Scott, Your email below reflects our understanding…I am looking forward to working with you and making this mutually beneficial for both our companies."[64] Notably, it is JEA's Scott Schultz – not LA Ash – who sets forth the terms of the deal. Accordingly, it was *JEA* who directed that the shipments were to go to Port Bienville, Mississippi, it was *JEA* who demanded the waste not be utilized, stored, or disposed of in Florida without JEA's consent, and it was *JEA* who granted LA Ash authority to send the waste to other locations – one of which became Promenade's shopping center project site.

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[60] *Id.*
[61] P.R.E. 15-16, Email from Tommy Stewart to Scott Schultz.
[62] *See* P.R.E. 329-31, Email from Scott Schultz to Ted Hobson. (Schultz writes at the conclusion of his January 18th email "This side arrangement is not pursuant to the existing documents and contracts between JEA and LA Ash, which are in the process of being terminated (without releases) by mutual agreement of the parties.").
[63] *Id.* (emphasis supplied).
[64] *Id.* (emphasis supplied).

JEA funded the waste removal called for in the "side arrangement" by using dummy purchase orders tied to previously terminated contracts.[65] Accordingly, the diversion of JEA bed ash to Mississippi became an "off the books" waste removal scheme: formal contracts were replaced with a "side arrangement" email agreement and the removal of waste to Mississippi was funded against non-existent purchase orders.

d. JEA's side arrangement and the individual shipments.

From 2008 through 2009, JEA continued its "Ash Removal and Marketing" operation. Despite operating under what JEA's Scott Schultz called the "side arrangement," JEA and Mr. Schultz have portrayed their relationship as a series of independent transactions.

JEA has denied the existence of a contract between JEA and LA Ash during the years 2008 and 2009.[66] Instead, JEA has emphasized that it was a "you send 'em, we'll load 'em" arrangement. When asked about the arrangement to send JEA waste to LA Ash's plant in Port Bienville, Mississippi, Schultz testified: "If you've got rail cars, you could send them to JEA. If I've got ash, I'll put ash in the railcars."[67] In fact, Scott Schultz testified: "I, JEA, did not care where they took the material."[68]

Thus, in JEA's own words, each of the rail shipments to Port Bienville, Mississippi, and each of the payments to LA Ash for the removal of ash, were individual independent transactions.

e. JEA's "zero dollar" sale.

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[65] P.R.E. 418-20, Testimony of Ted Hobson; *see also* P.R.E. 421 and P.R.E. 422-3.
[66] *See, e.g.*, R. 3789, L.19 - R. 3790 L.10, Testimony of Scott Schultz (denying the existence of a contract with LA Ash for 2008 - 2009 and referring to LA Ash as a "customer," even though it was JEA who was paying LA Ash).
[67] R. 3873, L.22 - R. 3874 L.11, Testimony of Scott Schultz.
[68] R. 3442, L.2-3, Testimony of Scott Schultz.

The "ash removal and marketing" relationship was not a straightforward sale-of-ash transaction. Even though JEA tried to characterize the ash as being "sold" to LA Ash, the money flowed in the opposite direction: at all times JEA was paying LA Ash to take the ash from Florida into Mississippi. The mechanics of their ash removal scheme were exposed in testimony by JEA's Scott Schultz:

> Q. [The JEA bed ash] wasn't really sold, was it? It was supplied for free.
>
> [JEA's Schott Schultz]: That's -- that's -- I don't know how you split that hair. I guess you could say it was sold.
>
> Q. You're saying it was sold, but the price was zero.
>
> [Schultz]: That's one way to put it, yes. I'm not sure how we split that hair.[69]

Pursuant to what JEA has described as a "no obligation" side arrangement, JEA made the decision on 437 separate occasions to fill a railcar with JEA power plant waste at JEA's onsite rail spur, then send that railcar on to the destination of Port Bienville, Mississippi.[70] When LA Ash received the railcars in Port Bienville, it invoiced JEA for each car at $2,100 a car. On 51 separate occasions, JEA paid an LA Ash invoice outside of JEA's established procurement procedures by using funds secured against dummy contracts that had long been terminated.[71]

Thus, what JEA subsequently tried to characterize as a "sale" was actually a payment-for-removal scheme in which JEA paid hundreds of thousands of dollars to send its waste to Mississippi. JEA did so to relieve capacity in its publicly-owned and publicly permitted onsite

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[69] R. 3413, L.24 - R. 3415, L.4, Testimony of Scott Schultz at; *see also* R. 3790, L.4 - R. 3791, L.1, Testimony of Scott Schultz (Schultz testified, "[JEA] subsidized some transportation. Included in that was what we considered payment, but I'm not even -- I'm not even sure that's the best way to explain it. They may not have paid for [the bed ash material]. We may have given them the ash.").

[70] *See* R. 6143-66, "Bed Ash Cars.xlsx."

[71] *See* R. 6168-85, LA Ash Invoices spreadsheet produced by JEA.

solid waste landfill in Jacksonville, to save millions in off-site landfill fees, and to defer investment in additional on-site waste management infrastructure.

f. Construction of the shopping center and discovery of the JEA waste.

Over the course of eight months during 2008, nearly 32,000 tons of JEA byproducts were trucked to the project site after having been shipped by JEA to the Port Bienville processing facility.[72] JEA's waste byproducts, marketed in Mississippi as a "soil additive" and sometimes under the name "OPF42" were used in preparation of Plaintiff's shopping center site in D'Iberville, Mississippi by mixing them with soils during the shopping center's construction.[73] In early 2009, these materials caused heaving, which resulted in cracking of the building slabs and displacement of other improvements.[74]

The deleterious characteristics of JEA's byproducts have caused injury to Promenade's property, and continue to cause serious injury to Promenade's property at great expense to Promenade. Indeed, JEA's byproducts have caused an array of invasive injuries. First JEA's byproducts never received state approval that "the material and its beneficial use are safe, suitable (chemically and physically), and nonhazardous, and that the material is being used as a replacement of another product."[75] As JEA's designated experts concede, the so-called soil additives have proven to be unsuitable and a source of the heaving and swelling at the site.[76]

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[72] *See, e.g.,* R. 2898-2922, "Daily Report" Aug. 1, 2008 – May 11, 2009*; see also* P.R.E. 28-57, Report of Dr. Richard Lee at p. 21 - 22 ("Vanadium is an indicator for the presence of LA Ash product [at the shopping center]. Our analyses indicated that the raw JEA bed ash contained vanadium on the order of 1000-2000 ppm. *** Vanadium concentrations and pH tended to be higher in those locations with the most distress[.]").

[73] R. 6406-19, Omnibus *Hyatt II* Order at R. 6406. OPF42 was the name created for the JEA materials that replaced the former name "CalBase." *See* P.R.E. 424-7, Marketing Minutes (May 29, 2007).

[74] R. 126-194, Amended Complaint at R. 135-6.

[75] *Compare* P.R.E. 17-22, Testimony of Tommy Stewart at Dep. Trns. 190:16 – 193:1, *with* P.R.E. 110-225, Beneficial Reuse of Industrial Byproducts in the Gulf Coast Region (Feb. 2008) at P.R.E. 135-6.

[76] *See also* P.R.E. 58-106, Report of JEA's Designated Expert Dr. Thomas Robl at P.R.E. 83 ("The combination of OPF42 and the clay minerals at the site resulted in the formation of mixtures of ettringite/thaumasite minerals or perhaps an ettringite/thaumasite intermediate form. The heaving and

Indeed, the physical ramifications of the unapproved material have been dramatic, and include vertical displacement causing ongoing heaving that has caused damage to the structures and other improvements above.

In addition to these physical injuries caused by the deleterious materials, Promenade has also suffered a decrease in the value of its property. Promenade's ability to market the shopping center for sale has been damaged as Promenade would have to disclose to any buyer the existence of thousands of tons of JEA waste byproducts under the parking fields and stores and disclose the deleterious characteristics of those byproducts.

STATEMENT CONCERNING ORAL ARGUMENT

Promenade believes that oral argument would be helpful in resolving the issues presented in this appeal.

SUMMARY OF THE ARGUMENT

The sovereignty implications that spurred the Full Faith and Credit analysis in *Hyatt II* are not at issue in this case because JEA is not an arm of the state of Florida. Because JEA is not a "state agency," treating JEA like any other tortfeasor under this Court's precedent in *Church v. Massey* does not constitute a policy of hostility to the State of Florida; rather, it supports Mississippi's constitutional and jurisdictional interests in protecting its territorial sovereignty and the property interests of its citizenry from JEA's hostile and reckless actions directed across state lines.

