

IN THE SUPREME COURT OF MISSOURI

SC91737

**EASTERN MISSOURI COALITION OF POLICE,
FRATERNAL ORDER OF POLICE, LODGE 15,**

Respondent,

v.

CITY OF UNIVERSITY CITY,

Appellant.

**Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit, Division 20,
Honorable Judge Colleen Dolan
Case No. 09SL-CC00023**

SUBSTITUTE BRIEF OF RESPONDENT

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INTRODUCTION

In 2007, the Missouri Supreme Court gave all public employees, including teachers and police officers, the right to organize and bargain collectively through representatives of their own choosing as guaranteed by Article I, Section 29 of the Missouri Constitution. Independence-National Education Association v. Independence School District, 223 S.W.3d 131, 133 (Mo.banc 2007). This Court held that the “right to organize and bargain collectively” from Article I, Section 29 applied “to public employees as well as private-sector employees.” Id. Through its application of Article I, Section 29, this Court held that all public employees have the fundamental, constitutional right to organize and bargain collectively through representatives of their own choosing.

This Court specifically explained how their holding would be applied in the interim until the Missouri Public Sector Labor Law¹ could be amended to include public sector employees that had previously been excluded:

“To be consistent with article I, section 29, the statute’s exclusion of teachers cannot be read to preclude teachers from bargaining collectively. Rather, the public sector labor law is read to provide procedures for the exercise of this right

¹ The Public Sector Labor Law, §§105.500 – 105.520, RSMo., implements the constitutional right of collective bargaining for public employees other than police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, and all teachers of all Missouri schools, colleges and universities. §105.510, RSMo.; Independence, 223 S.W.3d at 136 and n.2.

for those occupations included, but not to preclude omitted occupational groups from the exercise of the right to bargain collectively, because all employees have that right under article I, section 29. Instead of invalidating the public sector labor law to the extent that it excludes teachers, this Court’s reading of the statute recognizes the role of the general assembly, or in this case, the school district – in the absence of a statute covering teachers – to set the framework for these public employees to bargain collectively through representatives of their own choosing. In this regard, it is noteworthy that prior to this controversy, the district in effect recognized the teachers’ right to bargain collectively through its ‘discussion procedure.’”

Independence, 223 S.W.3d at 136.

Relying on this Court’s decision in Independence, the trial court found that the actions of Defendant University City violated the constitutional rights of the City’s police officers and sergeants as guaranteed in Article I, Section 29. (Legal File pages (“L.F.”) 119-120). In its Order and Judgment the trial court directed Defendant University City to “expeditiously establish a reasonable framework of its choosing for collective bargaining” to include the scope of the bargaining unit, procedures for a certification election of an exclusive bargaining representative, and the procedures for the meet and confer process. (L.F. 120).

The Missouri Court of Appeals Eastern District also followed the Missouri Supreme Court’s holding from Independence in its opinion. (Court of Appeals’ Opinion “Ct. App.” pages 4-9). The Court of Appeals affirmed and amended in part the trial

court's judgment and, due to the general interest and importance of the issues presented, transferred the case to this Court. (Ct. App. 9).

JURISDICTIONAL STATEMENT

Defendant/Appellant, City of University City (“University City” or “City”) appealed a Declaratory Judgment entered in favor of Plaintiff/Respondent, Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (“FOP Lodge 15”) after the parties submitted cross motions for summary judgment. Honorable Judge Barbara Wallace of Division 13 of the Circuit Court of St. Louis County, Missouri, entered her Order and Judgment on August 13, 2010 granting FOP Lodge 15’s Motion for Summary Judgment. In the judgment, University City was ordered to “expeditiously establish a reasonable framework of its choosing for collective bargaining” to include the scope of an appropriate bargaining unit, procedures for an election “for certifying FOP Lodge 15 as the exclusive bargaining unit for the City’s police officer and sergeants”, and procedures for the meet and confer process. On or about May 3, 2011 the Eastern District of the Missouri Court of Appeals affirmed in part and amended in part the trial court’s Order and Judgment. Pursuant to Rule 83.02, Missouri Rules of Civil Procedure, the Court of Appeals transferred this case to the Supreme Court of Missouri due to the general interest and importance of the issues presented.

STATEMENT OF FACTS

Pursuant to Rule 84.04(c) and 84.04(f) FOP Lodge 15 submits its Statement of Facts as a more “fair and concise statement of facts relevant to the questions presented.”

Respondent, Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (“FOP Lodge 15”) is a Missouri corporation. (L.F. 115). Appellant, City of University City, Missouri (“University City” or “City”) is a charter city formed pursuant to and governed by the Charter of the City of University City. (L.F. 115). University City operates the University City Police Department, which is the city department having law enforcement authority for the City of University City. (L.F. 5-6).

In December of 2008, thirty-nine (39) police officers and sergeants employed by University City signed a “Fraternal Order of Police, Lodge 15, Representation Interest Card” which stated that they supported the certification of FOP Lodge 15 as their exclusive representative for collective bargaining purposes with University City. (L.F. 6, 31, 40). The number of signed cards demonstrated a majority of support of the City’s police officers and sergeants for FOP Lodge 15 to act as their exclusive representative for collective bargaining purposes with University City. (Tr. 6, 31, 41).

On January 5, 2009, FOP Lodge 15 sent correspondence to University City requesting “voluntary recognition by the City of University City of FOP Lodge 15 as the exclusive bargaining representative of the City’s police officers and sergeants for the purposes for collective bargaining.” (L.F. 6, 31-32, 41, 70-72, 115). On January 22, 2009, University City sent correspondence to FOP Lodge 15 indicating that the City

declined to voluntarily recognize FOP Lodge 15 as the exclusive representative for its police officers and sergeants. (L.F. 7, 32, 41, 73, 116).

