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

REPLY BRIEF OF THE APPELLANT THE PROMENADE D'IBERVILLE, LLC

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INTRODUCTION TO PROMENADE'S REPLY

JEA does not contest the lion's share of Promenade's factual recitation detailing JEA's deliberate interstate waste removal program from Jacksonville, Florida to Port Bienville, Mississippi. Instead, JEA belabors factual allegations on which the Circuit Court has already *twice* ruled that there are genuine material issues.[1]

Promenade will not be baited into addressing the numerous inaccuracies of JEA's unsupported allegations, which on balance have nothing to do with the issues identified for appellate review. Rather, this Reply centers on: (a) addressing the inconsistencies in JEA's factual allegations critical to the issues at hand, (b) identifying those arguments for which JEA had no meaningful rebuttal, (c) clarifying the issues on which JEA gets the law wrong, and (d) distinguishing those areas in which JEA's legal position is completely disconnected from the underlying facts and circumstances.

FACTS OF SIGNIFICANCE: DISPUTED AND UNDISPUTED

JEA's Brief did not dispute the following significant facts:

- Judgments and settlements owed by JEA are not paid from Florida's public treasury.
- JEA is not funded by nor accountable to the State of Florida.
- The waste from JEA that was shipped to Mississippi in 2008 and 2009 never received an applicable Beneficial Use Determination ("BUD").
- Shipping ash out of state using LA Ash allowed JEA to claim those shipments as "beneficial uses" counting towards JEA's overall need to report "a majority [as] sold, used, or reused" as required by its project approval.
- JEA directed that the shipments were to go to Port Bienville, Mississippi.
- JEA was expressly targeting the State of Mississippi as a destination for the waste byproducts it generated in Florida because a JEA marketing consultant had identified Mississippi as a "Low Barrier to Entry State" for railing the ash byproducts for sale as construction materials.
- JEA proposed that LA Ash rebrand JEA's material for marketing outside Florida; LA Ash chose to call JEA's material OPF.
- Even though JEA tried to characterize the ash as being "sold" to LA Ash, at all times JEA was paying LA Ash to take the ash from Florida into Mississippi.

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

On the other hand, the Circuit Court has already determined that the bulk of the assertions in JEA's fact section present genuine issues of material fact. While most of JEA's alleged facts have no bearing on the issues under consideration on the instant appeal, and thus do not merit express contradiction, a few of the more material misleading assertions must be corrected and, at the very least, highlighted to show the existence of contrary material facts.

1. **JEA asserts, with no evidence or citation, that Promenade knowingly consented to the use of JEA's waste after learning of the material's deleterious characteristics.**

JEA alleges that "CBL in Chattanooga, Tennessee knew about and acquiesced in the use of the OPF42 ash product" in the Spring of 2009 after it had caused swelling in the soils. JEA cites nothing in the record for this assertion. The reason is obvious. It's not a fact. While Promenade diligently cited to the record to support the facts set forth in its brief, JEA includes unsupported contentions that are simply untrue. In addition, JEA attempts to blur the distinction between Promenade (the Mississippi company that owns and operates the shopping center in question) with CBL (the Tennessee REIT that is a member of Promenade and not a party to the appeal and was only a party to the litigation by virtue of a Kohl's cross-claim that was dismissed in 2016). This transparent attempt to paint Promenade as a *de facto* out-of-state interloper attempting to take unfair advantage in Mississippi is a classic example of JEA accusing its opponents of what it itself was doing.

The reality is that Promenade did not learn that the material had been used at the project site until after the vast bulk of it had already been placed in the ground.[2] Moreover, the subcontractors who had mixed the material in to the soils at the site had done so in the mistaken

[2] *See* R. 4584-4646 at 4637, Promenade's Response to JEA's Motion for Partial Summary Judgment (citing its Exhibit HH, Testimony of Jennifer Greer (Apr. 29, 2014), at Dep. Trns. 73:22 - 74:13 and 119:4 - 21)).

belief that it was a product with beneficial characteristics.[3] After learning that the JEA material had been placed on its property, and what that material actually is, Promenade has spent the better part of a decade systematically removing the material on a location by location and store by store basis at tremendous expense.[4]

2. In order to create the impression of a "windfall" for Promenade, JEA overstates Promenades recoveries, and understates Promenades expenditures.

JEA includes in its brief an amount that Promenade received in settlements from JEA's co-defendants. The only things JEA cites for this statement are its own unsupported allegations in its two Reply briefs filed with the Circuit Court.[5] JEA includes in the stated figure several million dollars paid by a subcontractor's insurer and bonding company *to EMJ*. In addition, a significant portion of the amounts received was not for property damage, but rather to provide reimbursements to Promenade for defense obligations related to the litigation itself that were paid by Promenade's insurers and additional insurers. On the expense side, JEA limits its description of the funds Promenade has been forced to expend to "repairs and store owner settlements."[6]

In its zeal to create the appearance of an illusory "windfall," JEA also knowingly omits reference to the funds Promenade has expended with engineering firms to investigate the subsurface conditions, to test the materials being removed, to design mitigating remediation

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[3] Once damage started occurring, the project engineers defended the use of the allegedly pre-hydrated byproducts because its own tests had shown that the material did not swell. Still, they took additional samples and re-ran their previous tests with newly delivered material, focusing on the swell characteristics of the material. Through those subsequent tests, in May of 2009, the project engineer found dangerous swell levels and concluded that so-called "OPF42" was responsible for the damage taking place at the shopping center. (See Exhibit D-1 to R. 2386-2421, Testimony of David Been (Apr. 30, 2014), at Dep. Trns. 145:4 – 146:25). Because of the dramatic differences in the results, the engineers suspected that the 32,000 tons of material delivered to the project site did not conform to the samples that had been provided in August of 2008. (See Id., see also Exhibit C-2 to R.2386-2421, Affidavit of David Been (Aug. 8, 2014), at ¶¶15 - 16).

[4] R. 5847 - 60, Remediation efforts described in answer to interrogatories.

[5] Brief of Appellee JEA, p. 21.

[6] Brief of Appellee JEA, pp. 2, 21.

programs that have allowed the shopping center to remain open while the excavation and removal of many thousands of tons of the material have been removed and replaced with clean soil, and to oversee the partial removal and repairs to date. Promenade has also been forced to incur significant legal expenses in discovery to learn the true nature of what was placed beneath its shopping center. While Promenade's recoveries from other defendants are in no way relevant to the issues on appeal, JEA's attempt to allege a windfall is extremely misleading.