As recognized by the U.S. Supreme Court in *Hyatt II*, the Full Faith and Credit Clause is not without its limits.[77] Neither the Framers, nor the presiding Justices in *Hyatt II*, intended the Clause to operate as an escape hatch for a foreign municipal utility engaged in rogue interstate

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swelling in these soils was most likely caused by hydraulic pressure induced by water influx into the soil-OPF42 mixtures during ettringite/thaumasite mineral formation.").

[77] 136 S.Ct. at pp. 1281, 1283.

operations that effect a taking of private property beyond the borders of its home state's legislated immunities. This is especially so when, as here, Mississippi has evinced a clear policy of holding its own utilities accountable for any tortious conduct committed outside of Mississippi to the full extent of the forum state's law, and of holding foreign utilities accountable for damage inflicted to property within Mississippi.[78]

The Circuit Court's extension of the *Hyatt II* ruling to supply damages caps to an out-of-state municipal utility reversed its prior unopposed adoption of the Special Master's ruling denying JEA immunity, and runs counter to this Court's ruling in *Church v. Massey.* By doing so, the Circuit Court failed to appreciate the other constitutional protections conferred to Promenade under Article III, Sec. 17 of the Mississippi Constitution and the Fifth Amendment to the U.S. Constitution. Promenade's claim for physical invasion to land, on which Promenade already survived summary judgment, is equivalent to a claim for inverse condemnation. Given the change in the law under the Circuit Court's extension of *Hyatt II,* Promenade should be allowed to amend its complaint to restate its claim for physical invasion as one for inverse condemnation so that its constitutional right to just compensation for the taking of its land is preserved.[79] To hold otherwise would elevate the legislated damages caps over the due process principles preserved in Mississippi's Constitution.

Moreover, many of the same facts and circumstances that demonstrate that this case meets the exception to the application of the Full Faith and Credit Clause under *Hyatt II,* also show that the partial summary judgments on Promenade's claims for injunctive relief and multiple occurrences were unwarranted and premature. Mississippi case law is replete with

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[78] *See* Miss Code Ann. § 77-5-769; *see also* The State of Mississippi's Response in Opposition to Defendants' Motions for Judgment on the Pleadings (Apr. 6, 2016) filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.) (available at http://www.ca6.uscourts.gov/special-master).

[79] *Crum v. City of Corinth,* 183 So.3d 847, 851 (Miss. 2016).

decisions granting injunctive relief in circumstances such as those faced by Promenade, and in this case there are *at least* issues of material fact such that a determination on the appropriateness of requested injunctive relief should be reserved for the fact-finder following the conclusion of the evidence at trial.[80] Likewise, under *Mississippi Department of Human Services v. S.W.*, there is at least a genuine issue of material fact with regard to the number of times JEA breached its nondiscretionary ministerial duties to properly dispose of its waste.[81]

STANDARD OF REVIEW

When the issue presented is one of law instead of one of fact, the standard of review is *de novo* review.[82] "'Immunity is a question of law,' and this Court conducts a de novo review of the application of the MTCA."[83] The Supreme Court reviews determinations whether to grant leave to amend the complaint under an abuse of discretion standard.[84] It is well-settled that appellate review of the trial court's grant or denial of a motion for summary judgment requires the application of *de novo* review.[85]

ARGUMENT

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[80] *See, e.g., Punzo v. Jackson County*, 861 So.2d 340 (Miss. 2003) (remanding for consideration of whether the facts presented at trial entitled the plaintiff to injunctive relief under the appropriate standard), *Gulf Park Water Co. v. First Ocean Springs Dev. Co*., 530 So.2d 1325, 1334 (Miss. 1988) (noting that "[r]ights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain[,]" and holding "land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value."), and *Phillips v. Davis Timber Co., Inc*., 468 So.2d 72 (Miss. 1985) (finding injunctive relief appropriate for nuisance).

[81] 111 So.3d 630 (Miss. Ct. App. 2012) (hereafter "*S.W.*"); *see also Donald v. AMOCO Prod. Co.,* 735 So.2d 161, 175 (Miss. 1999).

[82] *J.E.W. v. T.G.S*., 935 So.2d 954 (Miss. 2006), *Tel–Com Management, Inc. v. Waveland Resort Inns, Inc*., 782 So.2d 149, 151 (Miss.2001), *Ellis v. Anderson Tully Co*., 727 So.2d 716, 718 (Miss.1998).

[83] *City of Jackson v. Harris*, 44 So.3d 927, 931, 2010 Miss. LEXIS 393, *10 (quoting in part from *Miss. Dep't of Pub. Safety v. Durn*, 861 So.2d 990, 994 (Miss. 2003)). JEA styled its original motion as one to dismiss for lack of subject matter jurisdiction. While the issue is not actually based on subject matter jurisdiction, subject matter jurisdiction is also a question of law which the Court reviews *de novo*. *Trustmark National Bank v. Johnson*, 865 So.2d 1148 (Miss. 2004), *Briggs & Stratton Corp. v. Smith*, 854 So.2d 1045 (Miss.2003); *Rogers v. Eaves*, 812 So.2d 208 (Miss. 2002).

[84] *Webb v. Braswell*, 930 So.2d 387 (Miss. 2006).

[85] *Adams v. Graceland Care Center of Oxford, LLC*, 208 So.3d 575 (Miss. 2017), *Copiah Cty. v. Oliver*, 51 So.3d 205 (Miss. 2011) (citing *Monsanto v. Hall*, 912 So.2d 134 (Miss. 2005).

I. The Circuit Court improperly extended the holding of *Hyatt II* in a broad manner that effectively overruled the binding precedents of the Mississippi Supreme Court at the expense of Mississippi's inherent sovereignty.

In *Hyatt II*, the U.S. Supreme Court considered the ability and extent to which one state's courts can sit in judgment of an arm of a sister state. In light of the parallel sovereignty of each, the Court tempered the extent of relief that could be afforded to a litigant by applying an analytical framework grounded in the Full Faith and Credit Clause. But *Hyatt II* is distinguishable from the case *sub judice* because of the non-sovereign status of JEA and the injuries to Promenade's Mississippi property. In this case, JEA fails the threshold inquiry necessary even to apply the *Hyatt II* framework because JEA is not an arm of the State of Florida. Accordingly, the Circuit Court's Omnibus Order went further than the U.S. Supreme Court's decision in *Hyatt II* by applying the Full Faith and Credit Clause to extend legislated immunities to a non-state entity that has damaged private land, and in the process rejected the Mississippi precedent established by this Court in *Church v. Massey*.[86]

In *Massey*, this Court held that "[a] foreign governmental entity enjoys no greater status under our tort law than any other similarly situated tort defendant. We find no compelling public policy considerations which would dictate that Brewer State Junior College should enjoy immunities above and beyond those provided to our citizens."[87]

In *Hyatt II*, Nevada courts awarded Hyatt (a Nevada resident) $1 million in damages against California's state taxing authority for emotional distress caused by torts committed by California's personnel in Nevada.[88] On appeal, the U.S. Supreme Court considered "whether the

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[86] 697 So.2d 407, 410 (Miss. 1997).

[87] *Id.*; s*ee also Duckworth v. Warren*, 10 So.3d 433, 437-438 (Miss. 2009) ("The trial court analyzed the facts according to [the MTCA's] factors; however, a negligence theory is appropriate in the case *sub judice*, since Alabama State Trooper Bart Walker has no immunity under the Mississippi Tort Claims Act * * * the Mississippi Tort Claims Act does not apply[.]").

[88] *See* 136 S.Ct. at 1279 - 80.