On January 27, 2009, FOP Lodge 15 sent further correspondence to University City requesting the City to establish a framework for its police officers to bargain collectively through representatives of their own choosing pursuant to Independence – NEA v. Independence School District, 223 S.W.3d 131 (Mo.banc 2007). (L.F. 7, 32, 41-42, 74-76, 116). On January 30, 2009, University City declined FOP Lodge 15's request again. (L.F. 8, 32-33, 42, 77, 116).

University City has never recognized FOP Lodge 15 or any other organization as the exclusive bargaining representative for any of the police officers or sergeants employed by the City. (L.F. 33, 43, 119).

University City has never created a framework for collective bargaining purposes for its police officers and sergeants. (L.F. 33, 42-43, 120).

FOP Lodge 15 filed its Petition against University City on April 1, 2009 seeking a declaratory judgment that the City has an affirmative duty, pursuant to Article 1, Section 29 of the Missouri Constitution, to establish a meaningful framework of procedures that allows its police officers and sergeants to organize and bargain collectively. (L.F. 5-17, 33, 42, 116).

On April 30, 2010, University City and FOP Lodge 15 filed cross motions for summary judgment and memorandums of law in support thereof. (L.F. 2, 28-39, 45-62).

On August 13, 2010 the trial court entered its Order and Judgment granting FOP Lodge 15's Motion for Summary Judgment. (L.F. 3, 115-120) The trial court ordered

University City to “expeditiously establish a reasonable framework of its choosing for collective bargaining” which was to include the scope of an appropriate bargaining unit, procedures for a certification election, and procedures for the meet and confer process. (L.F. 120).

The City appealed the trial court’s opinion to the Eastern District of the Missouri Court of Appeals. (L.F. 123-125). On May 3, 2011 the Court of Appeals issued its Opinion affirming in part and amending in part the trial court’s Order and Judgment, and, due to the general interest and importance of the issues presented, transferred the case to the Supreme Court of Missouri. (Ct. App. 9).

POINTS RELIED ON

I. The trial court and the Court of Appeals did not err in ordering University City to “expeditiously establish a reasonable framework of its choosing for collective bargaining” because the separation of powers doctrine does not forbid such relief, in that the trial court’s order only provided general guidance for the framework’s contents.

A. University City’s argument relying on the separation of powers doctrine is inapposite and unfounded.

B. The doctrine of separation of powers substantiates the trial court’s judgment ordering University City to adopt a reasonable collective bargaining framework for its police officers and sergeants.

Missouri Constitution, Article I, Section 29

Independence-National Education Association v. Independence School District,

223 S.W.3d 1131 (Mo.banc 2007)

Lenette Realty v. City of Chesterfield, 35 S.W.3d 399 (Mo.App.E.D. 2000)

II. The trial court and the Court of Appeals did not err in declaring that University City has a legally enforceable duty to establish a framework for collective bargaining pursuant to Article I, Sections 29 of the Missouri Constitution and the Missouri Supreme Court’s holding in Independence-NEA v. Independence School District, 223 S.W.3d 1131 (Mo.banc 2007).

Missouri Constitution, Article I, Section 29

Independence-National Education Association v. Independence School District,

223 S.W.3d 1131 (Mo.banc 2007)

Johnson v. Christ Hospital, 84 N.J. Super. 541 (1964)

Missey v. Cabool, 441 S.W.2d 35 (Mo. 1969)

Quinn v. Buchanan, 298 S.W.2d 413 (Mo.banc 1957)

III. The trial court and the Court of Appeals did not err in declaring that FOP Lodge 15 has standing to sue on behalf of its members through the doctrine of associational standing.

- A. FOP Lodge 15's members have standing to bring suit in their own right.**
- B. The interests FOP Lodge 15 seeks to protect are germane to its purpose.**
- C. FOP Lodge 15's members did not need to participate individually in the lawsuit to obtain the relief requested.**
- D. The collective bargaining representative of the police officers and sergeants employed by University City is entitled to be their exclusive collective bargaining representative.**

Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921

(Mo.App.E.D. 1984)

Bankers Assoc. v. Div. of Credit Unions, 126 S.W.3d 360 (Mo.banc 2003)

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977)

Independence-National Education Association v. Independence School District,

223 S.W.3d 1131 (Mo.banc 2007)

ARGUMENT

I. The trial court and the Court of Appeals did not err in ordering University City to “expeditiously establish a reasonable framework of its choosing for collective bargaining” because the separation of powers doctrine does not forbid such relief, in that the trial court’s order only provided general guidance for the framework’s contents.

Applicable Standard of Review

This case is an action for declaratory judgment decided on cross motions for summary judgment. (L.F. 115-120). Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976) sets out the standard of review for a judge-trying case. The trial court’s judgment will be sustained unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Id.

Whether a motion for summary judgment should be granted is a question of law and the court’s review is de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993). Summary judgment is proper where the movant establishes the absence of any genuine issue of material fact and a legal right to judgment. Id. at 378. The record is reviewed in the light most favorable to the party against whom judgment has been entered. Id. Facts set forth are taken as true unless contradicted by the non-moving party’s response. Id. at 376. The trial court’s judgment will be affirmed if it is sustainable on any theory. Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc., 239 S.W.3d 631 (Mo.App.E.D. 2007).