3. JEA relies on the statements of its co-conspirator to support its distorted narrative.

Promenade's complaint includes a count alleging that JEA acted in a common plan or design with Defendant LA Ash.[7] JEA sought summary judgment on Promenade's common plan count, which was denied by the Circuit Court and is not subject to review in this appeal.[8] Accordingly, especially in the context of summary judgment proceedings, the Court should be wary of JEA's "factual" contentions which rely on the testimony of its alleged co-conspirator LA Ash.[9]

REPLY ARGUMENT SUMMARY

The "Summary of Argument" provided by JEA exposes the reality that JEA's position rests on several core assertions that cannot withstand careful scrutiny.

JEA contends that because it enjoys legislated immunity in Florida, the Full Faith and Credit Clause requires application of the damages cap for Mississippi governmental entities in the MTCA. By doing so, JEA joins the Circuit Court in taking an overly broad reading of *Franchise Tax Board of California v. Hyatt*[10] ("*Hyatt II*") by giving the benefit of the so-called *Hyatt II* "partial credit" to an institution that is not an arm of the State of Florida. This ignores the threshold issue of residual sovereignty (or in JEA's case, the complete lack thereof).

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[7] R.4431-4435 at 4432, Amendment to Complaint.
[8] R. 5821, Order Adopting Recommendation Denying Separate Motions for Summary Judgment.
[9] *See, e.g.*, Brief of Appellee JEA, pp. 13-18.
[10] 136 S.Ct. 1277 (April 19, 2016).

The sovereign status of the defendants involved in the *Nevada v. Hall*[11] and the *Hyatt* decisions was not subject to debate, leading the U.S. Supreme Court to determine that the Nevada Court had improperly "applied a special rule of law applicable only in lawsuits *against its sister States*, such as California."[12] Promenade's lawsuit is not against a "sister State" of Mississippi.

JEA also argues that, because it has no eminent domain power in Mississippi, JEA cannot be subject to a claim for inverse condemnation. This assertion ignores the decision in *King v. Vicksburg R. & L. Co.*[13] and the well-developed case law that emphasizes that the power of eminent domain is not a prerequisite to compensating a landowner under the 5th Amendment to the U.S. Constitution for a government entity's taking of private property.

Further, Promenade's proposed claim for inverse condemnation is one based on property rights, not environmental law. Promenade's motion for leave to amend, which was denied without explanation by the Circuit Court, sought to add a claim to recover *just compensation* for JEA's taking – not a regulatory clean-up. The fact that JEA passed its power plant waste off as a product does not relieve it from providing just compensation under the Constitutions of Mississippi and the United States. This is especially so given that JEA orchestrated the removal scheme for the purpose of relieving its publicly-owned onsite landfill, among others.

Moreover, the substance of Promenade's inverse condemnation claim is already a part of the case in the form of Promenade's previously pled claim for physical invasion to land, on which the Circuit Court denied JEA's Motion for Partial Summary Judgment. The law is clear that claims such as nuisance, trespass, and physical invasion to land are available to be pursued by plaintiffs at common law and that such common law claims are not subject to an

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[11] 440 U.S. 410 (1979).
[12] *Hyatt II*, 136 S.Ct. at 1283 (emphasis added).
[13] 42 So. 204 (Miss. 1906).

"administrative exhaustion" requirement just because the defendant tries to paint them as "environmental." Like the offensive soot in *King*, JEA's ash materials have damaged Promenade's private property. And, when private property is "damaged by physical invasion of deleterious agents produced by the plant of defendant," the plaintiff may pursue its remedy under the common law.[14] Likewise, under Article 3, §17 of the Mississippi Constitution, a defendant's claim of "public authority … to operate a public work … cannot confer a right to take or damage private property without compensating the owner for its value as taken or damaged[.]"[15]

As to the proposed amendment itself, JEA should not presume to tell this Court why the Circuit Court denied Promenade's motion for leave to file it, inasmuch as no grounds for the denial were included in the Circuit Court's Omnibus Order. The controlling case law indicates that an unexplained perfunctory denial of a properly sought amendment constitutes an abuse of discretion. Accordingly, JEA's speculation that the Circuit Court denied Promenade's request for leave on futility or exhaustion grounds cannot fill the void in the Circuit Court's Order.

Furthermore, Promenade's basis for seeking to amend is simple: if *Hyatt II* is found by this Court to extend the MTCA's damages caps to a foreign municipal utility, such a finding constitutes a change in the law and entitles Promenade to conform its complaint to the change. JEA's brief is inconsistent on the threshold question of whether *Hyatt II* constituted a change in the law. *Hyatt II* did not reverse *Hyatt I,* nor overturn *Nevada v. Hall*. Nevertheless, JEA embraces *Hyatt II* as a change to avoid being found to have waived its immunity defenses. But if *Hyatt II* is in fact a change in the law, Promenade must be permitted to conform its complaint as a matter of law.

In any event, further amendment is unnecessary with regard to Promenade's claim for injunctive relief. JEA's unfounded accusation that the injunctive relief sought by Promenade

[14] R. 4559, Promenade's Memorandum in Support of Partial Summary Judgment (discussing *King*).
[15] *King*, 42 So. at 204.

since 2010 somehow laid "dormant" has no bearing on Promenade's entitlement to that relief. Promenade had no obligation to seek affirmative summary judgment on its request for injunctive relief and cannot be faulted for *JEA's* lack of attention to the claim.[16] Moreover, JEA did not even attempt to address or distinguish the precedent established by this Court in *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*[17] and *Phillips v. Davis Timber Co.*[18] on which Promenade relies, both of which are cases with factual circumstances remarkably similar to Promenade's.

Likewise, JEA fails to establish a coherent position as to why the principles followed by the Mississippi Court of Appeals in *Mississippi Dep't of Human Serv. v. S.W.*[19] should not apply to Promenade's claims. JEA's focus on the phrasing found in other papers filed by Promenade, none of which spoke to the issue of the number of occurrences involved under the MTCA, is an apparent attempt to avoid consideration of the issue on the merits.

I. Florida's sovereignty is not threatened by Promenade's pursuit of the full measure of damages against JEA, and thus *Hyatt II's* Full Faith and Credit Analysis is unnecessary.