Constitution permits Nevada to award Hyatt damages *against a California state agency* that are greater than those that Nevada would award in a similar suit against its own state agencies."[89]

As revealed in its briefing to the U.S. Supreme Court, Petitioner/Defendant Franchise Tax Board of California ("the Board") is an agency of the State of California charged with the core sovereign function of collecting taxes for the State of California.[90] The Board's operations are funded by the California Treasury, and any judgment obtained against it would be paid with dollars from the public fisc.[91] Neither the Board as petitioner, nor the respondent Hyatt, argued that the constitutional and State sovereignty considerations at issue should be extended and applied to municipal corporations or their subordinate utilities, and thus such facts were never under consideration by the *Hyatt II* Court.[92]

In its Petitioner's Brief, the Board began its "Summary of Argument" by identifying the narrow relief sought: "When a State is involuntarily haled into the courts of a sister State, it must be accorded at least the same sovereign immunity as the forum State accords itself…The Nevada Supreme Court blatantly transgressed these principles…when it refused to extend to FTB, a California agency, the *same* sovereign immunity Nevada provides its own agencies."[93]

The Board asserted that Nevada's ruling reflected "a one-sided policy interest in compensating Nevada citizens at the expense of *California taxpayers*…And it reflects a healthy

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[89] *Id.* at 1281 (emphasis added).

[90] R. 5157-5233 at R. 5171-2, Petitioner's Brief (Sept. 3, 2015) ("[The Board] is a California agency with the statutory duty to administer and enforce California's personal income tax law…It has the authority to examine records, require attendance, take testimony, and issue subpoenas" The Board describes the foregoing activities as "[e]xercising these sovereign powers[.]").

[91] *See, e.g., id.* at pp. 12, 23 (describing Nevada's ruling as "…compensating Nevada citizens at the expense of California taxpayers." The Board also describes the Nevada ruling as not "giving the [Board] and California's treasury the benefit of a comparable trade-off").

[92] Nor could such facts be under consideration by the U.S. Supreme Court. *See, e.g., Mazer v. Stein,* 347 U.S. 201, 206, n. 5 ("We do not reach for constitutional questions not raised by the parties") (superseded by statute on other grounds).

[93] R. 5180, Brief for Petitioner Franchise Tax Board of the State of California (Sept. 3, 2015), (underlining added).

disregard for California's sovereign status by treating a California agency different from a Nevada agency *and the same as a non-sovereign.*"[94] Moreover, the Board argued that the Nevada Supreme Court's rulings "demean the dignity of the *States*, threaten their *treasuries*, and disregard their *residual sovereignty*."[95]

In its decision, the U.S. Supreme Court held that, absent "sufficient policy considerations[,]" a forum state may not apply a special rule of law that evinces a "policy of hostility" toward a sister state because doing so violates the Full Faith and Credit Clause.[96] Under the facts presented there, the Supreme Court ruled that awarding damages against a California *state agency* that were greater than what Nevada immunity laws would allow against its own *state agency*, without sufficient policy considerations for doing so, was hostile to the State of California and thus contrary to the Full Faith and Credit Clause.[97]

JEA relied on *Hyatt II* to revive the immunity arguments JEA had conceded without objection nearly a year earlier when the Circuit Court had adopted the Special Master's Report overruling defenses based on JEA's asserted governmental status in August of 2015. After briefing, the Circuit Court ruled that *Hyatt II* now requires it to give JEA certain MTCA immunities as a matter of law, while also claiming that this Court's decision in *Massey* is not overruled.[98]

But JEA's asserted status as a municipal utility never even calls the question of whether immunity under the Full Faith and Credit Clause is required. Accordingly, the Circuit Court improperly extended the ruling in *Hyatt II* (which was limited to a judgment against a state

[94] *Id*. at R. 5181 (emphasis added).
[95] *Id*. at R. 5194 (emphasis added).
[96] *Hyatt II*, at 136 S.Ct. at 1281.
[97] *Id*. at 1281 - 1282.
[98] *See* R. 6406, Omnibus Order at 6409, 6412-4.

agency to be paid from the state's treasury) to JEA, even though JEA has no inherent sovereignty, is not an "arm of the state," and is not backed by Florida's treasury.

Additionally, because there are no true sovereignty implications for the State of Florida, the improper application of *Hyatt II* outside the context of a claim against an inherently sovereign state creates a constitutional conundrum by elevating Florida's legislated immunities (as opposed to inherent sovereign immunity) via the Full Faith and Credit Clause above the protections afforded to owners of private land in Mississippi by Article III, §17 of the Mississippi Constitution and by the 5th Amendment to the United States Constitution. *Hyatt II* held that a judgment against the state agency of a sister state was only hostile to the extent it allowed a damages award that exceeded the amount that could be awarded against the forum state's own state agency. Under the Mississippi and U.S. Constitutions, a Mississippi state agency would face unlimited damages (other than as limited by "just compensation") for the same claims of physical invasion to land brought by Promenade under a theory of inverse condemnation.

In addition to elevating Florida legislation over Mississippi's Constitution, the Circuit Court's decision to extend *Hyatt II* to JEA also elevates the non-sovereign interests of a foreign municipal utility over Mississippi's own territorial sovereignty. As Mississippi's Attorney General recently advocated in Mississippi's original action against Tennessee in the U.S. Supreme Court, "the territorial sovereignty of each state within its borders under the Constitution, specifically recognized in *Kansas v. Colorado,* 206 U.S. 46 (1907), controls: 'It is enough for the purposes of this case that each state has full jurisdiction over the lands within its

borders[.]"[99] Accordingly, the immunities legislated by Florida for its non-sovereign municipal entities cannot operate to limit the relief Mississippi Courts can afford Mississippi property owners for damage done to private land within Mississippi.[100]

Therefore, the Circuit Court improperly hypothesized how this Court would apply *Hyatt II* to the existing Mississippi precedents, disregarding the existing precedents of this Court in *Massey* and *Duckworth* in the process. By doing so, the Circuit Court rulings, if permitted to stand, would relinquish Mississippi sovereignty to a non-sovereign public entity of another state, affording foreign municipal entities protections they did not have under *Massey* and protections they do not have in Federal Courts.

II. Under the circumstances of this case and the analytical framework provided in *Hyatt II*, JEA is not entitled to the damages caps in the MTCA.

In *Hyatt II,* the U.S. Supreme Court reaffirmed that the Full Faith and Credit Clause does not require a forum state to afford immunity to a foreign state agency if doing so reflects a conflicting and opposed policy held by the forum state.[101] Likewise, the Supreme Court articulated an exception to extending immunity under the analytical framework created by its decision in *Hyatt II* when there exist "sufficient policy considerations" to justify a special rule of law that discriminates against a sister state.[102]

Thus, even if this Court were to agree with the Circuit Court that the *Hyatt II* decision applies to a municipal utility like JEA, such that JEA merits consideration by the Court of whether to extend the damages caps reserved for Mississippi entities to JEA, the facts and

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[99] The State of Mississippi's Response in Opposition to Defendants' Motions for Judgment on the Pleadings (Apr. 6, 2016) filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.) (available at http://www.ca6.uscourts.gov/special-master).

[100] *See id.*, at p. 12 (citing *Rhode Island v. Massachusetts*, 37 U.S. 657, 733-34 (1838) for the proposition that "[t]he retained sovereignty of each State within its borders as against its neighboring states is one of the foundations of the Union."

[101] *Hyatt II*, 136 S. Ct. at 1281- 1283 (citing *Carroll v. Lanza*, 349 U.S. 408, 412 (1955)).

[102] *See Hyatt II*, 136 S. Ct. at 1283.

circumstances of this case weigh against doing so. The policy analysis required by *Hyatt II* was not addressed by the Circuit Court, and each of the following policy considerations provides an independently sufficient basis for concluding that immunity should not be extended to JEA in those circumstances.

a. The foreign municipal utility failed to timely pursue its alleged immunity defense while participating in the litigation.

Despite Promenade's protests under Rule 53 and *Stuart v. Univ. of Miss. Med. Ctr.*,[103] the Circuit Court ruled that *Hyatt II* allowed JEA (a municipal utility with no inherent sovereignty) to revive its previously rejected immunity defense and receive MTCA immunities.

In *Stuart,* this Court recounted the facts and ruling of its prior decision in *Grimes v. Warrington,* 982 So.2d 365, 369 - 370 (Miss. 2008) and found the Circuit Court's dismissal of a plaintiff's claims against a Mississippi State hospital was improper because the hospital had waived its MTCA defense by failing to timely pursue it.