Argument in Support of the Trial Court’s Judgment

A. University City’s argument relying on the separation of powers doctrine is inapposite and unfounded.

University City argues that the trial court’s judgment violates the separation of powers doctrine under Article II, Section 1 of the Missouri Constitution in its judgment by ordering University City “to expeditiously establish a specific framework for collective bargaining with its police officers and sergeants. (Appellant, University City’s Brief (“App. Br.”) 12). In actuality, pursuant to the Missouri Supreme Court’s holding in Independence and the Missouri Court of Appeals’ decision in Lenette Realty & Investment Co. v. City of Chesterfield, 35 S.W.3d 399 (Mo.App.E.D. 2000) the trial court ordered University City to “establish a reasonable framework of its choosing for collective bargaining” (L.F. 119, 120) rather than a “specific” framework as the City repeatedly asserts in its brief.

University City relies on language from State v. Banks, 454 S.W.2d 498 (Mo.banc 1970) for its proposition that the trial court’s judgment constituted an encroachment upon a legislative body and was violent toward the doctrine of separation of powers. (App. Br. 13). However, State v. Banks involved the historical power of a legislative body to judge the qualifications of its own members. 454 S.W.2d at 501. In State v. Banks, the Court’s decision to defer to the legislature was guided by Article II, Section 18 of the Missouri Constitution which specifically stated that each house of government would be the sole judge of its members’ qualifications. Id. at 500. Thus, in actuality, State v. Banks furthers the idea that it is the judiciary’s responsibility to protect enumerated constitutional rights as it did in State v. Banks. The separation of powers doctrine is

meant to protect constitutional rights. Here, the trial court protected the constitutionally guaranteed collective bargaining rights of University City's police officers and sergeants.

The City claims that Lenette Realty supports its contention that a municipality cannot be ordered to engage in particular, affirmative conduct. (App. Br. 13). University City relied on this case in its motion for summary judgment at the trial court level, and as a result the trial court addressed the Lenette Realty decision in its Order and Judgment. (L.F. 119). In Lenette Realty, the Missouri Court of Appeals upheld the trial court's judgment which determined that the existing zoning restriction was invalid and ordered the city "to place a reasonable zoning classification" on the properties in question. 35 S.W.3d 408-409. Here, the trial court, noting the decision in Lenette Realty, ordered University City "to adopt a reasonable framework of its choosing for collective bargaining" rather than ordering the City "to establish or adopt a particular framework" so as not to "raise questions of the separation of powers of the legislative and judicial branches." (L.F. 119). The trial court recognized that University City's actions, or lack thereof, were invalid by denying the constitutional rights of its employees, and ordered the City to remedy the situation without violating the doctrine of separation of powers. (L.F. 119-120).

University City seemingly makes the argument that the trial court, through its Order and Judgment, ordered the City to pass a specific City ordinance thereby adopting an explicit collective bargaining framework detailed by the court's decision. University City argues that its "status as a legislative body... protects it from being ordered to take legislative action by the judiciary" relying on the separation of powers doctrine. (App.

Br. 12). In its Judgment, the trial court makes no such order or even mentions that the City must pass a specific ordinance to comply with its ruling.

Here, the trial court merely ordered the City to adopt “a reasonable framework of its choosing” to include the usual elements of a collective bargaining framework. The trial court’s order allowed University City the flexibility to comply with its judgment without placing stringent guidelines on the contents of the framework. Any so-called “specifics” of said framework were mere perimeters of a typical framework for collective bargaining purposes. As stated in the Court of Appeals’ Opinion, the trial court’s order comports “with the constitution by respecting City’s authority to define the specific terms of a ‘reasonable framework of its choosing’ and providing only general guidance on basic components thereof.” (Ct. App. 9).

“Collective bargaining” as a term of art entails “negotiations between an employer and the representatives of organized employees to determine the conditions of employment.” (Ct. App. 6 citing Independence, 223 S.W.3d at 138, n.6, citing Black’s Law Dictionary (8th Ed. 2004)). Collective bargaining requires more than just talking to or meeting with an employee or group of employees. In its order, the trial court set out the basic components required to initiate the collective bargaining process. In order to collectively bargain with employees, a specified bargaining unit must be set forth. Accordingly the trial court stated that the City’s framework was to include “the scope of an appropriate bargaining unit.” (L.F. 120). In order to collectively bargain with employees, an employee representative must be elected. For that reason the trial court instructed the City to include “procedures for the election process.” (L.F. 120).

Procedures for the negotiations between the employer and the representative of the employees would need to be described; consequently the trial court directed the City's framework to include "procedures for the meet and confer process." (L.F. 120).

In its Opinion, the Eastern District of the Missouri Court of Appeals distinguishes between the general perimeters set forth in the trial court's order with the portion of the court's directive that it deems "too specific to withstand constitutional scrutiny." (Ct. App. 9). The Court of Appeals stated that specifically directing University City to designate FOP Lodge 15 as the exclusive bargaining unit "preempts the very procedures yet to be adopted." (Ct. App. 9). By amending the trial court's order, the Court of Appeals made an explicit distinction of specific terms that would violate the separation of powers doctrine; consequently affirming that the remaining elements of the trial court's order withstood constitutional scrutiny by not violating the separation of powers doctrine.

In its brief, University City argues that the holding of Independence does not allow the trial court to "order a legislative body to legislate" since Independence involved a school district that had already allowed its employees to organize and bargain collectively rather than a municipality that refused to allow its employees to organize and bargain collectively. (App. Br. 15). University City mistakenly argues that because the defendant school district in Independence "was not a legislative body," the Supreme Court's decision fails to apply in this case since University City is a "legislative body." (App. Br. 16). The Court in Independence unequivocally held that all public sector employees have the right to organize and bargain collectively through representatives of their own choosing. 223 S.W.3d at 133. Regardless of the type of defendant in

Independence, its holding is applicable here to protect the rights of the University City police officers and sergeants to organize and bargain collectively through their chosen representatives.