Although the *Hyatt II* "history lesson" JEA provided has the appearance of thoroughness, JEA's Full Faith and Credit analysis is critically incomplete: JEA disregards the "hostility to the State" factor that triggers the provision of so-called "partial credit" under *Hyatt II*.[20]

JEA gets it wrong when it argues: "*Hyatt II* does not consider some qualitative analysis of the character of the government entity. It requires the forum give appropriate respect to the statutes (public acts) of an equally dignified sister state."[21] This simply parrots the Circuit

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[16] Just because JEA ignored that pending claim, it does not change the reality that the claim for injunctive relief has been there from the beginning.
[17] 530 So. 2d 1325 (Miss. 1988).
[18] 468 So. 2d 72 (Miss. 1985).
[19] 111 So. 3d 630 (Miss. Ct. App. 2012).
[20] *See, e.g., Hyatt II,* 136 S.Ct. at 1281 (the U.S. Supreme Court found that the Nevada Supreme Court's decision "applied a special rule of law that evinces a 'policy of hostility' *toward California.*") (emphasis added); *see also Id.* at 1284 (Chief Justice Roberts describes the majority's opinion as permitting "partial credit" by providing California Nevada's damages cap as opposed to California's).
[21] Brief of Appellee JEA, at p. 29.

Court's unwarranted expansion of the *Hyatt II* holding.

Taking that argument at face value would abolish choice of law analysis for out-of-state tortfeasors altogether, as applying forum law would be contrary to the statutes "of an equally dignified sister state." It is a suit's potential impact on an *inherently* sovereign *state* institution that triggers the provision of protective "partial credit" by the courts of a sister State.

JEA stops short of explaining what entitles it to the *Hyatt II* Full Faith and Credit analysis. Unlike the defendant in *Hyatt II* (which was an arm of the State government of California), JEA is not an arm of the State of Florida. JEA does not perform a core state function, nor is it backed by the public fisc. JEA's so-called public status is gratuitous, extended by the Florida legislature to it and other entities outside those performing core (and thus inherently sovereign) governmental functions. A legislated immunity cannot be the triggering event for the "partial credit" immunity of *Hyatt II*.

In fact, even if the U.S. Supreme Court had overturned *Nevada v. Hall*, the Harrison County Circuit Court would not have been foreclosed from exercising jurisdiction over JEA. In *Nevada v. Hall*, the U.S. Supreme Court's recitation of the facts begins by stating, "[i]t is conceded that [defendant] was driving a car *owned by the State*, that he was *engaged in official business*, and that *the University is an instrumentality of the State itself*."[22] JEA is not "an instrumentality of the State itself." Promenade does not concede that JEA is an "instrumentality of the State" of Florida at all; rather, JEA is an independently bonded community-owned electric authority, which operates beyond the oversight of even the City of Jacksonville and which is not backed by the Florida treasury. None of JEA's equipment or infrastructure is "state-owned."

These facts are not disputed; they are confirmed by the fact that JEA is subject to the jurisdiction of the United States Federal Courts. If JEA were "the State" it would enjoy 11th

[22] *Nevada v. Hall*, 440 U.S. at 411 (emphasis added).

Amendment immunity, which it does not.[23] The question central to *Nevada v. Hall*, and the argument which Mississippi Attorney General Mike Moore supported as one of several amicus curiae in the first *Hyatt* ("*Hyatt I*"), was centered on the "pre-existing immunity" held by the States prior to the U.S. Constitution's ratification.[24] The amici argued:

> States, upon ratification of the Constitution … entered the Union 'with their sovereignty intact.' … An integral component of that 'residuary and inviolable sovereignty,'… retained by the States is their immunity from private suits.[25]

The core concern of the amici in *Hyatt I* was articulated as "[t]he threat to the States' fisc by private damages actions brought in sister States' courts[.]"[26] Further evidence of this concern, which is not implicated in the instant case, can be found in the amici's brief in support of certiorari in *Hyatt I*:

> Only [the U.S. Supreme Court] can clarify whether a state's *retention* of sovereign immunity as to conduct *involving core governmental functions* is entitled to respect in the courts of another state.
>
> ***
>
> This case gives the Court the opportunity to explain the proper analysis to be employed when a State asserts that a foreign state's assumption of jurisdiction, or *failure to respect the state's retained sovereign immunity*, would adversely impact the state's ability to carry out *its core governmental responsibilities.*[27]

The amici in *Hyatt I* relied on the foregoing to argue that this residual sovereignty was confirmed by the States' reaction to *Chisolm v. Georgia*[28] resulting in the immediate enactment of the 11th Amendment. But neither Florida's inherent sovereignty, nor its post-ratification

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[23] *See, e.g., Anchor Hocking Corp. v. Jacksonville Electric Authority,* 419 F. Supp. 992 (M.D. Fla. 1976) (JEA argues that it would enjoy its legislated immunities in the federal courts of the United States - to the contrary, application of Florida's legislated immunity would be subject to a choice of law determination).
[24] Brief of Amici Curiae in Support of Petitioner Franchise Tax Board of California, *Franchise Tax bd. of California v. Hyatt,* 2002 WL 31863327 (2002), at *14.
[25] *Id.* at *12 (quoting from *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743 (2002).
[26] *Id*. at *15.
[27] Brief of Several States, Amici Curiae, In Support of Petitioner California, 2002 U.S. S. Ct. Briefs LEXIS 520 ("Amici in Support of Cert."), *2, *4, and *8 (emphasis added).
[28] 2 U.S. 419 (1793).

residual sovereignty, is at issue in this case. The existential threat warned of by the amici[29] is not at stake in Promenade's suit against JEA. Whereas California's core governmental function was threatened by a private citizen in *Hyatt II*, here Mississippi private property is threatened by a foreign community-owned utility engaged in a proprietary scheme to relieve the strain that JEA's annual waste production placed on its public landfill.[30]

Over the last 200 years, the individual legislatures of the States have been responsible for what could be called *immunity-creep*: an ever-expanding extension of immunity legislatively bestowed to quasi-public entities. These entities have nothing to do with the core sovereign functions envisioned by the framers to be inherently immune, such as tax authorities, legislatures, courts, militias, etc. Accordingly, a damages award exceeding the caps established under the MTCA cannot be hostile to the State of Florida, and therefore not contrary to the Full Faith and Credit Clause.