Discussing *Grimes,* this Court stated: "the defendant 'did nothing to argue or even assert immunity until he moved for summary judgment solely on this defense' more than five years after filing his answer."[104] This Court noted that, "instead of filing a motion to dismiss based on the immunity defense, the defendant 'proceeded substantially to engage the litigation process by consenting to a scheduling order, participating in written discovery, and conducting depositions."[105] It concluded, "[t]hus, this Court found that the defendant had waived its MTCA defense."[106]

JEA took a similar approach to its purported immunity defense as the defendants in *Grimes* and *Stuart.* More than two years after JEA was first served, JEA filed for the first time a

[103] 21 So.3d 544, 547 (Miss. 2009).
[104] *Stuart,* 21 So.3d at 547 (quoting in part from *Grimes,* 982 So. 2d at 369 - 370).
[105] *Id.*
[106] *Id.*

"Motion to Dismiss for Lack of Subject Matter Jurisdiction" based on an alleged sovereign immunity defense.[107] Even then, JEA did not pursue the motion for *another two* years, and engaged in extensive motion practice and discovery in the interim. Indeed, JEA did not bring its Motion on for a hearing until more than two years after it was filed, four and a half years into the case, and several months after the close of discovery.[108]

After JEA finally argued its motion, the Special Master made the finding of fact and conclusion of law in May of 2015, that: "…*JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the Mississippi Tort Claims Act*."[109] JEA did not file an objection to the Special Master's report and recommendation pursuant to Rule 53. The Report was then adopted by the Court on Promenade's motion without any objection by JEA.[110] Thus, in addition to waiving its defenses under *Stuart*, JEA also failed to preserve its objection under Rule 53.[111]

It is both the policy and the law in Mississippi that the legislated MTCA defenses can be waived. Thus, even if JEA would otherwise be entitled to MTCA immunity under *Hyatt II*, this Court is not obligated to extend the MTCA protections to JEA under the Full Faith and Credit Clause when doing so would be contrary to Mississippi's own laws and policies that dictate a waiver under these circumstances.

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[107] R. 898-904, JEA Motion to Dismiss.

[108] The docket for Case No. A-2402-10-41 (R. 5-125) shows 522 intervening entries before JEA brought its motion for a hearing.

[109] R. 4663, Rpt. & Rec. of Special Master (emphasis added).

[110] R. 4982, Order adopting Special Master's Rpt. & Rec.; *see also* T. 956:23-26, Hearing Transcript (Aug. 13, 2015) ("THE COURT: And Master Simpson entered a recommendation on a motion to dismiss for lack of subject matter jurisdiction, I think, on May 28th. *There's been no objection*.") (emphasis added). A proposed order presented to the Court was signed the following day. (R. 4982).

[111] *See, e.g., Miles v. Miles*, 949 So.2d 774 (Miss. Ct. App. 2006) (finding "that a party has a right to a hearing on their objections to a special commissioners' report where the party that seeks the hearing follows the requirements set forth in Rules 53(g)(2), 6(d), and 7(b)(1)." (writ of certiorari denied by 949 So.2d 37 (Miss. 2007)).

b. Mississippi has a legislated policy towards municipal utilities acting beyond their state's borders to consent to the laws of the affected forum state.

The Full Faith and Credit Clause does not require a forum state to extend immunity to a foreign state agency if doing so reflects a conflicting and opposed policy held by the forum state.[112]

Mississippi has defined – both through legislation and by the State's recent lawsuit against the State of Tennessee to protect its territorial sovereignty – a policy that conflicts with granting a municipal utility immunity for wrongs committed to land in other states.

In Title 77 of Mississippi Code ("Public Utilities and Carriers"), Chapter 5 ("Electric Power"), the Legislature has stated its policy on municipal electric utilities operating beyond their home-state's borders. Specifically, in Miss. Code Ann. § 77-5-769 (which is titled "Application of laws of other states and the United States"), the Legislature stated: "Legislative consent is hereby given…(b) *to the application of regulatory and other laws of the other states* and of the United States *to any municipality or joint agency which owns or operates a project without the state*."[113]

Accordingly, it is the legislated policy of Mississippi to subject Mississippi utilities to the laws of the forum states in which they operate. If an analogous Mississippi municipal electric utility damaged land beyond Mississippi's borders, that utility would be subject to the full "Application of laws" of the state of injury.[114] JEA should not receive special treatment better than that to which Mississippi's own municipal electric utilities would be entitled. Excluding JEA from the application of *Massey* via the Full Faith and Credit Clause thus conflicts with

[112] *Hyatt II*, 136 S. Ct. at 1281- 1283.

[113] (emphasis added); *see also* T. 1196:29 - 1197:15, Hearing on JEA's Motion to Reconsider (June 30, 2016) (citing Mississippi Attorney General Opinion 2005-0247, which advised a Mississippi fire department that the protections afforded under the MTCA would not extend to torts committed by the department on a fire run beyond Mississippi's borders).

[114] *See* T. 1195:11 - 1197:15, Hearing on JEA's Motion to Reconsider (June 30, 2016).

Mississippi's opposed legislated policy of municipal electric utilities consenting to the laws of the affected forum state.

Additionally, Mississippi has recently emphatically stated its position that, "each state has full jurisdiction over the lands within its borders[.]"[115] Mississippi has filed an original action in the U.S. Supreme Court against the State of Tennessee and certain of its utilities for damage done to Mississippi's resources held in trust for its citizens.[116] In its lawsuit, Mississippi seeks its full measure of damages for what it describes would otherwise be an act of war if the states were fully sovereign.[117] Given its stance on territorial sovereignty of Mississippi and the application of that sovereignty to the protection of *public* resources from transgressions by other states, it stands to reason that Mississippi has a parallel policy interest in protecting the privately held lands within its borders from destruction by foreign utilities sending waste across state lines. Thus, the Circuit Court's refusal to allow Promenade an opportunity to be made whole for damage to its land is contrary to Mississippi's stated policy interest in preserving the land within its territorial borders.

Moreover, at its most basic, the *Hyatt II* analytical framework involves a damages analysis: a determination of whether the forum state's application of its damages law "reflects a constitutionally forbidden" policy of hostility.[118] Hostility turns on whether the damages awarded represent an unjustified departure from how the forum state would treat a similarly

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[115] The State of Mississippi's Response in Opposition to Defendants' Motions for Judgment on the Pleadings (Apr. 6, 2016) filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.) (available at http://www.ca6.uscourts.gov/special-master).

[116] *See id.*, at pp.14, 15 ("The Defendants intentional violation of Mississippi's territorial sovereignty goes to the foundations of the Constitution and its Amendments on which our federal system is built. In this context, the Court possesses the authority to both grant such relief and enforce such remedies as are necessary to prevent such abuses and best promote the purposes of justice.").

[117] *See* Mississippi's Motion for Leave to File Bill of Complaint in Original Action, Complaint, and Brief in Support of Motion (June 6, 2014), at p. 1, filed in *Mississippi v. Tennessee, et al.* Case No. 143 (U.S.), 2014 WL 5319728 (also available at http://www.ca6.uscourts.gov/special-master).

[118] *Hyatt II*, 136 S.Ct. at 1279.

situated agency. Were JEA a Mississippi municipal utility in this case, the MTCA would not limit Promenade's recovery to the damages caps because JEA's physical invasion to land constitutes a taking under Article III, §17 of the Mississippi Constitution and the 5th Amendment to the United States Constitution. Allowing Promenade the full measure of damages constituting "just compensation" for the physical invasion to Promenade's private land is not "constitutionally forbidden" – it is constitutionally ensured, and thus neither hostile, nor a special rule.

Accordingly, even if the *Hyatt II* analytical framework were to be applied to JEA, the policy analysis would show that extending immunity to JEA under these circumstances would constitute a conflicting and opposed policy to Mississippi's own Constitution, its laws and its policies.

c. Sufficient Mississippi policy interests run counter to the application of the caps, including but not limited to Mississippi's interests in protecting its citizens' property and the State's territorial sovereignty from the unapproved importation and deposition of harmful wastes holding a negative value.

The Circuit Court's decision extending immunity to JEA under the *Hyatt II* analytical framework also failed to appreciate the differences in the procedural posture between this case and the one before the U.S. Supreme Court in *Hyatt II*.

The U.S. Supreme Court, and the parties before it, each had the benefit of a full trial record. This is critical because the exception carved out by the Supreme Court in *Hyatt II* is inherently fact dependent. Based on the record in the underlying trial, the U.S. Supreme Court held that there were not sufficient policy considerations to justify a special rule.[119] Likewise, the

[119] *Hyatt II*, 136 S. Ct. at 1283.