Further, acceptance of the City's argument, that it can not be ordered to establish a framework for collective bargaining, would render the Supreme Court's decision in Independence meaningless. The Court in Independence specifically held that the employer, the school district, must "set the framework for these public employees to bargain collectively through representatives of their own choosing" due to the absence of a statute covering teachers. 223 S.W.3d at 136. Police, just like the plaintiff teachers in Independence, currently have no statutory framework to exercise their constitutional right of collective bargaining.² Therefore University City, like the Independence School District, must provide a framework for the police officers and sergeants to bargain collectively through representatives of their own choosing. University City's distinction of itself as a "legislative body" does not make it immune to the constitutional rights guaranteed to its employees by Article I, Section 29.

University City uses the separation of powers doctrine as a legal scapegoat while it ignores the constitutional rights of its employees solely because it is a municipal

² Under §105.510, RSMo., police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, and all teachers of all Missouri schools, colleges and universities are all excluded from the statutory framework laid out in the Public Sector Labor Law, §§105.500-.520, RSMo.

government employer. The City is theoretically arguing that since it is a “legislative body” it can refuse to set a framework for collective bargaining as proscribed in Independence and can not be held responsible for denying the constitutional rights of its police officers and sergeants. Private sector employers can not rely on the doctrine of separation of powers to ignore the constitutional rights of their employees, therefore neither should University City.

B. The doctrine of separation of powers substantiates the trial court’s judgment ordering University City to adopt a reasonable collective bargaining framework for its police officers and sergeants.

The separation of powers doctrine, provided in Article II, Section 1 of the Missouri Constitution, states:

“The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.”

The purpose of the doctrine of separation of powers is to prevent the abuses that can flow from the centralization of power. State Tax Com’n v. Administrative Hearing, 641 S.W.2d 69, 73-74 (Mo.banc 1982). The doctrine’s function is to prohibit concentrated, unchecked power in the hands of one branch of government. Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo.banc 1993). “The authority that the constitution

places exclusively in the judicial department has at least two components – judicial review and the power of courts to decide issues and pronounce and enforce judgments.” Dabin v. Director of Revenue, 9 S.W.3d 610, 614 (Mo.banc 2000). It is clear that the separation of powers doctrine is used to prevent abuses, not perpetuate them.

University City chooses to use the separation of powers doctrine as a shield arguing that it prohibits the judiciary from granting FOP Lodge 15’s members relief from denial of their constitutional rights. In actuality, separation of powers is the very doctrine that allows FOP Lodge 15 to bring this case to protect the rights of its members. The inaction of University City is subject to review by the judicial branch to ensure protection of the constitutional rights of the City’s employees. Separation of powers is meant to protect the rights of individuals, not to be utilized to deny them their guaranteed constitutional rights.

Other courts have found that one of the exceptions to the separation of powers doctrine is when constitutionally guaranteed or protected rights are threatened. Dade County Class. Teach. Ass’n. v Legislature, 269 So.2d 684, 686 (Fla. 1972). In that case dealing with the collective bargaining rights of teachers, the Florida Supreme Court acknowledged that the “judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A Constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it.” Id. Here, it is the responsibility of the judiciary to correct the wrongs that University City has perpetrated through its inaction. The City police officers and sergeants must rely on the judiciary to protect their constitutional right to bargain collectively.

II. The trial court and the Court of Appeals did not err in declaring that University City has a legally enforceable duty to establish a framework for collective bargaining pursuant to Article I, Sections 29 of the Missouri Constitution and the Missouri Supreme Court’s holding in Independence-NEA v. Independence School District, 223 S.W.3d 1131 (Mo.banc 2007).

Applicable Standard of Review

As stated in Point 1 above, this case is an action for declaratory judgment decided on cross motions for summary judgment. (L.F. 115-120). Murphy v. Carron sets out the standard of review for a judge-trying case. 536 S.W.2d at 32. The trial court’s judgment will be sustained unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Id.

Whether a motion for summary judgment should be granted is a question of law and the court’s review is de novo. ITT Commercial, 854 S.W.2d at 376. Summary judgment is proper where the movant establishes the absence of any genuine issue of material fact and a legal right to judgment. Id. at 378. The record is reviewed in the light most favorable to the party against whom judgment has been entered. Id. Facts set forth are taken as true unless contradicted by the non-moving party’s response. Id. at 376. The trial court’s judgment will be affirmed if it is sustainable on any theory. Citibrook II, 239 S.W.3d 631.

Argument in Support of the Trial Court’s Judgment

University City argues that no justiciable controversy exists in this case because it has no lawfully enforceable duty to recognize an exclusive bargaining representative of

its police officers and sergeants, to hold a certification election, or to adopt a framework for collective bargaining purposes. (App. Br. 17). To state a claim for a declaratory judgment, a justiciable controversy is required which refers to “a real, substantial, presently existing controversy admitting of specific relief.” (App. Br. 18 citing to Camden County v. Ozarks Council of Local Governments, 282 S.W.3d 850, 856 (Mo.App.S.D. 2009)). “A question is justiciable only where the judgment will declare a fixed right and accomplish a useful purpose.” (App. Br. 18 citing to Camden County, 282 S.W.3d at 857.)