Indeed, core Mississippi institutions like the judiciary enjoyed inherent common law immunity prior to this Court's decision in *Pruett v. City of Rosedale.*[31] On the other hand, community-owned utilities in Mississippi were not recognized as institutions retaining the inherent immunity of the sovereign. Under Mississippi's common law, a plaintiff could recover against a Mississippi municipality engaging in proprietary activities. For example, in *City of Pass Christian v. Fernandez,* the Mississippi Supreme Court upheld the jury's verdict against a Mississippi municipality noting that "the hauling of dirt and trash is for the use and advantage of the city in its corporate capacity, is a corporate duty, and the city is liable for all damage done by

[29] Amici in Support of Cert. at *16 (the amici argued "some – perhaps many – taxpayers will follow respondent Hyatt's path and seek to block states' legitimate tax collection efforts, hoping that by dragging States through the judicial processes of foreign courts States will forego those efforts").
[30] Id. at *12.
[31] 421 So. 2d 1046 (Miss. 1982) (abolishing judicially created sovereign immunity) (superseded by statute as stated in *Gale v. Thomas,* 759 So. 2d 1150, 1152 (Miss. 1999)); *see also De Witt v. Thompson,* 192 Miss. 615, 625 (Miss. 1942) (noting the immunity of the judiciary has a "deep root in the common law.").

any officer or agent so employed."[32]

Hyatt II does not require that the rule of "partial credit" be applied to municipal utilities that are not part of "the State itself" and which do not perform a core governmental function. Indeed, the underlying briefing, including the amici curiae briefing in *Hyatt I,* contextualize the U.S. Supreme Court's "partial credit" as being premised on respect for the residual sovereignty of an arm of *a State* that finds itself before a court of its sister *State*. Accordingly, the Circuit Court improperly expanded the application of *Hyatt II* to JEA, which offends the controlling Mississippi precedent established by *Church v. Massey.*[33]

II. Even if JEA were entitled to any *Hyatt II* "partial credit" analysis, providing damages caps to a municipal electric utility operating beyond its borders is contrary to legitimate Mississippi policy interests.

In its Appellee Brief, JEA admits that it seeks to import Florida law under the Full Faith and Credit Clause: "JEA is not a direct beneficiary of MTCA [*sic*] because it is not a Mississippi political subdivision. Its protection is via the Full Faith and Credit Clause with the MTCA limitations on damages used as a 'benchmark.'"[34] But forum courts are not bound to apply another state's laws over their own, especially when doing so would be contrary to the forum state's policy interests. Relying on *Carroll v. Lanza,*[35] the *Hyatt II* majority explained that the "Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy."[36]

On its face, the MTCA simply does not apply to foreign government entities. JEA is asking the Court to extend the MTCA's damages caps, to JEA through the improper application of a fiction developed by the *Hyatt II* Court relying on the Clause. An underlying requirement

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[32] 100 Miss. 76, 82, 56 So. 329 (Miss. 1911); *see also White v. City of Tupelo,* 462 So.2d 707 (Miss. 1984) (discussing the common law distinctions between governmental and proprietary functions).
[33] 697 So. 2d 407 (Miss. 1997).
[34] Brief of Appellee JEA, p. 36.
[35] 349 U.S. 408, 411 (1955).
[36] *Hyatt II,* 136 S.Ct. at 1281.

for the application of that fiction is a determination that doing so would not represent "a conflicting and opposed policy" of Mississippi. So, under the circumstances presented here, would extending the MTCA caps offend any express or implicit Mississippi policy interests? There are at least three.

The first and most obvious is Mississippi's legitimate State interest in not allowing itself to become a dumping ground for waste from other states. The trial court's application of *Hyatt II* would render Mississippi defenseless against the hostile conduct of governmental entities in other States who seek to shift the risks and problems from within their own boundaries to the citizens and lands of other places.

Second, applying the MTCA damages caps to JEA would represent a stark conflict with Mississippi's constitutional maxim that "[p]rivate property shall not be taken or damaged for public use, except on due compensation[.]"[37] There is no reason why the MTCA should limit JEA's exposure for damaging private property when it would not do the same for a Mississippi government entity.

Third, applying the MTCA damages caps to JEA conflicts with the policy embodied in Miss. Code Ann. § 77-5-769. Of course, Miss. Code Ann. § 77-5-769 applies to JEA no more than the MTCA does. Each is a statute enacted without any apparent consideration of its application or extension to foreign actors. But Section 77-5-769 presents a clearly opposed policy on Mississippi's treatment of municipal electric utilities for activities occurring beyond their home borders. *As a matter of policy*, the Mississippi legislature saw fit to provide express "legislative consent" to the application of the forum state's laws to "any municipality or joint

[37] Miss. Const. Art. 3, §17.

agency" operating a project outside of the State.[38] The logic is, were the roles reversed, such that a Mississippi municipal utility entered into an arrangement with a foreign actor to operate a waste removal project in another State, Miss. Code Ann. § 77-5-769 would prohibit that joint agency from seeking application of the caps in the MTCA, and from seeking the application of the foreign state's damages caps through *Hyatt II's* "partial credit."

Accordingly, Mississippi has legitimate policy interests that conflict with the concept of providing a foreign municipal utility the MTCA's damages caps under the circumstances of this case.

III. JEA's lack of eminent domain powers in Mississippi has no bearing on whether JEA owes just compensation for the taking of Promenade's constitutionally protected private property.

JEA attempts to cloak itself with the vestments of the State to receive all of the privileges of sovereignty but none of its limitations. JEA insists that the Court both recognize JEA's alleged "official" status and ignore the State and Federal constitutional checks incumbent on such status.[39]

Indeed, JEA's entire argument is premised on a fallacy: that inverse condemnation claims do not apply to it because JEA has no eminent domain power in Mississippi. Such a contention cannot be squared with the numerous decisions "disagree[ing] with the basic premise…that an inverse condemnation action will not lie against [a public entity] because it does not have the power of eminent domain."[40] As the 11th Circuit cautioned, allowing an agency to escape liability for just compensation on the premise that such agency lacks eminent domain power is a

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[38] *See* Miss. Code Ann. § 77-5-769 ("Legislative consent is hereby given…to the application of regulatory and other laws of the other states… to any municipality or joint agency which owns or operates a project without the state.").
[39] *See, e.g., King,* 42 So. at 204 and 205 (holding that it is the court's obligation "to enforce the mandate of the constitution and protect the owner of private property" when that property is "damaged by physical invasion of deleterious agents produced by the [power] plant of the defendant[.]").
[40] *See, e.g., Fountain v. Metropolitan Atlanta Rapid Transit Authority,* 678 F.2d 1038, 1043 (11th Cir. 1982).