Court found that the Nevada Supreme Court's contention that California did not have adequate control over its own taxing authority to be conclusory and not based on the evidence.[120]

Conversely, Promenade *does* have evidence that Florida lacked oversight of JEA's activities in Mississippi.[121] Likewise, Promenade has powerful evidence that justifies a special rule outside the ordinary immunity that could be afforded under the MTCA. JEA targeted Mississippi for its waste, identifying it as a jurisdiction with a "low barrier to entry[.]"[122] JEA then implemented and funded an interstate waste removal scheme railing tens of thousands of tons of its byproducts to Mississippi to avoid the landfilling costs and regulatory burdens in its home state of Florida. Now Promenade (and ultimately Mississippi) is forced to suffer the consequences of JEA's reckless cost-saving measures.

Based on the ruling in *Hyatt II,* any "hostility" determination by this Court (or the Circuit Court) should be based on the facts developed at trial. Promenade has not been able to put on its evidence and create a record to show that JEA's actions warrant relief from any caps of the MTCA, and to demonstrate that such uncapped relief would be justified under these circumstances.

The "hostility" analysis in *Hyatt II* is rooted in fairness and is fact dependent. Promenade should be afforded the opportunity to present its case because fairness dictates that a systematic program implemented by a municipal utility in another state to make its waste problems the problems of Mississippians should not go unchallenged.

III. Depriving Promenade the opportunity to conform its complaint and proof to the new "inter-state" immunity framework adopted by the Circuit Court is patently unfair.

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[120] *Id*. at 1283.

[121] *See* P.R.E. 226-8, Email from Matt McClure to Christopher Teaf (emphasis added); *see also* P.R.E. 359-61, Testimony of Dr. Teaf.

[122] R. 4406, By-products Opportunity Analysis by Ducker Worldwide (Aug. 3, 2006), at p. 26 (filed under seal).

Were this Court to affirm the Circuit Court's application of *Hyatt II* to JEA, thereby extending immunity to a foreign municipal utility, it would represent a departure from *Church v. Massey*, and thus a dramatic change in the application of Mississippi's immunity laws. As discussed below, when litigants were previously faced with similar changes to the application and/or interpretation of the MTCA, this Court has consistently found that refusing such a litigant the opportunity to amend its complaint to conform its allegations to the change would be patently unfair. Here, the Circuit Court's denial of Promenade's motion for leave to amend to state a claim for inverse condemnation was especially unfair given that Promenade had already survived summary judgment on its existing claim for physical invasion to land, which is a claim nearly identical to inverse condemnation. Moreover, the Circuit Court denied Promenade's motion for leave without articulating or identifying any grounds for denial.

In *Frank v. Dore*, this Court reviewed whether a trial court's denial of an appellant's motion for leave to amend constituted an abuse of discretion.[123] Noting the deferential standard under Rule 15, this Court quoted extensively from the U.S. Supreme Court's decision in *Forman v. Davis*: "*the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion*[.]"[124] The foregoing emphasis was provided by this Court because in *Frank* the "[a]ppellant was denied leave to amend by the court without the court expounding on the reasons for denial."[125] This Court

[123] 635 So.2d 1369 (Miss. 1994).
[124] *Id*. at 1375 (quoting from *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (emphasis in original).
[125] *Id*.

concluded that the trial court "committed manifest error in denying Appellant's Motion for leave to amend."[126]

More recently, this Court again held that refusal to allow a plaintiff to conform its complaint to a change in the Court's approach to Mississippi's immunity laws would be patently unfair. In *Crum v. City of Corinth*, the plaintiff's claims against the City of Corinth were dismissed based on the City's discretionary immunity defense.[127] While on appeal, this Court announced its abandonment of the public-policy function test, and ordered supplemental briefing from the parties to address this change.[128] Despite supplemental briefing, this Court held that plaintiff/appellant "ought to be given the opportunity to redraft her pleadings in accordance with this Court's recent decisions in *Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2014), and *Boroujerdi v. City of Starkville*, 158 So. 3d 1106 (Miss. 2015)."[129] Accordingly, this Court stated that "Crum has not been provided the opportunity in the trial court to attempt to 'conform her complaint and proof to this Court's current approach to discretionary function immunity." This Court held "depriving Crum of this opportunity would be 'patently unfair.'"[130]

Like the lower court's decision in *Crum*, the Circuit Court's denial of Promenade's request to conform its complaint in the wake of *Hyatt II* was "patently unfair." Similar to the plaintiffs in *Frank, Pratt,* and *Crum,* Promenade's amendment simply seeks to add an additional theory of recovery based on the same transactions and series of events.

Even more compelling, Promenade's request to amend does not revive an otherwise terminated litigation claim to the prejudice of the defendant. The substance of Promenade's

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[126] *Id*. at 1376; *see also Pratt v. City of Greenville*, 804 So.2d 972, 978 (Miss. 2001).
[127] 183 So.3d 847 (Miss. 2016).
[128] *Id*. at 850.
[129] *Id*. at 851.
[130] *Id*. (quoting from *Boroujerdi*, 158 So.3d at 1114).

inverse condemnation claim – physical invasion to land – already exists and has been deemed worthy of trial over JEA's attempted summary judgment.[131]

Promenade's physical invasion claim is premised on the precedent established by this Court in *King v. Vicksburg R. & L. Co.*[132] Promenade's prior briefing in support of its claim for physical invasion explained:

> The Mississippi Supreme Court held "[t]he evidence shows that the property of the plaintiff was damaged by **physical invasion of deleterious agents produced by the plant of the defendant**…and it should have been left to the jury to say…to what extent." [133]

In Promenade's discussion of *King,* Promenade also pointed out that "notably, the defendant power plant claimed it was 'exempt from any liability for any damage, because it is operating under public authority[.]'"[134]

Importantly, the Mississippi Supreme Court's rule of law in *King* that no one may "set in motion agencies which physically invade the home of another," was established despite the power plant's assertion of an immunity defense. This Court further held:

> Public authority may confer the right to operate a public work, and thus make it lawful, but cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged--that is, diminished in its market value as property--by some physical invasion of it or by affecting some right of the owner in relation to it.[135]

This Court based its ruling on Article 3, Section 17 of the Mississippi Constitution, which the Court held mandates that a property owner "be fully compensated for any loss of value sustained from any physical injury to his property…whereby its market value is diminished."

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[131] *See* R. 5821, Order denying JEA's Motion for Partial Summary Judgment on Promenade's Claim for Physical Invasion.
[132] 42 So. 204 (Miss. 1906).
[133] R. 4559, Promenade's Memorandum in Support of Partial Summary Judgment (discussing *King,* emphasis added).
[134] *Id.* at n.70.
[135] *King,* 42 So. at 204.

The Court then contemplated and rejected the very argument JEA raised in its underlying briefing 110 years later, stating:

> It is true that the language of sec. 17 of the constitution was intended for formal condemnation proceedings, wherein it provides for compensation to be first made in a manner to be prescribed by law; **but it is equally protective of the owner of private property, when no condemnation is had and his property is taken or damaged by public use**. Due compensation is what ought to be made--that is, **what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses**, or by interference with some right in relation to property whereby its market value is lessened as the direct result of the public use.[136]

This Court specifically noted the public nature and societal importance of the defendant's power plant operations, but held "it is equally important to enforce the mandate of the constitution and protect the owner of private property, which is the purpose of this decision."[137]

King, and its progeny, formed the basis of Promenade's 2014 physical invasion claim, the addition of which via amendment was recommended by the Special Master and approved by the Circuit Court at a time when JEA was to be treated as any other tortfeasor per *Church v. Massey*. Should this Court affirm the Circuit Court's holding that the existing *Church v. Massey* precedent is subject to a *Hyatt II* analysis for JEA, it would confer a public status on JEA. Doing so activates the constitutional mandate announced in *King* to protect Promenade from the damage caused by a public authority through physical invasion of its private property.

Accordingly, there was no basis for the Circuit Court's unexplained denial of leave for Promenade to amend its complaint to reflect a claim for inverse condemnation. But for the public status of the defendant, the claims for physical invasion and inverse condemnation are generally equivalent. Thus, this Court should reverse the Circuit Court's denial of leave, or in

[136] *Id.* at 205.
[137] *Id.*

the alternative, decree that the damages sought pursuant to Promenade's existing physical invasion claim cannot be capped due to the protections afforded by Article 3, Section 17 of the Mississippi Constitution and the Fifth Amendment of the Constitution of the United States.