University City argues that it is not clear on what grounds the trial court found that a justiciable controversy exists in this case. (App. Br. 18). In its Order and Judgment, the trial court cited to the Missouri Supreme Court’s decision in Independence and found that University City has a duty to establish a framework for collective bargaining purposes because its employees have the right to bargain collectively through representatives of their own choosing. (L.F. 117, 118, 119-120.) The trial court declared that the City’s police officers and sergeants have a fixed right to bargain collectively through representatives of their own choosing. (L.F. 117, 118, 120). The City’s denial of its employees’ rights created “a real, substantial, presently existing controversy admitting of specific relief.” Camden County, 282 S.W.3d at 856. The Eastern District of the Missouri Court of Appeals agreed with the trial court’s judgment and opined that “[e]mployees have a constitutional right to bargain collectively under a procedural framework set by their employer. (Ct. App. 5 citing Independence, 223 S.W.3d at 136).

University City admits and does not argue with the fact that its employees “have the right to organize and bargain collectively through representatives of their own choosing” pursuant to the decision in Independence. (L.F. 54-55; App. Br. 19). Yet the City denied its employees the ability to exercise this right and then candidly argues that no controversy exists. This case is a textbook example of a justiciable controversy. The City’s employees have a fixed right to collectively bargain, University City denied them that right, so the City’s employees, through FOP Lodge 15, brought suit to have the court declare their rights and grant them relief. No justiciable controversy could be more easily identified than in this case.

In its brief, University City relies heavily on Quinn v. Buchanan, 298 S.W.2d 413 (Mo.banc 1957) which was decided fifty years prior to the Court’s holding in Independence. Quinn is easily distinguished from Independence and subsequently, this case as well. The defendant in Quinn was a private-sector employer engaged in the business of meat processing and was by no means a public-sector employer like the City in this case or the school district in Independence. Quinn, 298 S.W.2d at 416. The defendant employer in Quinn engaged in coercion to induce its employees to withdraw their choice of union representation. Id. Further, Quinn was a class action suit brought by individual members of the union but not by the union itself. Id. The Court in Quinn interpreted Article I, Section 29, but based its decision on the coercive actions of the defendant employer. The Court of Appeals rightfully found “Quinn inapplicable” and factually inapposite to this case. (Ct. App. 5). Unlike Quinn, this case involves the inaction of University City. That is, the City disallowed its police officers and sergeants

to bargain collectively by failing to recognize an exclusive bargaining representative of its police officers and sergeants, refusing to adopt a framework for collective bargaining purposes, and refusing to hold a certification election.

University City relies on Quinn for its argument that “Sec. 29, Art. 1 is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations.” (App. Br. 19 citing 298 S.W.2d at 418). To support its statements regarding Article I, Section 29, the Court in Quinn cites New York case law that supposedly dealt with a similar New York constitutional provision. 298 S.W.2d at 418. However, the Superior Court of New Jersey discussed Quinn and described that the New York cases cited in Quinn were decided in a different context where the employer was not required to bargain with employee representatives under its pre-existing law. Johnson v. Christ Hospital, 84 N.J. Super. 541, 551-552 (1964). The Court in Johnson stated “that to accept the contention of defendant which construes Article I, [section 29] to impose no affirmative duty upon an employer to bargain collectively with the representative of his employees renders impotent the rights guaranteed to employees under the constitutional provision.” Id. at 555.

However, placed in proper perspective, Quinn need not be read as inconsistent with the Supreme Court's directive to the public employers in Independence to establish a framework for collective bargaining. The issue in Quinn was whether the Court could order mandatory injunctive relief remedying the private employer's discriminatory discharge by reinstatement. 298 S.W.2d 413. The Court held that Article I, Section 29 does not by itself give power to the Courts to order mandatory injunctive relief against a

private sector employer. Id. at 419. However, the Court in Quinn also observed that Article I, Section 29 “is a declaration of a fundamental right of individuals. It is self-executing to the extent that all provisions of the Bill of Rights are self-executing, namely: Any governmental action in violation of the declared right is void. As between individuals, because it declares a right the violation of which surely is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right.” Id. at 418-419. The Court stated that in the absence of legislation, employees may enforce and protect their rights from infringement by others “by any appropriate common law or code remedy.” Id. at 417. Here, the Court of Appeals recognized that Quinn acknowledged “that the constitutional right of collective bargaining could not be denied by the government.” (Ct. App. 5 citing Quinn, 298 S.W.2d at 417.)

Further, Quinn supports the proposition that a public sector employer has a duty under Article I, Section 29, enforceable by mandatory injunction, to permit its employees to select a collective bargaining representative and bargain with that representative. That view was expressed by the Supreme Court even before Independence in Missey v. Cabool, 441 S.W.2d 35 (Mo. 1969), which ordered the defendant city to reinstate employees discriminatorily fired for exercising their collective bargaining rights. The Court in Missey stated that the defendant city had “a constitutional duty to meet and consider” the proposals of the employees’ representative. Id. at 45.

University City mistakenly argues that the principles from Quinn remain “binding Missouri Supreme Court precedent.” (App. Br. 19). It was not necessary for the Court in Independence or the trial court in this case to even address the Quinn v. Buchanan

holding as stated in the Court of Appeals Opinion. (Ct. App. 5). The Independence Court and the trial court here were not faced with a set of facts that involved private-sector employer coercion. The Independence Court had an entirely dissimilar set of facts involving the complexities of collective bargaining in the public sector for employees that had previously been excluded from collective bargaining under the Public Sector Labor Law in §§105.500-105.520 RSMo. Here, University City, a municipal government employer, refused to allow its employees to bargain collectively contrary to Quinn which was decided fifty years before Independence. Private sector employer coercion was not an issue before the trial court in this case. While Quinn may give some insight into Article I, Section 29, it is no more controlling than any private-sector case that cites to the constitutional provision while dealing with an entirely dissimilar fact pattern.