"threat" that "ought to be avoided[.]"[41]

a. Promenade is constitutionally guaranteed just compensation for JEA's damage to Promenade's private property.

JEA's attempt to seek cover under *Burkett v. Ross,* is unavailing.[42] In *Burkett,* this Court considered the appellant's contention that, "if public bodies with the power of eminent domain cannot take or damage the rights or property of private individuals without compensation that it should necessarily follow that *private persons* should not be permitted to do so for their own profit or advantage."[43] The Court disagreed, ruling, "[w]e do not think that Section 17 of our State Constitution is applicable except where property is taken or damaged for public use by the public authorities or corporations, etc., vested with the power of eminent domain."[44]

JEA is not a private person. In fact, this appeal centers on JEA's motion to have the Circuit Court *reconsider* its earlier ruling that JEA was to be treated as a private person. The Circuit Court originally adopted the Special Master's recommendation that found, "JEA is not an employee or political subdivision nor enjoys any other status that would provide the protection afforded under the [MTCA]."[45] This ruling was expressly based on this Court's decision in *Church v. Massey,* which held that a foreign government entity should be treated as a private person for torts committed in Mississippi: "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." Moreover, unlike the private defendants in the *Burkett* case, *JEA is vested with the power of eminent domain* in Florida.[46]

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[41] *Id*. at 1044.
[42] *See* Brief of Appellee JEA, p.35 (quoting from *Burkett v. Ross,* 86 So. 2d 33, 36 (Miss. 1956)).
[43] *Burkett,* 86 So. 2d at 36 (emphasis added).
[44] *Id.*
[45] R. 4663, Special Master Report and Recommendation.
[46] *Compare JEA v. Williams,* 978 So. 2d 842 (Fla. Ct. App. 2008) (finding JEA responsible for attorneys' fees where JEA filed a petition for condemnation seeking a fee interest in appellee's property owners' land) *with Burkett,* 86 So. 2d at 36.

That being said, Promenade does not dispute JEA's position that JEA has no eminent domain power *in Mississippi*.[47] An agency's eminent domain power, however, is not a prerequisite for being held liable on the distinct claim of inverse condemnation. The United States Supreme Court explained that:

> The phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.…A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation.'[48]

The self-executing character of the U.S. and Mississippi Constitutions ensure just compensation under Amendment V and Article 3, §17, respectively. And, neither of those provisions identify as a pre-requisite – nor even mention – "eminent domain" powers.

Although it is rare for a public entity to so grossly exceed its power as to take private property without the requisite authority, courts have roundly rejected JEA's position when confronted with the issue:

- *Fountain v. Metropolitan Atlanta Rapid Transit Authority*:[49] "More importantly, however, we disagree with the basic premise of the district court that an inverse condemnation action will not lie against MARTA because it does not have the power of eminent domain."

- *Baker v. Burbank-Glendale-Pasadena Airport Authority:*[50] "We therefore conclude that plaintiffs' inverse condemnation action may be maintained although defendant lacks eminent domain power…Clearly, in cases of physical invasion an inverse condemnation action is appropriate."

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[47] *See* R. 5764, JEA Response to Plaintiff's Motion to Amend Complaint. In fact, JEA's concession on this point is yet another factor weighing in favor of the policy exception under the *Hyatt II* analytical framework.

[48] *United States v. Clarke*, 445 U.S. 253, 257, (1980) (quoting from D. Hagman, Urban Planning and Land Development Control Law 328 (1971) (emphasis supplied by Rhenquist, C.J.), and 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)); *see also McLemore v. Miss. Transp. Comm'n*, 992 So.2d 1107, 1111 (Miss. 2008) (describing Section 17 of the Mississippi Constitution as "self-executing" and "mandatory").

[49] 678 F.2d 1038, 1043 (11th Cir. 1982).

[50] 705 P.2d 866, 869 and N. 2 (Cal. 1985).

- *Mowrer v. Charleston County Park & Rec. Comm'n:*[51] "'as long as the state acts through one of its arms in such a way as to deprive an individual of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power.' Based on this reasoning, we hold that whether Defendants had authority to commit the acts about which Mowrer has complained is not relevant to the question of whether these acts amounted to an unconstitutional taking of his property for public use." (quoting 29A C.J.S. *Eminent Domain* §386, at 761 (1992)).

- *Dept. of Forests, Parks & Rec. v. Town of Ludlow Zoning Bd.*:[52] "Irrespective of the Department's eminent domain power, Lysobey was entitled to bring an inverse condemnation action against the Department to obtain compensation for the loss of the right to access his property[.]"

These decisions, and others like them, merely confirm the intuitive principle that a public entity cannot escape constitutional accountability for damaging or taking private property by arguing it had no authority for the taking in the first place. Consider the perverse incentives if JEA's position were true: foreign state actors could dump waste of an extreme negative value across state lines with relative impunity. JEA was already willing to pay over $1.5 million to transport some 80,000 tons of its combustion waste to Mississippi: surely JEA would be willing to pay an additional $500,000 for unchecked immunity.

It is illogical, if not inflammatory, for JEA to suggest that it can damage or destroy Mississippi private property and elude the constitutional requirements for just compensation based solely on JEA having flouted the territorial limits of its eminent domain power. Such a position is not borne out by the law, nor is it supported by the Mississippi or U.S. Constitution.

b. Promenade's property was taken and damaged by JEA's interstate waste removal and marketing program, which was instituted for a public purpose and realized a public benefit.

With respect to Promenade's proposed amendment, JEA's brief reads-in a futility analysis that simply does not appear anywhere in the Circuit Court's Omnibus Order. The Circuit Court did not conclude that Promenade's proposed amendment failed for want of a

[51] 605 S.E.2d 563, 566 (S.C. 2004).
[52] 869 A.2d 603, 609 (Vt. 2004).

