

NO. SC92062

IN THE MISSOURI SUPREME COURT

PAT DUJAKOVICH, *et al.*,
APPELLANTS

vs.

ROBIN CARNAHAN, *et al.*,
RESPONDENTS.

Appeal from the Circuit Court of Cole County, Missouri
Honorable Jon Edward Beetem

APPELLANTS' REPLY BRIEF

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POINTS REPLIED TO

I.

Response to Respondents' Standard of Review Arguments (Intervenor-Respondents' Unnumbered Introductory Point and Defendant-Respondents' Point I).

Intervenor-Respondents argue that this court should overrule its earlier decision in *State ex rel. City of Creve Coeur v. St. Louis County*, 369 S.W.2d 184, 187 (Mo. 1963). Appellants contend that the *Creve Coeur* decision sets out the proper standard of review. As this court stated in *Creve Coeur*, the only question before the Court in considering the motions to dismiss is whether the Appellants pleaded facts entitling them to a declaration of rights.

Intervenor and Defendant-Respondents claim that the trial court was permitted to treat their motions to dismiss as motions for judgment on the pleadings.

To the extent that a trial court may treat a motion to dismiss as a motion for judgment on the pleadings, it is clear from the record that the trial court did not treat the motions as motions for judgment on the pleadings. The trial court stated the following in dismissing Count II of Plaintiffs' petition, in pertinent part: "Accordingly, Count II fails to state a claim upon which relief may be granted and is dismissed with prejudice." L.F. 203. As to Count III, the trial court stated that a "similar analysis requires dismissal with prejudice as well." L.F. 203. Finally, with respect to the Count IV, the trial court stated: "That claim will also be dismissed with prejudice." L.F. 203. The trial court did not treat the motions to dismiss as motions for judgment on the pleadings and the cases cited by

both Intervenor and Defendant-Respondents stating that it was permitted to do so are irrelevant for the purposes of this appeal.

Additionally, as noted by the court in *In re Marriage of Busch*, cited by both Intervenor and Defendant-Respondents, a motion to dismiss is made before the filing of an answer, while a motion for judgment on the pleadings is not made until the pleadings are closed. 310 S.W.3d 253, 260 (Mo. App. E.D. 2010). Rule 55.27(b) governs motions for judgment on the pleadings and states as follows: “After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” In this case, Intervenor-Respondents did not file an answer to the Plaintiffs’ Second Amended Petition. The Second Amended Petition was deemed filed on April 8, 2011. L.F. 83. Intervenor-Respondents filed their motion to dismiss on April 19, 2011, well before the close of the pleadings. L.F. 116. The trial court could not have treated the motion filed before the close of the pleadings as a motion for judgment on the pleadings.

This case is an appeal from the trial court’s judgment dismissing Appellants’ Second Amended Petition, and the appropriate standard of review is the standard set forth in Appellants’ brief.

Finally, Intervenor-Respondents claim that “in [declaratory judgment] cases where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile.” *Clifford Hindman Real Estate, Inc. v. City of Jennings*, 283 S.W.3d 804, 808 (Mo. App. E.D.

2009). ” Int. Resp. Br. 14. Intervenor-Respondents also cite to *State ex rel. American Eagle Waste Industries*, 272 S.W.3d 336, 341 (Mo. App. E.D. 2008) for further support. Defendant-Respondents join in this argument citing to the same authority. Respondents argue further that these cases provide authority for this Court to exceed the standard of review on a motion to dismiss for failure to state a claim and review the merits of Appellants’ second amended petition and enter a judgment as a matter of law.

Respondents misunderstand the implication of this authority. Neither case stands for the notion that this court may enter a judgment on merits in favor of Respondents, or that remand in this case would be “futile.” Rather, in both cases the appellate courts remanded the cases back to the trial courts. Both cases hold that when the trial court does prematurely decide questions of law when ruling on a motion to dismiss, the appellate court has jurisdiction to correct the trial court’s erroneous conclusions of law before remanding the matter back to the trial court so the trial court does not make the same errors of law again when the case proceeds for a judgment on the merits.

In *State ex rel. American Eagle Waste Industries*, the appellate court determined that because the trial court prematurely reached the merits of Plaintiff’s claim, it would review the trial court’s conclusions of law “in order to guide the court’s determination on remand.” 272 S.W.3d 336, 341 (Mo. App. E.D. 2008). The appellate court then remanded the case back to the trial court with instructions to correct its erroneous interpretation of the statute at issue in the case. *Id.* at 343.

In Clifford Hindman Real Estate, Inc., the court similarly determined that “where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile.” In *Hindman*, the trial court had determined that the plaintiff lacked standing to bring its petition for declaratory judgment, “which should have prompted dismissal.” *Id.* at 808. Rather than entering a dismissal, however, the trial court analyzed the validity of the ordinance at issue, ruled on the merits of the case and entered a declaratory judgment in favor of the defendants. *Id.* The appellate court determined that the trial court’s review of the merits was improper, and concluded that this improper review of the merits by the trial court provided the appellate court the jurisdiction to review the merits prior to remand. *Id.* The appellate court then reviewed the merits, reversed the trial court’s judgment and remanded it back with instructions to enter declaratory judgment in favor of the plaintiff. *Id.* at 809.