IV. In the event the Circuit Court's extension of *Hyatt II* stands, Promenade should be allowed to present its claims for injunctive relief to the fact-finder.

The Circuit Court's Omnibus Order granting JEA partial summary judgment on Promenade's claims for injunctive relief failed to consider the record "in the light most favorable to the non-moving party, who has the benefit of every reasonable doubt."[138]

Promenade presented facts in support of its claim for physical invasion to land that were sufficient to survive JEA's 2015 Motion for Partial Summary Judgment.[139] Yet, after the summary judgment deadline had long passed, JEA sought to foreclose Promenade's remedy for injunctive relief.

Injunctive relief is typically allowed to be tried to the fact finder on the merits in cases where there are sufficient facts showing harm to land from deleterious agents.[140] For example, in *Punzo v. Jackson County,* this Court reviewed a trial court's decision that had found the plaintiff's claim for money damages was time-barred and had denied the plaintiff's request for injunctive relief against a Mississippi county that harmed the plaintiff's real property.[141]

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[138] *Garrett v. Northwest Miss. Junior College,* 674 So.2d 1, 2 (Miss. 1996).

[139] R. 5290-4, Consolidated Rpt & Rec. of Special Master (overruling JEA's exhaustion arguments, as adopted by Order at R. 5821).

[140] *See, e.g., Punzo v. Jackson County*, 861 So.2d 340 (Miss. 2003) (remanding for consideration of whether the facts presented at trial entitled the plaintiff to injunctive relief under the appropriate standard), *Gulf Park Water Co. v. First Ocean Springs Dev. Co*., 530 So.2d 1325, 1334 (Miss. 1988) (noting that "[r]ights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain[,]" and holding "land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value."), and *Phillips v. Davis Timber Co., Inc*., 468 So.2d 72 (Miss. 1985) (finding injunctive relief appropriate for nuisance).

[141] 861 So.2d 340 (Miss. 2003).

The plaintiff in *Punzo* owned real property that suddenly began flooding following heavy rains.[142] The plaintiff later discovered that the flooding was caused by the construction of culverts by Jackson County and filed suit seeking "$129,973.98 in damages to date" and a mandatory injunction.[143] The trial court dismissed the plaintiff's claim for money damages on statute of limitations grounds under the MTCA, but allowed the plaintiff's claim for injunctive relief to proceed to trial.[144] Following the trial, the lower court entered a judgment also denying the plaintiff's claim for injunctive relief.

This Court reversed the trial court on both the dismissal of the plaintiff's claim for money damages and the denial of injunctive relief. Relying on "another property damage case" – *Donald v. AMOCO Prod. Co.* (the case that supports Promenade's physical invasion claim and other claims) – the Supreme Court held: "We find the trial court erred in dismissing the money damages portion of [plaintiff's] complaint as time barred. We reverse and remand the matter for a full trial on the merits."

The Court then analyzed the plaintiff's appeal of the trial court's denial of injunctive relief. Notably, this Court stated that, "[t]he trial court made detailed findings of fact **after a trial on the merits** and concluded that [plaintiff] did not sustain the burden of proof required to justify the court's establishment of a mandatory injunction against the County."[145] This Court reversed the trial court, finding that the trial court had used the wrong standard in denying injunctive relief, and remanded for the trial court to reconsider the facts presented at trial to

[142] *Id*. at 342-343.
[143] *Id*.
[144] *Id*. at 343.
[145] *Id*. at 347.

determine whether the plaintiff satisfactorily showed a threat of irreparable harm for which there is no adequate remedy at law.[146]

This Court's decision in *Punzo* is important here for three reasons: (1) claims for injunctive relief against Mississippi governmental entities relating to property damage are not barred by the MTCA; (2) a plaintiff whose real property has been injured is entitled to a full trial on the merits for both its liquidated money damages and its claim for injunctive relief; and (3) even though the "trial court made detailed findings of fact after a trial on the merits[,]" this Court required the trial court as the trier of fact to reevaluate the evidence under the appropriate standard, rather than simply finding harmless error based on the record.

Punzo supports the conclusion that, based on the evidence presented by Promenade, Promenade's claim for injunctive relief requires a full trial so that the facts can be weighed and considered under the injunctive relief standard.

Another case that addresses damage to real property, specifically in the context of a nuisance created by waste materials, is *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*[147] This Court affirmed a judgment that ordered a water company to properly dispose of its waste and awarded money damages for the harm done.

In *Gulf Park*, a golf course owner sought an injunction and money damages for sewage effluent that was being discharged into a lagoon on the golf course and which caused algae problems. The trial court ordered that the sewage company properly discharge its waste, awarded damages for the cost to combat the algae growth caused by the effluent with fungicide and for related labor, and "decreed that Gulf Park submit a report detailing efforts to bring its system into compliance with state pollution control standards…[, that] the chancellor retained

[146] *Id.* at 348.
[147] 530 So.2d 1325 (Miss. 1988).

jurisdiction over the plant operation for purposes of monitoring compliance….[, and] enjoined [Gulf Park] from discharging effluent unless or until it acquired a permit."[148]

On appeal, this Court specifically addressed the issue of "irreparable harm" in the context of injury to real property. This Court emphasized the appropriateness of injunction for injuries to land:

> The general rule is that a landowner is entitled to an injunction directing the removal of a trespassing structure on his land erected thereon by the owner of the adjoining land. The facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by the removal of the trespassing structures, and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriate, are ordinarily no reasons for denying an injunction. **Rights in real property cannot ordinarily be taken from the owner at valuation, except under the power of eminent domain**. Only when there is some estoppel or laches on the part of the plaintiff, or a refusal on his part to consent to acts necessary to the removal or abatement which he demands, will an injunction ordinarily be refused.[149]

In particular, this Court stated that "land is per se property of peculiar value, and will be protected by injunction without reference to its quality, use or value."[150] This Court noted that this concept was "cited approvingly in *Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72 (Miss. 1985) [a case previously relied on by Promenade in support of its claim for physical invasion]."[151] The Court summarized the *Phillips* case, stating "[i]n *Phillips* this Court reversed a chancellor who failed to grant relief to a landowner whose lake had been polluted from release of pentacholorphenol, or PCP. The Court considered this invasion a nuisance, and held that Phillips was entitled to an injunction[.]"

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[148] *Id*. at 1330.
[149] *Id*. at 1333-1334 (quoting from *Turner v. Morris*, 17 So.2d 205 (Miss. 1994) (emphasis added).
[150] *Id*. at 1334 (quoting from *Shattles v. Field, Brackett & Pitts, Inc.*, 261 So.2d 795, 798 (Miss. 1972).
[151] *Id.*

Accordingly, this Court affirmed the trial court's decision awarding the golf course an injunction, and held:

> **These cases stand for the proposition that an injunction will be available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance**. Since Gulf Park has no easement, Pine Island in effect **met its burden of showing irreparable harm by establishing a continuing trespass**.
>
> In addition, Gulf Park argues that through enforcement proceedings brought by the State Bureau of Pollution Control, there exists an adequate remedy of enforcement and/or damages, making the harsh remedy of injunctive relief inappropriate. With this we cannot agree.[152]

This Court summarized its affirmance of the mandatory injunction by stating, "we think the chancellor reached the best possible remedy in a difficult case[.]"[153]

Like the plaintiffs in the foregoing cases, Promenade's interests in real property have been injured and continue to be injured and threatened. The trespassing waste on Promenade's property is not something that will simply disappear by stroking a check. This is especially true with the incalculable risk of potential future lawsuits, regulatory actions, or other injuries that could arise from the handling and disposal of JEA's waste. The evidence in the record creates *at least* an issue of material fact with regard to the necessity for injunctive relief, and the Circuit Court should have weighed that evidence following a trial to make the appropriate determination in this complex and unusual case.

In addition to the foregoing examples in which Mississippi's Courts have held equitable relief necessary and appropriate in cases with fact patterns similar to Promenade's, the Restatement (Second) of Torts also bolsters Promenade's position regarding the inadequacy of a

[152] *Id*. at 1334 (citing Miss. Code Ann. § 49-17-43) (emphasis added).
[153] *Id*. at 1326.

purely financial remedy.[154] Section 944 of the Restatement concerns the "Relative Adequacy of Damages." It advises that "[t]he relative adequacy of the damage remedy for tort as compared with the remedy of injunction, depends" upon: (a) the nature of the interests harmed, (b) the effects of the rules of law governing the measure of damages, (c) the availability and persuasiveness of evidence bearing upon the assessment of damages, (d) the effects of resort to measures of self-help, (e) the cost of assessing damages, and, in the case of repeated or continuing torts, the cost of a multiplicity of suits, (f) the collectability of the judgment, and (g) other pertinent factors.

