

**Statute of Limitations Drowns Homeowners'  
Recovery of Personal Property Damages from Flood**

by

James R. Keller

This article appeared in *St. Louis Construction News & Real Estate*, p. 10-11, January-February, 2007.

Missouri's Western District Court of Appeals recently decided that homeowners who suffered flood losses due to the construction by the Missouri Highways and Transportation Commission (MHTC) of a highway bypass for Highway 65 around Carrollton waited too long to file their lawsuit for damages to their personal property. The case is *Randolph d/b/a Randolph Farm Equipment, et al. v. Missouri Highways and Transportation Commission*, 2006 WL 3589483 (Mo. App. W.D.), decided December 12, 2006.

The Randolphs, as landowners, had sued the MHTC for inverse condemnation. A claim for inverse condemnation means that a government entity (in this case MHTC) allegedly engaged in wrongful activity that created an invasion or appropriation of a valuable property right of landowner.

The Randolphs alleged that the construction around Highway 65 had materially changed and altered the flow of the surface water around the highway and Wakenda Creek which resulted in the flooding of their property in 1993 and again in 1998. The MHTC had completed the construction that caused the flooding of landowners' property in 1977.

They filed suit on May 24, 1999, more than five years after the flood of 1993 but obviously only one year after the 1998 flood. The 1993 flood was rare and one of the worst in Missouri's history.

The landowners admitted they had suffered personal property losses before 1998. The appellate court thus decided that the first flood in 1993 triggered the five-year statute of limitations and any suit for personal property damage had to be brought by 1998. A lawsuit in 1998 would have been 21 years after the construction.

During the pre-trial conference, the trial judge granted MHTC's motion to dismiss from the lawsuit the Randolphs' claim for personal property damages, based on Missouri's five-year statute of limitations. The jury returned a verdict in favor of the property owners for their real estate damages. After the jury verdict, the judge denied the landowners' request for attorney fees but did award them prejudgment interest.

On appeal, the appellate court reaffirmed that Missouri courts recognize that inverse condemnation actions derive from constitutional protections (rather than common law tort liability) afforded landowners so that their property cannot be taken without just compensation. The courts extend the time to sue for real property damages in inverse condemnation cases to ten years, the same time a public entity with power to condemn would need to obtain a prescriptive easement.

The landowners asked the court to overturn prior case law from 2001 that requires lawsuits within five years for personal property losses. The appellate court concluded that nothing has changed in the law since 2001 to prompt the court to now find that personal damages are subject to the longer period allowed for real estate damages. The property owners could not recover for personal damages caused in either flood.

While the appellate court did not specifically address this, by finding that the landowners should have sued sooner, this means that they should have brought a lawsuit before they may even have known about the second flood. It always is difficult for a jury to know how and whether to assess damages for future events—like another flood—when deciding how much to award. It also means that no matter how many more floods there may be, the landowners cannot recover for their personal damages from them.

The appellate court also reaffirmed that Missouri law does not authorize the award of attorney fees in inverse condemnation cases even though the landowners had won on their claim for real property damages. Recovery of costs or fees against state agencies like the MHTC cannot occur, the court held, absent express statutory authority.

The MHTC challenged on appeal the trial court's award of prejudgment interest. The Western District noted that it had just decided this same issue on October 31, 2006, in *Collier v. City of Oak Grove*, WD 65355 (Mo. App. W.D.) when it found that a trial court had erred by adding prejudgment interest to a jury's verdict in an inverse condemnation action.

The Western District held that prejudgment interest could have been awarded by the jury (but not the judge) to the Randolphs for the period of time between the start of the wrongful action by the MHTC and the time of payment of the judgment.

Ironically, the parties had agreed that the judge should add prejudgment interest to the jury's verdict if in favor of the landowners, which is exactly what the trial court did after the jury's verdict. The Western District

noted that this “probably is the best procedure for awarding prejudgment interest,” but it is not permissible under present Missouri law in an inverse condemnation case. The court urged the Missouri legislature (as it did in *Collier*) to remedy this situation.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.