University City further mistakenly tries to distinguish the facts in Independence to the facts in this case to support its argument that Quinn is still binding precedent and therefore it has no duty to take any action to allow its employees to exercise their constitutional rights. (App. Br. 20-21). The Supreme Court's decision in Independence is more pertinent and applicable than a fifty year old holding regarding a public sector employer. The Court of Appeals is constitutionally bound by the Missouri Supreme Court's most recent pronouncements on a subject and must follow the last controlling decision of the Court. (Ct. App. 5 citing Godfrey v. Union Elec. Co., 874 S.W.2d 504, (Mo.App.E.D. 1994) citing Missouri Constitution, Article V, Section 2).

The City misguidedly argues that the employer in Independence was only "required to bargain with its employees' unions because it had contractually obligated

itself to do so.” (App. Br. 20). In other words, the employer had no duty to act, and only had to because it already agreed to do so. This argument is entirely contradictory to the plain meaning of the holding in Independence. The Court in Independence unambiguously stated that all employees shall have the right to organize and to bargain collectively through representatives of their own choosing” under Article I, Section 29. 223 S.W.3d at 133. The Court placed no qualifier on this holding that sets forth that its holding only applied if the employer had already contractually obligated itself to do so. All employees are guaranteed this right and no employer inaction should be allowed which denies any public sector employee the ability to exercise this right.

University City agrees that the holding in Independence gives public employees the right to organize and bargain collectively through representatives of their own choosing and acknowledges that the City’s employees have this right under Article I, Section 29. (L.F. 54-55; App. Br. 19). However, University City then argues that it has no duty to allow them the ability to exercise that right. The right to bargain collectively implies that the employees must have someone to bargain with. The Court of Appeals applied basic logic to dispel the City’s arguments stating that “if one is granted the right to bargain, he must bargain with someone other than himself.” (Ct. App. 6). As discussed before, collective bargaining entails two parties: the employer and the employees’ representative. University City’s reasoning reduces the Independence decision to a nullity. The City’s suggestion that it has no corresponding duty “renders meaningless those rights guaranteed to City’s employees under article I, section 29.” (Ct.

App. 6). A constitutional employee right to “organize and bargain collectively” with no corresponding duty by an employer to honor that right, is no right at all.

If the City’s employees have the right to bargain collectively, the City has the duty to create the collective bargaining framework as prescribed in Independence and subsequently to bargain with the bargaining unit representative chosen by the police officers and sergeants. The Court of Appeals interpreted the Supreme Court’s opinion “to mean that an employer of statutorily excluded employees must not only adopt procedures for collective bargaining but also participate in the process it created.” (Ct. App. 6 supported by Judge Price’s opinion in Independence, 223 S.W.3d at 147.)

University City argues that it has done nothing to impede the officers from exercising their collective bargaining rights. The question of wrongdoing in this case does not concern the City’s action. Rather, the issue here is the City’s inaction which has “effectively extinguished” the police officers’ rights “by the City sitting on its hands and refusing to act.” (Ct. App. 6 quoting the trial court’s order, L.F. 118). Here, University City has refused to voluntarily recognize the exclusive bargaining representative chosen by its police officers and sergeants and refused to hold an election to select a collective bargaining representative. (L.F. 119). The City has never created a framework for collective bargaining purposes for its police officers and sergeants. (L.F. 120). As fittingly and accurately stated by the Court of Appeals when affirming the decision of the trial court: the “employees’ constitutional right of collective bargaining implies a corresponding duty of City to facilitate the exercise of that right.” (Ct. App. 6-7). University City has not fulfilled its duty to its police officers and sergeants.

III. The trial court and the Court of Appeals did not err in declaring that FOP Lodge 15 has standing to sue on behalf of its members through the doctrine of associational standing.

Applicable Standard of Review

As stated in Points 1 and 2 above, this case is an action for declaratory judgment decided on cross motions for summary judgment. (L.F. 115-120). Murphy v. Carron sets out the standard of review for a judge-trying case. 536 S.W.2d at 32. The trial court's judgment will be sustained unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Id.

Whether a motion for summary judgment should be granted is a question of law and the court's review is de novo. ITT Commercial, 854 S.W.2d at 376. Summary judgment is proper where the movant establishes the absence of any genuine issue of material fact and a legal right to judgment. Id. at 378. The record is reviewed in the light most favorable to the party against whom judgment has been entered. Id. Facts set forth are taken as true unless contradicted by the non-moving party's response. Id. at 376. The trial court's judgment will be affirmed if it is sustainable on any theory. Citibrook II, 239 S.W.3d 631.

Argument in Support of the Trial Court's Judgment

University City argues that FOP Lodge 15 does not have a "legally protectable interest" in this case because it is a labor organization and has no interest in the issues. (App. Br. 22-23). To state a claim for a declaratory judgment, a legally protectable interest is required which refers to "a pecuniary or personal interest directly in issue or

jeopardy, which is subject to some consequential relief, immediate or prospective.”

Camden County, 282 S.W.3d at 856. In other words, University City argues that FOP Lodge 15 does not have standing to sue on behalf of its members in an action for declaratory judgment.

This case parallels the case of Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield, Circuit Court of St. Louis County, Cause No. 09SL-CC00023, Supreme Court No. SC91736. In that equivalent case involving the right of police officers and sergeants to organize and bargain collectively through representatives of their choosing, the trial court explicitly held that FOP Lodge 15 had associational standing to bring suit on behalf of its members. (Chesterfield Findings of Fact, Conclusions of Law and Judgment, pg. 5). Here, the lack of discussion in the trial court’s Order and Judgment regarding FOP Lodge 15’s standing, demonstrates that FOP Lodge 15 did indeed have standing and presented a “legally protectable interest” sufficient for a declaratory judgment in its favor. If the trial court found that any element required for a declaratory judgment was not satisfied, it would not have granted FOP Lodge 15’s Motion for Summary Judgment awarding it declaratory relief.