When considered in the context of the current proceedings, these factors overwhelmingly support Promenade's entitlement to equitable relief in addition to money damages for the harm already suffered and will continue to suffer until the JEA material is removed. Indeed, the facts presented here meet every single one of the criteria identified by the Restatement:

- The nature of the interests harmed: Promenade's real property;
- The alleged effects of the rules of law governing the measure of damages: The Circuit Court found *Hyatt II* requires the application of the MTCA damages caps, which JEA asserts would require that Promenade's damages to be statutorily limited to $500,000, despite the many millions of dollars of harm already suffered by Promenade to date and millions in financial hardship and risk;
- The availability of evidence bearing upon the assessment of damages: Monetizing Promenade's risk for future regulatory actions and other potential lawsuits are likely to be considered conjectural by the Circuit Court for the purposes of a money judgment, though both can be eliminated by removal of the JEA material from Promenade's real property;
- The effects of resort to measures of self-help: Promenade inequitably bears the regulatory risk associated with the removal and disposition of JEA's waste, which JEA should have properly disposed of in Florida;
- The case of repeated or continuing torts: Promenade faces repeated – and in some respects unknown – harm, particularly from potential third party claimants and regulators;

[154] *See* Restatement (Second) of Torts § 944.

- The collectability of the judgment: JEA has repeatedly argued to the Court that any judgment for money damages will be uncollectable in Mississippi and unenforceable in Florida;[155] and

- Other pertinent factors: The predicament caused by JEA's waste disposal scheme implicates ongoing and future site monitoring, which JEA currently conducts at its own facilities and other areas from which JEA has removed its waste. Also, JEA's self-proclaimed efficiencies and expertise with regard to the long-term impact of the waste, and the monitoring, handling, and disposal of its waste favor injunctive relief.[156]

The circumstances of this case satisfy every single factor identified by the Restatement for consideration in determining whether injunctive relief is the necessary and adequate remedy, as opposed to money alone. Accordingly, the facts and the law establish that a mandatory injunction is the only adequate remedy to prevent Promenade from inequitably bearing the risk involved with the handling and disposal of JEA's waste. Indeed, an equitable remedy is the favored remedy by Mississippi and other courts to abate a nuisance and to protect a plaintiff's interests in damaged and/or threatened real property. Furthermore, JEA's own efforts to cap its monetary liability and to challenge eventual collection emphasize the inadequacy of a strictly financial remedy.

Nevertheless, the Circuit Court decided that Promenade's injuries could be undone through monetary remedies alone. And, conceding that there was no authority in support of the point, the Circuit Court ruled that allowing injunctive relief for injury to land in these circumstances would "render the Legislature's limited waiver of sovereign immunity

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[155] *See* T. 504:19-25, Hearing Transcript (Dec. 19, 2014) (counsel for JEA argued, "[i]f there is a judgment in this case, it will have to be enforced against the assets of JEA in Florida. We have no assets in Mississippi...So Florida may refuse to allow the judgment to be enforced in Florida[.]")

[156] *See, e.g.,* R. 6046-6050, Promenade's Response to JEA's Motion for Partial Summary Judgment on Promenade's Claim for Injunctive Relief (enumerating several examples of JEA's removal of its ash material when it caused problems); *see also* R. 6095, Email from S. Schultz to T. Hobson (Mar. 9, 2012) (JEA's Scott Schultz wrote: "My people can remove the material more efficiently than anybody[.]").

meaningless."[157] But that ruling ignores the reality that JEA has no inherent sovereign immunity, and certainly none under the MTCA. Moreover, it fails to appreciate that Florida law allows injunctive relief against JEA and other similarly situated entities, and thus an injunction in this case cannot be considered a hostile "special rule of law."[158] Likewise, allowing injunctive relief for the injury to land in these circumstances does not render the limited waiver meaningless any more than the constitutional protections of Article III, §17 of the Mississippi Constitution can be considered to render the MTCA meaningless.

Accordingly, JEA was not entitled to summary judgment on Promenade's longstanding claim for injunctive relief.

V. In the event the Circuit Court's extension of *Hyatt II* stands, the number of occurrences should be determined by the fact finder at the trial of the matter.

Were this Court to affirm portions of the Circuit Court's Omnibus Order allowing JEA to cloak itself in the MTCA protections heretofore reserved for Mississippi government entities, JEA would then still be subject to the particular waivers of immunity articulated in the MTCA.

Section 11-46-5 of the MTCA waives immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and their employees "to the extent of the maximum amount of liability provided for in Section 11-46-15." Although section 11-46-15(1)(c) caps damages for actions arising from acts or omissions occurring on or after July 1, 2001 at $500,000, the cap is only applicable to "claims arising out of a single occurrence."

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[157] R. 6416-17, Omnibus Hyatt II Order.

[158] *Dep't of Transp. v. Burnette*, 384 So. 2d 916, 922, 1980 Fla. App. LEXIS 16911, *17-18 (Fla. Dist. Ct. App. 1st Dist. 1980) ("If the sovereign's immunity was ever a serious impediment to a suit for injunction to secure relief from action by the State having that effect…it is no longer. Every remedy which would be available against an individual for such a repeated trespass or continuing nuisance, including an injunction to prevent a multiplicity of damage suits, is now available against the State.").

In. *S.W.*, the Mississippi Court of Appeals affirmed a Circuit Court's ruling, which had found multiple separate occurrences under Miss. Code Ann. § 11-46-15(1) of the MTCA, thereby entitling the plaintiff to a damages award up to the statutory maximum for each separate occurrence.[159] In affirming, the Court of Appeals held that "[t]he circuit court, sitting as the factfinder, found that [the government entity's] failure to act, when required to do so by [its] regulations, breached specific and separate affirmative ministerial and nondiscretionary duties, and as a result, [the plaintiff] endured repeated… injury and harm."[160]

As a self-identified community-owned electric utility and waste generator, JEA has affirmative ministerial and nondiscretionary duties to (a) properly dispose of its power plant waste, and (b) properly procure and fund the means for the responsible transportation, handling, and disposition of such waste.[161] JEA failed to satisfy these obligations on hundreds of separate occasions, each of which was a substantial factor in bringing about severe harm to Promenade. Each time JEA improperly sent its waste to Mississippi to be passed off as a construction material, and each time JEA paid LA Ash for the removal and marketing of JEA's waste into

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[159] 111 So.3d 630, 645 (Miss. Ct. App. 2012). DHS sought review of the Court of Appeals decision, but this Court denied certiorari. *See Mississippi Dep't. of Human Servs. v. S.W.*, 973 So.2d 244 (Miss. 2008). On remand, the parties stipulated to briefing the issue of damages rather than a new trial, and the trial court detailed the separate occurrences of DHS's negligence. The trial court's damages findings were then appealed again to the Mississippi Court of Appeals. In reviewing the trial court's decision on remand, the Court of Appeals relied heavily on its prior decision which had remanded the case, and noted that, "[i]n addition to the supreme court's [*sic*] denial of certiorari review of our prior opinion in this case, the supreme court cited our prior opinion in *S.W.* in *Fontenberry v. City of Jackson*, 71 So.3d 1196, 1201 (¶13) (Miss. 2011)." Subsequently, a writ of certiorari was granted by the Mississippi Supreme Court, before being denied on its own Motion. *Mississippi Dep't. of Human Servs. v. S.W.*, 2013 Miss. LEXIS 250 (Miss. Apr. 18, 2013). A Mississippi Supreme Court majority, *en banc*, ruled: "Petition for writ of certiorari filed by the Mississippi Department of Human Services was granted by order of this Court on December 6, 2012. Upon further consideration, the Court finds that there is no need for further review and that the writ of certiorari should be dismissed. On the Court's own motion, the writ of certiorari is dismissed." *Id.*

[160] *S.W.*, 111 So.3d at 645.