"public benefit." Indeed, doing so would have ignored the most basic "public benefit" for the taking at issue. As was pled in Promenade's proposed Amendment, JEA's combustion waste was deposited on Promenade's land "to remove it from the State of Florida[.]"[53]

Perhaps relying on its unsubstantiated contention that a government entity's obligation to provide just compensation is predicated solely on the power of eminent domain, JEA contends that Promenade must allege a *Mississippi* public benefit. Incredibly, JEA argues: "Promenade alleges no 'public use' by Mississippi or its citizens. In fact, Promenade alleges the opposite – that a private shopping center was used as a dumping ground not for the benefit of Mississippi but to its detriment."[54] This argument completely ignores the fact that Promenade's proposed amendment sought just compensation pursuant to 42 U.S.C. § 1983 *vis-à-vis* Amendment V to the U.S. Constitution, *in addition* to the protections afforded by Article 3, §17 of the Mississippi Constitution. Of course there is no Mississippi benefit; it is the Jacksonville public entity that benefitted from JEA's interstate waste removal program. But neither the U.S. nor Mississippi Constitutions requires that the taking or damage to private property be by a Mississippi entity or for the benefit of a Mississippi entity.

In addition to the public benefit expressly identified in Promenade's proposed amendment, JEA benefited as a community-owned utility in several other ways. JEA placed its combustion waste into rail cars, and then directed and paid for their shipment to Mississippi:

- to benefit the operation of JEA's publicly-owned Northside Generating Station;[55]
- to avoid penalties from the Florida Department of Environmental Protection;[56]
- to relieve capacity in its publicly-owned and publicly permitted onsite Byproduct

[53] *See* R. 5695, Promenade's proposed Amendment to Complaint. *See also Kelly v. Corinth PUC*, 200 So. 3d 1107, 1118 (holding inverse condemnation is appropriate when private property is taken or damaged in respect to public use "*or use for the public benefit.*" (emphasis added)).
[54] Brief of Appellee JEA, p. 34.
[55] R. 2388, Promenade's Response to Itemized Facts in JEA's Re-Urged Motion for Summary Judgment (relying on its Exhibit D-22); *see also* P.R.E. 24-27, Approved Proposal.
[56] R. 2395, Promenade's Response to Itemized Facts in JEA's Re-Urged Motion for Summary Judgment (relying on its Exhibit A-50, Byproducts Services Agenda).

Storage Area solid waste landfill;[57]

- to record byproducts material sent to Mississippi as "beneficially reused" in order to protect the same designation for its byproducts marketed in the Jacksonville area (including those used in public projects by the Jacksonville Port Authority and the Florida Department of Transportation);[58]
- to save millions in off-site landfill fees;[59]
- to defer investment in additional onsite waste management infrastructure;[60] and
- to meet its annual financial obligations to the City of Jacksonville, Florida.[61]

As discussed in detail in Appellant's Brief, Promenade's physical invasion claim and proposed inverse condemnation claim, are premised in part on the precedent established by this Court in *King v. Vicksburg.* Whereas, JEA's "public use" counter-argument is premised on a decision by the Mississippi Court of Appeals in *Kelley, LLC v. Corinth Pub. Utilities Comm'n.*[62] *Kelley* neither disturbed nor subsumed this Court's ruling in *King*, and the underlying facts in *Kelley* are readily distinguishable.

In *Kelley*, a contractor solicited bids for the installation of waterlines for a private construction project and ultimately hired the low bidder among several private applicants for the work: the Corinth Public Utility Commission.[63] The Utility Commission charged the contractor for its services in accordance with its bid and subsequent contract. The circumstances underlying Promenade's claims are quite different: *the money flowed the opposite direction.* It was JEA who paid to have its waste material transported to Mississippi to avoid capacity

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[57] *See Id.*; *see also* R. 2388, Promenade's Response to Itemized Facts in JEA's Re-Urged Motion for Summary Judgment (relying on its Exhibits D-24, Matt McClure testimony and Approved Proposal (P.R.E. 24-27).

[58] R. 4584-4646 at 4588, Promenade's Response to JEA's Motion for Partial Summary Judgment (relying on P.R.E. 107, Florida BUD requiring "A majority of the industrial byproducts are demonstrated to be sold, used, or reused within one year."); *see also Id.* (relying on its Exhibit D, P.R.E. 345-352, Testimony of M. McClure; *see also* Id. at R. 4606 at its Exhibit Z, Byproduct Business Review Plan slide 53 (JEA recorded every ton it gave to LA Ash, for which JEA paid to have it shipped to Port Bienville, as going towards a "beneficial use.").

[59] Id. at R. 4587 (relying on P.R.E 0024, selecting LA Ash for "ash removal and marketing" "[w]ill reduce operating costs of byproducts storage area and future avoided costs with respect to landfill.")

[60] Id. at R. 4593 (relying on its Exhibit J, at slides 43 - 45, noting the infrastructure investment needed to expand JEA's onsite landfill or build a new JEA landfill to range between $730 million and $1 billion).

[61] *See* Brief of Appellee JEA, p. 10.

[62] 200 So. 3d 1107 (Miss. Ct. App. 2016).

[63] *Id*. at 1110.

limitations at its local on-site public landfill.[64] JEA, which is bound by a public purchasing code,[65] could not have subsidized shipments at a cost exceeding $1.5 million if doing so was not for a "public purpose."

That said, the foregoing recitation of the public purposes for JEA's conduct is unnecessary.[66] While the "public benefit" prong is satisfied in this case, it is not and should not be determinative of Promenade's rights against JEA. The "public benefit" prong is more appropriately considered as a check on attempted affirmative takings by eminent domain – not as a limit to recovery for inverse condemnation.

It is fundamental that a public entity cannot condemn property for a non-public use, and thus a property owner has a defense on that basis against any agency attempting to do so through formal eminent domain proceedings. But a public entity's self-serving allegation that its property-damaging activity was not for a "public use" cannot be used to shield the entity from its constitutional obligation to provide just compensation.

A Florida appellate court highlighted this logical inconsistency: "If appellee [City] here has, without authority, taken appellant's property, it is a strange proposition for appellee to now in effect say, 'Yes, I took your property, but I did not do it for a public purpose, and therefore, I am not required by the Constitution to compensate you for it.'"[67]

Thus, the circumstances of JEA's interstate waste removal and marketing program highlight the public purpose for JEA's activities: Even if there were no public purpose, JEA's

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[64] *See* R. 4584-4646 at 4602-4604, Promenade's Response to JEA's Motion for Partial Summary Judgment (relying on its Exhibit C (P.R.E. 342-4, Testimony of Mike Brost) and Exhibit R (Testimony of Scott Schultz (March 10, 2011) at Dep. Trns 182:24 - 184:4 and (May 19-20, 2014) Vol. 3, at Dep. Trns. 52:4 - 53:1).