In both cases, the appellate courts reached the merits because they determined that the plaintiffs’ cases had been prematurely dismissed and that review of the trial courts’ premature legal conclusions was necessary in order to ensure the same mistakes were not made on remand. In neither case did the appellate court determine that remand was unnecessary.

Pursuant to this authority, Appellants ask this court to remand this case back to the trial court with instructions to correct its erroneous conclusions of law for the reasons set forth in Appellants’ Brief and herein.

II.

Initiative Petition 2010-007 required the City to hold elections in order to continue its earnings tax in violation of Article X, Sections 16 and 21 of the Missouri Constitution. (Response to Intervenor-Respondents' Point III and Defendant-Respondents' Point III(a)).

Respondents note that in dismissing Counts II and III of its Second Amended Petition, the trial court held that Initiative Petition 2010-077 “terminated” the City’s authority to have an earnings tax. This is an erroneous legal conclusion. The official ballot title of Initiative Petition 2010-077 certified by Defendant Carnahan states the following: “Shall Missouri law be amended to . . .require voters in cities that currently have an earnings tax to approve continuation of such tax at the next general municipal election and at an election held every 5 years thereafter.” L.F. 89. Section 92.105 states the following: “It is the intent of sections 92.105 to 92.125 that starting in 2011, voters in any city imposing an earnings tax will decided in local elections to continue the earnings tax.”

The City’s authority to have an earnings tax was not terminated. Rather, a new condition was imposed upon the City by state voters in order for the City to continue the earnings tax. Intervenor-Respondents state the following on page 26 of their Brief: “As the trial court held in language that is conveniently ignored by Appellants, the City’s authority to impose an earnings tax was withdrawn by the statute enacted through the

initiative – in the trial court’s words, the authority was ‘terminated.’” Int. Resp. Br. 25-26.

Intervenor-Respondents use this erroneous legal conclusion as the basis for distinguishing this case from *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. 1996), which concerned the issue of water testing. “In *Missouri Municipal League*, the authority for a city to provide water was a continuing one. Here the authority to tax has been terminated.” Int. Resp. Br. 26.

The City’s authority to tax is also a continuing one. It has not been terminated. Appellants, and other Missouri voters, were alerted to this fact by the ballot title certified by Defendant Carnahan. When Appellants cast their votes, they were informed that the measure would require them and other Kansas City voters to approve continuation of the earnings tax. It is true that the statutes proposed by Initiative Petition 2010-077 did prohibit cities that did not have an earnings tax at the time of the election from implementing a new earnings tax following passage of the statutes. § 92.105 RSMo. But Kansas City’s authority to tax is continuing, and the tax has in fact continued, uninterrupted, following the mandated election that Kansas City was required to have in April 2011 after state voters approved the statues contained in Initiative Petition 2010-077. App. Br. 61.

III.

Initiative Petition 2010-007 required the City to hold elections in order to continue its earnings tax in violation of Article III, § 51 of the Missouri Constitution.

(Response to Intervenor-Respondents' Point I and Defendant-Respondents' Point IV(b)).

As stated in Point II above, the trial court's dismissal of Count II of Appellants' Second Amended Petition was based on its erroneous conclusion that Initiative Petition terminated the City's authority to continue to levy an earnings tax. Appellants ask that this Court reverse the trial court's dismissal and remand this case back to the trial court with instructions to correct this erroneous conclusion.

IV.

Initiative Petition 2010-007 resulted in an amendment to the City's Charter without following the process required by Article VI, Section 20 of the Missouri Constitution for amending a City Charter and is therefore unconstitutional.

The trial court stated the following in dismissing Count IV of Appellants' Second Amended Petition:

With respect to any remaining issues in Count IV and in that the power to limit or deny powers to a constitutional charter city, limited only to issues not relevant herein, rests with the people and/or the legislature. That claim will also be dismissed with prejudice. L.F. 203.

Appellants argued in their brief that a City Charter may only be amended through a *local* initiative process as set forth in Article IV, §20 of the Missouri Constitution. Further, Appellants argued that allowing state voters to amend a City Charter through the

process set out in Article III, §§ 49-51 is an attack on home rule provisions that have been a part of Missouri's history since 1875.

Appellants will not repeat those arguments here, but ask that this Court remand this case back to the trial court with instructions that the trial court correct its erroneous conclusion that the people of the *state* may amend a City Charter through a statewide initiative, and enter its judgment holding that a City Charter may only be amended through a *local* initiative as set out in Article IV, §20.

V. Conclusion

For the foregoing reasons, as well as the reasons stated in Appellants' brief, this Court should reverse the trial court's Order and Judgment dated August 15, 2011 and remand this cause to the trial court with instructions to correct its erroneous conclusions of law that formed the basis for its dismissal and enter judgment in favor of Appellants.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Sarah Baxter, attorney for Appellants, hereby certifies that she is in compliance with Rule 55.03, that this brief is in compliance with the limitations contained in rule 84.06(b), that Appellant's brief contains 2,266 words, that the brief was prepared using Microsoft Word 13 point Times New Roman font. I hereby certify that I electronically filed Appellant's Reply Brief through the Missouri eFiling System this 20th day of March 2012, and that notification of such filing will be sent to the following eFiling participants of record in this case:

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