[161] *See, e.g.*, P.R.E. 107-9, EZBase Beneficial Use Project Approval; P.R.E. 332-8, Testimony of James Chapman, JEA's Director of Risk Management and author of the JEA Purchasing Code; P.R.E. 110-225, Beneficial Reuse of Industrial Byproducts in the Gulf Coast Region (Feb. 2008); and *Donald v. AMOCO Prod. Servs.* 735 So.2d 161, 175 (Miss. 1999) (holding generators have a duty to safely dispose of their waste).

Mississippi, constitutes a separate breach of JEA's nondiscretionary ministerial duties. These separate breaches are the occurrences that caused (and continue to cause) Promenade to suffer repeated damage due to the negligent conduct of JEA.

As held by this Court, "[i]t is within the province of the factfinder to determine the amount of damages to be awarded."[162] As to the damages issues, this is a jury case.[163] Whether JEA's repeated conduct, including the dereliction of its affirmative duties, constitutes multiple occurrences involves genuine issues of material fact for the jury to decide. Accordingly, the Circuit Court's grant of summary judgment on the question of whether JEA's repeated separate breaches constitute multiple occurrences was inappropriate and premature, especially because the facts and arguments should have been considered "in the light most favorable to the non-moving party, who has the benefit of every reasonable doubt."[164]

Like the Second Circuit in *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC* (arguably the most closely-watched case involving multiple occurrences),[165] this Court in *Universal Underwriters v. Buddy Jones Ford*, determined that the question of the number of occurrences is a "factual issue[.]"[166]

And, while the Circuit Court identified that "[t]he main question before the Court is what constitutes an 'occurrence' under Miss. Code Ann. § 11-46-15[,]" it provided no answer or case law addressing that question. Despite Promenade's lengthy discussion of *S.W.* – the freshest authority on the issue – it was not even addressed in the Omnibus Order.

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[162] *S.W.*, 111 So.3d at 647 (citing *Lewis v. Hiatt*, 683 So.2d 937, 941 (Miss. 1996)).
[163] See R. 6409 – 6412, Omnibus Order (the Circuit Court ruled, "[t]o try Promenade's claims against JEA to a jury as mandated by *Church v. Massey* would not be hostile to any 'public act' of Florida because Florida has no act prohibiting jury trials against JEA…A jury trial under these circumstances does not run afoul of *Hyatt II*, rather it embraces the *Hyatt II* analytical framework[.]"
[164] *Garrett v. Northwest Miss. Junior College*, 674 So.2d at 2.
[165] 467 F.3d 107 (2d Cir. 2006).
[166] 734 So.2d 173, 178 (Miss. 1999).

In *S.W.*, an unnamed minor filed suit against the Mississippi Department of Human Services ("DHS") for damages he suffered resulting from DHS's negligence.[167] The plaintiff was placed in the care of DHS, during which time he was abused on multiple occasions by two men who worked for supporting agencies that provided care at DHS facilities.[168] The plaintiff alleged that DHS neglected to carry out its duties to him while he was in their custody, which allowed him to be abused.[169] He alleged further that DHS failed to fully investigate the reported abuse and failed to ensure that he received medical treatment in the form of psychological counseling.[170] The trial court found that DHS breached its duties by (1) failing to make required monthly face-to-face meetings, (2) failing to sufficiently investigate reports of abuse, and (3) failing to provide counseling.[171]

The Court of Appeals answered the question of what constitutes an occurrence under the MTCA by holding the record supported:

> the award of damages for **each separate breach of ministerial duties by DHS as a separate occurrence which caused**…**repeated tortious damage and harm**…This case does not involve a situation where harm reverberates from a single act or omission…the circuit judge, **as the factfinder**, specified the separate breaches of ministerial duties, the occurrences here causing…repeated damage[.][172]

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[167] *S.W.*, 111 So.3d at 631.
[168] *Id*. at 632 - 633.
[169] *Id*.
[170] *Id*. at 633.
[171] *Id*. at 633 - 634.
[172] *Id*. at 646 - 647 (citing *Pierce v. Cook*, 992 So.2d 612, 619- 620 (Miss. 2008)). The analysis provided in *Pierce* is instructive on the issue of JEA's repeated acts constituting multiple occurrences.

> In *Pierce*, this Court considered whether a claim for intentional infliction of emotional distress that stemmed from an adulterous relationship constituted a continuing tort for statute of limitations purposes. The Court examined the continuing tort doctrine, stating: "a 'continuing tort' is one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort…is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Pierce*, 992 So.2d at 619 (quoting from *Stevens v. Lake*, 615 So.2d 1177, 1183 (Miss. 1993). Drawing on prior decisions, the Court further stated: "the defendant must commit repeated acts of wrongful conduct…We have held that we will not apply the continuing tort doctrine when harm reverberates from one wrongful act or omission." *Id*. (quoting from *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 148 -149 (Miss. 1998)).

Like DHS, JEA had affirmative duties to properly dispose of its waste, including those articulated in *Donald v. AMOCO Prod. Co.*[173] Pursuant to what JEA has described as a "no obligation" side arrangement, JEA made the decision on 437 separate occasions to fill a railcar with JEA power plant waste at JEA's onsite rail spur, then send that railcar on to the destination of Port Bienville, Mississippi.[174] When LA Ash received the railcars in Port Bienville, it invoiced JEA for each car at $2,100 a car. On 51 separate occasions, JEA paid an LA Ash invoice outside of JEA's established procurement procedures by using funds secured against dummy contracts that had long been terminated.[175]

Thus, on a combined 488 occasions, JEA chose to breach its duties by shipping its waste to Mississippi and paying for it to be passed off as a construction material. Like DHS, JEA's failure to satisfy its obligations caused the improper disposition of JEA's waste in Promenade's land. The injuries suffered by Promenade (and which Promenade continues to suffer) are proportionate to the amount of material used at the site.

The multiple repeated breaches constitute multiple occurrences under the MTCA, and Promenade's harm was proportional to the amount of waste from those corresponding breaches. At trial, the jury, as factfinder, should be permitted to make the inherently factual determination of how many separate occurrences caused harm to Promenade.

It is undisputed that the slow and powerful expansion of JEA's waste materials beneath the shopping center has caused prolonged and repeated injuries to Promenade. But these injuries are not "continual ill effects from an original violation." The injuries suffered are proportionate to the amount of material used at the site. Indeed, Promenade's injuries from a single ton of waste would be much different than the injuries incurred from the more than 32,000 tons actually used. These injuries are the result of JEA's repeated wrongful conduct contrary to its non-discretionary ministerial duties.

[173] 735 So.2d 161, 175 (Miss. 1999) ("'Duty' is properly determined by the court as a matter of law and issues of public policy are considered. The Oil Defendants have a duty to ensure the safe disposal of their waste. Without such a duty, oil companies and others could hire anyone to remove it and claim their liability has ended. We would all bear the burden of such a rule.").

[174] *See* R. 6143-66, "Bed Ash Cars.xlsx."

[175] *See* R. 6168-85, LA Ash Invoices spreadsheet produced by JEA.

CONCLUSION

Based on the foregoing, this Court should reverse the Circuit Court's application of *Hyatt II* to JEA, which is not a sovereign arm of the State of Florida.

Furthermore, even if this Court finds that the claims against JEA are subject to *Hyatt II* analysis, the Court should reverse that portion of the Circuit Court's Order that found JEA is entitled to MTCA immunity pursuant to *Hyatt II*. Given the facts and circumstances of this case, the Court should remand the matter and allow Promenade to proceed to trial without any artificial caps on the damages it may be awarded.

Alternatively, if this Court affirms the Circuit Court's Order (to the extent that it finds JEA is entitled to MTCA immunity pursuant to *Hyatt II*), the Court should reverse the Circuit Court's refusal to allow Promenade to amend its complaint to conform its claims to the new interpretation of Mississippi's immunity laws and allow Promenade to present its case for inverse condemnation. In addition, the Court should reverse the Circuit Court's granting of summary judgment to JEA on Promenade's claims for injunctive relief, and allow Promenade to present its case for injunctive relief. Finally, the Court should reverse the summary judgment granted by the Circuit Court on the issue of multiple occurrences under the MTCA, and remand for a full trial on the merits at which the jury will determine the number of occurrences that caused harm to Promenade.

Respectfully submitted, this the 11th day of December, 2017.

THE PROMENADE D'IBERVILLE, LLC,
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document was served via the Court's MEC system and/or U.S. Mail, postage prepaid to the following:

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