A party has standing if it “is directly and adversely affected by the action in question.” Ste. Genevieve School Dist. v. Board of Alderman, 66 S.W.3d 6, 10 (Mo.banc 2002). An association, such as a union, can have standing in either one of two ways (1) by seeking judicial review from injuries to its own rights or (2) by seeking to vindicate whatever rights its members may enjoy. Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921, 924 (Mo.App.E.D. 1984) citing Warth v. Seldin, 422 U.S.

490, 511 (1975). When an association is not itself affected by the actions of a party, the association has standing to sue the adverse party on behalf of its members if associational standing exists. Bankers Assoc. v. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. banc 2003). The Missouri Courts have long applied the United States Supreme Court’s test for associational standing to Missouri associations. Ferguson Police, 679 S.W.2d at 924.

Before an association can bring suit on behalf of its members, the following criteria must be met: (1) the members must have standing to bring suit in their own right; (2) the interests the association seeks to protect must be germane to its purpose; and (3) neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit. Id. citing Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343 (1977).

A. FOP Lodge 15’s members have standing to bring suit in their own right.

The first element of associational standing requires that the association allege that “its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.” Ferguson Police, 670 S.W.2d at 924 citing Warth v. Seldin, 442 U.S. at 511.

Here, FOP Lodge 15’s members have been denied their constitutional right to bargain collectively through representatives of their own choosing as guaranteed by Article 1, Section 29 of the Missouri Constitution. FOP Lodge 15’s members are

suffering immediate and continuing injury from University City's ongoing refusal to adopt a framework for collective bargaining for its police officers and sergeants. Any of FOP Lodge 15's members employed by the City could bring a suit in their individual capacity. Contrary to the City's argument, the trial court and the Court of Appeals appropriately found that FOP Lodge 15's members are legally entitled to a collective bargaining process as discussed throughout this brief and the respective court decisions. (L.F. 120; Ct. App. 3).

B. The interests FOP Lodge 15 seeks to protect are germane to its purpose.

The court in Ferguson Police Officers Association v. City of Ferguson, found that the second element of associational standing was met given that the goals of the association were to "promote the welfare of its members and to improve their working conditions" and the association's suit sought to protect the members constitutional rights thus improving their working conditions and welfare in general. 670 S.W.2d at 925. The court went on to say that the "members of the association agreed to bring the suit and feel it is in their best interest." Id.

Here, FOP Lodge 15 seeks to protect its members' constitutional right to collectively bargain as guaranteed by Article I, Section 29 of the Missouri Constitution. Fighting for and defending the constitutional rights of its members is one of the primary principles of FOP Lodge 15 and one of the main reasons the association was formed. As stated in the Court of Appeals' Opinion FOP Lodge 15's "central purpose is to defend the

rights of its members” consequently the second element of associational standing is satisfied and not challenged by University City. (Ct. App. 3).

C. FOP Lodge 15’s members did not need to participate individually in the lawsuit to obtain the relief requested.

A request for prospective relief generally does not require membership participation, in contrast to a case where money damages or some other relief is sought that is specific to individual members. Bankers Assoc., 126 S.W.3d at 363; Ferguson Police, 670 S.W.2d at 925-926.

Here, like the plaintiff in Ferguson Police, FOP Lodge 15 sought a declaratory judgment in order to determine the rights of its members. Therefore, FOP Lodge 15’s members are not individually required in this suit to obtain the court’s determination of the rights, obligations, and liabilities that exist among the parties. The Court of Appeals’ Opinion barely mentions this element of associational standing since it was unchallenged by University City. However, the Opinion of the Court of Appeals states that this element is satisfied since neither the “claim nor the relief requested requires membership involvement (in contrast to a suit for individual money damages).” (Ct. App. 3)

FOP Lodge 15 has standing to sue on behalf of its members through the doctrine of associational standing. FOP Lodge 15 satisfies all the elements of associational standing: (1) its members have standing to bring suit in their own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. Ferguson Police, 679 S.W.2d at 924.

University City's brief once again relies on Quinn v. Buchanan, 298 S.W.2d 413 (Mo.banc 1957) to support its argument that FOP Lodge 15 may not bring this action to vindicate the rights of its members under Article I, Section 29. University City argues that FOP Lodge 15 cannot maintain this suit on behalf of the employees. (App. Br. 25). However, Quinn v. Buchanan is antiquated legal precedent on the subject of standing for labor unions. Quinn was decided in 1957 prior to the US Supreme Court's 1977 decision in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) regarding associational standing. Since adopting the Hunt test for associational standing, the Missouri Supreme Court and the Missouri Court of Appeals for the Eastern District have both consistently held that voluntary associations can have associational or representational standing if all the required elements are met. Ferguson Police, 670 S.W.2d 921; St. Louis Police Officers' Ass'n v. Sayad, 685 S.W.2d 913 (Mo.App.E.D. 1984); Missouri Health Care Ass'n v. Attorney General, 953 S.W.2d 617 (Mo.banc 1997); HBA v. City of Wildwood, 32 S.W.3d 612 (Mo.App.E.D. 2000); Bankers Assoc. v. Div. of Credit Unions, 126 S.W.3d 360 (Mo.banc 2003).