[65] Id. at R. 4596 (relying on its Exhibit A, P.R.E. 332-8, Testimony of James Chapman).

[66] *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) ("'It is only the taking's purpose, and not its mechanics,' we explained, that matters in determining public use.").

[67] *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. 1st DCA 1975) (noting the difference between "a condemnation suit, as distinguished from an inverse condemnation suit[,]" and that the public purpose requirement is not a sword to be used against the landowner).

attempt to condition Promenade's inverse condemnation claim on the existence of a public purpose would be improper.

IV. JEA will not be prejudiced by the relabeling of Promenade's physical invasion claim as one for inverse condemnation.

JEA twists the logic of *Crum v. City of Corinth*,[68] which Promenade discussed in its Appellant's Brief. In *Crum*, the Mississippi Supreme Court held, "[Plaintiff] 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.'…depriving Crum of this opportunity would be 'patently unfair.'"[69] Applying *Hyatt II* to provide immunity to JEA would similarly reflect a change "to this Court's current approach" to the damages caps in the MTCA.

Promenade is the party that stands to suffer prejudice should it be denied an opportunity to conform its complaint to what JEA itself has described as a complete "change in the law."[70] However, JEA argues that there has been no change in the law significant enough for *Crum* to apply. If there was no change in the law, then there exists no exculpatory explanation for JEA to have waited four years to set its motion for a hearing and then waive its right to object to the Special Master's finding that JEA was not entitled to protection as a political subdivision under the MTCA. It was only after *Hyatt II* that JEA filed a motion for reconsideration based on a "change in the law." Either the law changed or it didn't; JEA can't have it both ways.

JEA's allegations of the need for additional discovery and new experts are hollow, as JEA has already designated two valuation experts and needs no new discovery on physical

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[68] 183 So. 3d 847, 852 (Miss. 2016).
[69] *Id*. (citing *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 1114 (Miss. 2015) ("as our treatment of discretionary function immunity changed significantly in consequence of *Brantley*, we find that it would be patently unfair to affirm summary judgment in the City's favor without Boroujerdi's having an opportunity to attempt to conform his complaint and proof to this Court's current approach")).
[70] *See* T. 1164: 4-9 (counsel for JEA argued, "we're seeking reconsideration of the special master's report and recommendation … [a]nd this Court's order … because the law has changed.").

invasion claims that have existed since 2015.[71] Moreover, no additional opinion testimony is needed with regard to the factual nature of the JEA bed ash materials. JEA has not contested that the material is a waste byproduct of JEA's electric generation process, nor has JEA contested that the bed ash in excess of that which JEA shipped to Mississippi or elsewhere was landfilled.

Because Rule 15 instructs that leave should be freely given, and because Promenade's inverse condemnation claim simply re-labels its physical invasion claim based on JEA's recently recognized public status, Promenade should be granted leave to amend its Complaint to conform.

V. Promenade's claims, including its proposed claim for inverse condemnation, are not environmental claims and do not seek environmental remedies.

Contrary to JEA's allegations, Promenade is not pursuing *per se* environmental claims. JEA's continuing mischaracterization of Promenade's proposed claim for inverse condemnation as an "environmental claim" cannot serve as grounds for denying Promenade's request to amend its complaint to conform to the change in the law. The Circuit Court has already determined that Promenade's existing claim for physical invasion to land (which alleged that JEA's materials were "unauthorized for use or distribution in Mississippi" and constitute a nuisance and/or trespass) was *not* subject to exhaustion of administrative remedies.[72] That decision is not under review and will proceed to a trial on the merits.

Promenade explained that it is not seeking enforcement by the MDEQ; rather Promenade is seeking an opportunity to try its proposed claim for inverse condemnation that would entitle Promenade to just compensation under the principles guaranteed by the Mississippi and United States Constitutions. Promenade's pursuit of just compensation through the courts is supported by JEA's stated position that, "in the absence of 'environmental or public health problems,'

[71] R. 4427-9, Report and Recommendation Granting Promenade's Motion for Leave to Amend.
[72] *See* R. 4431-5, Exhibit A to proposed amendment; see also R. 5821, Order Adopting Recommendation Denying Separate Motions for Summary Judgment.

MDEQ would have no interest in ordering remediation or corrective action."[73] No environmental or public health problems have been alleged, but that does not eliminate the impact of the presence of JEA's materials have on the value of Promenade's private property.

JEA muddles a critical distinction. While many of the facts developed in the case may be "environmental" in nature, Promenade's claims (including Promenade's proposed claim for inverse condemnation) are not seeking environmental relief under any Mississippi or Federal environmental statutes. Promenade's reference to Miss. Code Ann. § 17-17-1 in its proposed amendment is nothing more than a factual allegation, not a claim or "count" on which Promenade seeks relief.[74] As discussed below, this factual allegation was included in support of Promenade's claim for multiple occurrences under the MTCA. The actual "claim" Promenade sought leave to add is for inverse condemnation under the Mississippi and U.S. Constitutions.

JEA's assertions about the supposed limits on Promenade's ability to bring certain claims ignores the reality that the inverse condemnation claims are *constitutional* in nature and therefore not subject to the statutory or administrative limitations that JEA seeks to apply to them. JEA's arguments also fail to appreciate and apply the decisions dealing with similar issues in Mississippi. Both *Donald v. Amoco Production Co.*[75] and the subsequent *Georgia-Pacific Corporation, Inc. v. Mooney*[76] support the conclusion that Promenade can freely pursue common law and constitutional claims that do not seek an administrative remedy.

Also, JEA's position exposes another of its contradictions: (a) JEA asserts Promenade must exhaust its remedies, while (b) simultaneously challenging their existence.[77] The applicable case law explains that to effectively assert an exhaustion defense, a defendant must

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[73] R. 4664-4813 at 4680, JEA's Combined Reply in Support of Motion for Partial Summary Judgment.
[74] *See* R.5684-5698 at 5695-8, Promenade's proposed Amendment to Complaint.
[75] 735 So. 2d 161 (Miss. 1999).
[76] 909 So. 2d 1081 (Miss. 2005).
[77] *See* R. 4664-4813 at 4682, JEA's Combined Reply in Support of Motion for Partial Summary Judgment. ("the mechanical damage…is not the type of harm the SWDL covers").

demonstrate an agency remedy is both (1) available, and (2) adequate.[78] JEA has not done so.