Further, the Court in Quinn was actually referring to wrongful discharge cases when it noted that a damages cause of action could only be brought by an individual. Strinni v. Mehlville Fire Protection Dist., 681 F. Supp.2d 1052, 1079 (8th Cir. 2010).

University City argues that FOP Lodge 15 differs from the teachers' union in Independence, where plaintiffs sued to enforce their already existing contracts. In theory, University City is making the argument that FOP Lodge 15 cannot sue to enforce the constitutionally protected collective bargaining rights of its members that the City is

denying them, but it would be able to sue to enforce a contract if the City had actually allowed its employees to exercise said rights by voluntarily agreeing to enter into a contractual agreement. University City argues FOP Lodge 15 is not the proper plaintiff to bring this suit because University City has not contractually obligated itself to collectively bargain with its police officers and sergeants. (App. Br. 26). However, University City fails to acknowledge that FOP Lodge 15 brought this suit on behalf of its members, the City's police officers and sergeants, to enforce their constitutionally protected right to bargain collectively, and not as the collective bargaining representative.

Relying on Independence, University City argues that FOP Lodge 15 has no standing because the City refused to voluntarily allow FOP Lodge 15 to be the exclusive bargaining representative of its police officers and sergeants and subsequently did not enter into contractual agreements with FOP Lodge 15. In other words, if it had allowed recognition and a contractual relationship, then FOP Lodge 15, as the exclusive bargaining representative, would have standing to bring this suit.

University City's argument is circular. If University had already recognized FOP Lodge 15 as the exclusive bargaining representative of its police officers and sergeants and had contractually entered into an agreement, there would be no need for this suit. The duty of the City rather than their voluntary decision to allow representation is the very essence of this action. University City's actions and/or inactions have been the one and only roadblock to allowing FOP Lodge 15's members to have an exclusive bargaining representative of their choosing.

D. The collective bargaining representative of the police officers and sergeants employed by University City is entitled to be their exclusive collective bargaining representative.

University City argues that nothing in Independence or the Missouri Constitution gives FOP Lodge 15 the right to be the *exclusive* bargaining representative for the City's police officers and sergeants. (App. Br. 23).

In Independence, while the majority did not fully expound upon the full nature of the right to collective bargaining, as that issue was not directly before the court, Justice Price further explained the extent of the constitutional right to collective bargaining in his concurring opinion. Justice Price stated that:

The statutes guarantee the right of public employees, through their *exclusive* bargaining representative, to present proposals regarding salary and working conditions to a governing body. It also requires the governing body to meet, confer and discuss the proposals with the labor organization that is the *exclusive* bargaining representative of the employees. Again, teachers are afforded the same rights under Clouse and Peters. See Clouse, 206 S.W.2d at 542; Peters, 506 S.W.2d at 432.

Independence, 223 S.W.3d at 144. Justice Price specifically set out that the right to collective bargaining for teachers and police officers is the same as the rights to collective bargaining for all occupations and that such right to collective bargaining specifically includes the ability of the bargaining unit members to choose an exclusive bargaining representative. Id.; *see also* Section 105.520 RSMo.

Justice Price indicated that an employer is required to meet with employees' exclusive bargaining representative for each bargaining unit regarding proposals set out by the union and for the employer to meet and discuss such proposals with the employees' representative. Id. at 145. Justice Price stated that the school district was "obligated by law to meet and confer with the exclusive bargaining representative of its employee groups. The meet and confer procedure adopted by the board [] violates section 105.520 as well as the rights of the teachers recognized in Clouse and Peters." Independence, 223 S.W.3d at 145; see Clouse, 206 S.W.2d at 542; Peters, 506 S.W.2d at 432. Justice Price set out in clear terms that teachers and police officers' rights to collective bargaining are the same as the rights afforded occupations covered by the public sector labor act.

If Article I, Section 29 applies to all employees under Independence, the right of employees to have an exclusive bargaining representative is implicit in that right. Here, a significant showing and a majority of the police officers and sergeants employed by University City signed Representation Interest Cards indicating that they supported the certification of FOP Lodge 15 as their exclusive representative for collective bargaining purposes with the City. (L.F. 6, 31, 40). University City has not only denied these employees their right to bargain collectively through representatives of their own choosing, it has denied their right to have an exclusive bargaining representative.

CONCLUSION

The judgment of the Circuit Court of St. Louis County must be sustained in its entirety (with the exception of the amendment by the Eastern District Court of Appeals'

Opinion) because it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. University City's arguments are without merit and fail to substantiate its claim that FOP Lodge 15 is not entitled to relief. The doctrine of separation of powers is not a barrier to this Court granting relief to the City's employees for the denial of their constitutional rights to bargain collectively through representatives of their own choosing. FOP Lodge 15 satisfies the justiciable controversy element of its declaratory judgment in that Article I, Section 29 of the Missouri Constitution and the Missouri Supreme Court in Independence have set forth that it is the role of University City to set the framework for its public employees to bargain collectively through representatives of their own choosing. FOP Lodge 15 has a legally protectable interest in this suit in that it has standing to bring this suit on behalf of its members through the doctrine of associational standing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13th, 2011, a copy and a computer disk of the foregoing were served via U.S. Mail, postage prepaid to the following:

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CERTIFICATE OF RULE COMPLIANCE

The undersigned counsel for Respondent, FOP Lodge 15 hereby certifies that this Brief is typed in Times New Roman, 13 point type, using Microsoft Word. This Brief contains 9,077 words, which is within the word count limit allowed by Rule 84.06(b). This Brief is otherwise in compliance with Rule 84.06(b).

The undersigned further certifies that the computer disk served in conjunction with this Brief has been scanned for viruses using Norton Anti-Virus and has been found to be virus free.