Through dozens of depositions and hard-fought document discovery, Promenade has learned the truth: the JEA material that was passed off as a "product" was nothing more than a solid waste that was given a bath (literally) and an opaque technical-sounding name. If JEA is to be extended immunities reserved for Mississippi government entities through a fiction under the Full Faith and Credit Clause, Promenade should be permitted to pursue just compensation *vis-à-vis* inverse condemnation for the damage done to its land.

VI. The number of occurrences under the MTCA is determined by the repetition of the ministerial breaches, not the manner of the resultant harm.

JEA properly summarizes the holding in *S.W.*: "The court in *S.W.* rules that *each* breach of duty was subject to a new cap under § 11-46-15."

Both JEA's arguments and the Circuit Court's Omnibus Order improperly disconnect the multiple separate breaches of JEA's duties from the corresponding harm suffered by Promenade. The other cases relied on by JEA that discuss multiple occurrences have no factual nexus to the case at hand: Promenade is not seeking to aggregate liability limits, nor is it seeking to apply the caps on a per claimant basis.[79] On the other hand, the *S.W.* decision has an underlying logic that is similar to the circumstances which befell Promenade.

It is JEA's own position that each rail car it sent to Port Bienville, Mississippi was an independent transaction.[80] Accordingly, each decision to send a rail car constituted an independent breach of JEA's ministerial duties to dispose of its power plant waste properly. The

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[78] *See* R. 4584-4646 at 4639, Promenade's Response to JEA's Motion for Partial Summary Judgment (citing *Ass'n Cas. Ins. Co. v. Allstate Ins. Co.*, 507 F. Supp. 2d 610 (S.D. Miss. 2007), among others).
[79] *See* Brief of Appellee JEA, p.43 (JEA relies on the dissimilar cases of *Prentiss Ct. Bd. of Educ. v. Beaumont,* 815 So. 2d 1135, 1137 (Miss. 2002), and *Allred v. Yarborough,* 843 So. 2d 727, 730 (Miss. 2003)).
[80] *See* R. 6117-6293 at 6129, Promenade Response to JEA's Motion for Partial Summary Judgment on Issue of Multiple Occurrences (relying on its Exhibit C, Testimony of S. Schultz (March 10, 2011), at 211:2 - 3, and JEA's Response to Promenade's Request for Admission No. 16 (characterizing the shipment of byproducts as independent transactions)).

duty which JEA repeatedly breached can be found in the common law established by this Court: "'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."[81]

The foregoing common law duty is also echoed by statute in Miss. Code Ann. §17-17-1. In Promenade's proposed amendment, Promenade included a factual allegation referencing JEA's ministerial duties under Miss. Code Ann. §17-17-1 to serve as an additional predicate to seek a finding of multiple occurrences. JEA attempts in vain to twist a factual allegation into a count or claim for relief that simply does not exist in Promenade's papers, and that should not distract from the genuine issues of material fact regarding the number of times JEA breached its ministerial duties causing Promenade repeated harm.

Each railcar sent to Mississippi constitutes the best evidence of JEA's breach. JEA's focus on the modes of transportation and pleading linguistics is short-sighted. It is the multiple affirmative breaches of JEA's duties that controls the number of occurrences.

VII. Summary judgment on Promenade's longstanding claim for injunctive relief is premature because of the existence of genuine issues of material fact.

JEA does not address the cases relied on by Promenade that speak directly to the facts and circumstances surrounding the injuries to Promenade's property.[82] Instead, JEA relies on unsupported assertions about the extent and immediacy of Promenade's ongoing harm, and recycles an exhaustion argument that does not apply to Promenade's common law claims.[83]

For JEA to claim that "Promenade's property is not under any imminent threat[,]"

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[81] *Donald*, 735 So. 2d at 175.
[82] *See, e.g., Gulf Park Water Co. v. First Ocean Springs Dev. Co.,* 530 So. 2d 1325 (Miss. 1988) and *Phillips v. Davis Timber Co*, 468 So. 2d 72 (Miss. 1985).
[83] *See* Part V, *supra* regarding exhaustion.

completely ignores the characteristics of JEA's bed ash materials and the inequitable burden shifting should Promenade be required to remove and dispose of all of the material itself.

As for irreparable harm, JEA claims that Promenade can put a dollar-figure on the cost of repair and removal of JEA's material. This contention ignores the practical realities (i) that the abatement of a nuisance on land presents scenarios in which equitable relief is particularly appropriate and (ii) that JEA has also demanded that the MTCA's damages caps be applied to foreclose Promenade's opportunity to be awarded those funds. As to the latter point, JEA's own positions – if upheld – create a situation in which Promenade's harm is *per se* irreparable with no adequate remedy at law.[84]

Accordingly, the threatened harm is inherently imminent, and (in addition to the involvement of real property) JEA has advocated itself into a corner of irreparability by seeking application of the damages caps.

CONCLUSION

Based on the foregoing, this Court should reverse the Circuit Court's application of *Hyatt II* to JEA, because JEA is not a sovereign arm of the State of Florida and because extending the MTCA's damages caps to JEA is contrary to Mississippi policy. Alternatively, if this Court affirms the Circuit Court's extension of MTCA immunity to JEA, the Court should reverse the Circuit Court's refusal to allow Promenade to amend and present its case for inverse condemnation. Additionally, the Court should reverse the Circuit Court's granting of summary judgment to JEA on Promenade's claims for injunctive relief and on the issue of multiple occurrences under the MTCA.

[84] JEA's follow-up contention, that allowing injunctive relief under these circumstances would open the door to other plaintiffs to attempt to end-run the MTCA in future Mississippi cases, is unfounded. Promenade's harm involves damages to its real property, a future case involving circumstances similar to those here against a Mississippi entity would fall outside of the MTCA, as the plaintiff would be entitled to due compensation under Art. 3, §17 of the Mississippi Constitution.

Respectfully submitted, this the 15th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all parties by operation of the Court's electronic filing system:

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