

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI

FILED
JAN 24 2011

EASTERN MISSOURI COALITION)
OF POLICE, FRATERNAL ORDER OF)
POLICE, LODGE 15,)
Respondent,)
v.)
CITY OF UNIVERSITY CITY,)
Appellant.)

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

91737

Appeal No. ED 95564 **FILED**

MAY 6 2011

Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Circuit Court of St. Louis County, Missouri
Division 13, Honorable Judge Barbara W. Wallace
Case No. 09SL-CC01454

APPELLANT'S BRIEF

Timothy A. Garnett (Mo. Bar No. 30414)
Nathan J. Plumb (Mo. Bar No. 56547)
OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.
7700 Bonhomme, Suite 650
St. Louis, MO 63105
Telephone: (314) 802-3935
Facsimile: (314) 802-3936
tim.garnett@ogletreedeakins.com
nathan.plumb@ogletreedeakins.com

ATTORNEYS FOR APPELLANT CITY OF
UNIVERSITY CITY

SCANNED

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

EASTERN MISSOURI COALITION)	
OF POLICE, FRATERNAL ORDER OF)	
POLICE, LODGE 15,)	
)	
Respondent,)	
)	
v.)	Appeal No. ED 95564
)	
CITY OF UNIVERSITY CITY,)	
)	
Appellant.)	

**Appeal from the Circuit Court of St. Louis County, Missouri
Division 13, Honorable Judge Barbara W. Wallace
Case No. 09SL-CC01454**

APPELLANT'S BRIEF

**Timothy A. Garnett (Mo. Bar No. 30414)
Nathan J. Plumb (Mo. Bar No. 56547)
OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.
7700 Bonhomme, Suite 650
St. Louis, MO 63105
Telephone: (314) 802-3935
Facsimile: (314) 802-3936
tim.garnett@ogletreedeakins.com
nathan.plumb@ogletreedeakins.com**

**ATTORNEYS FOR APPELLANT CITY OF
UNIVERSITY CITY**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	6
POINTS RELIED ON.....	9
ARGUMENT	11
I. The trial court erred in ordering Appellant to expeditiously establish a specific framework for collective bargaining with Appellant’s police officers and sergeants through exclusive representation by Respondent because the trial court lacked the legal authority to so order Appellant in that the separation of powers doctrine in Article 2, Section 1, of the Missouri Constitution prohibits a court from issuing such an order to a legislative body such as Appellant	11
II. The trial court erred in declaring that Appellant unlawfully refused, <i>inter alia</i> , to voluntarily establish a framework for collective bargaining with Appellant’s police officers and sergeants through exclusive representation by Respondent because Respondent did not satisfy the “justiciable controversy” element of its declaratory judgment claim in that Appellant has no legally enforceable duty under Article 1, Section 29, of the Missouri Constitution to establish such a framework.....	16
III. The trial court erred in declaring that Appellant unlawfully refused, <i>inter alia</i> , to voluntarily establish a framework for collective bargaining with Appellant’s police officers and sergeants through exclusive representation by Respondent because Respondent did not satisfy the “legally protectable interest” element of its declaratory judgment claim in that Respondent itself has no legally recognized interest in such declaratory relief	21
CONCLUSION	27

CERTIFICATE OF SERVICE..... 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Camden County v. Lake of the Ozarks Council of Local Governments</i> , 282 S.W.3d 850 (Mo. Ct. App. 2009)	18
<i>City of Arnold v. Tourkakis</i> , 249 S.W.3d 202 (Mo. banc 2008)	12
<i>Giers Imp. Corp. v. Investment Service</i> , 235 S.W.2d 355 (Mo. 1951).....	12
<i>Guyer v. City of Kirkwood</i> , 38 S.W.3d 412 (Mo. 2001)	11, 16 21, 22
<i>Huttig v. City of Richmond Heights</i> , 372 S.W.2d 833 (Mo. 1963).....	13
<i>Independence-National Educ. Ass'n. v. Independence School District</i> , 223 S.W.3d 131 (Mo. 2007).....	6, 7, 15, 19, 20, 24, 26
<i>ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.</i> , 854 S.W.2d 371 (Mo. 1993)	11, 17, 22
<i>Layne v. City of Windsor</i> , 442 S.W.2d 497 (Mo. 1969)	12, 14
<i>Lenette Realty & Inv. Co. v. City of Chesterfield</i> , 35 S.W.3d 399 (Mo. Ct. App. 2000).....	13, 14
<i>Local Union 1287 v. Kansas City Area Transp. Auth.</i> , 848 S.W.2d 462 (Mo. banc 1993).....	18
<i>Missouri Coalition for the Environment v. Joint Committee on .. Administrative Rules</i> , 948 S.W.2d 125 (Mo. 1997)	13
<i>Missouri Soybean Ass'n v. Missouri Clean Water Com'n.</i> , 102 S.W.3d 10 (Mo. 2003)	17, 22
<i>Quinn v. O.J. Buchanan</i> , 298 S.W.2d 413 (Mo. banc 1957)	19, 24

Ste. Genevieve School District v. Board of Alderman of City of Ste. Genevieve,
66 S.W.3d 6 (Mo. 2002) 23

State on Information of Danforth v. Banks,
454 S.W.2d 498 (Mo. 1970)..... 13

Weber v. Moerschel,
313 S.W.3d 220 (Mo. Ct. App. 2010)..... 11, 17, 22

STATUTES

Missouri’s Public Sector Labor Law, § 105.500, RSMo., et seq. 23

29 U.S.C.A. §15224

OTHER AUTHORITIES

Constitution of Missouri, Art. I, § 29 19, 25

Constitution of Missouri, Art. II, § 1 13

Constitution of Missouri, Art. VI, § 19..... 12

JURISDICTIONAL STATEMENT

Appellant City of University City (“Appellant”) appeals a Judgment entered following an entry of Order and Judgment on the parties’ cross motions for summary judgment by the Circuit Court of St. Louis County in which Respondent Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (“Respondent”) was awarded declaratory and injunctive relief. The Order and Judgment declared that Appellant had a duty to establish a specified “reasonable framework for collective bargaining” by Appellant’s police officers and sergeants and ordered Appellant to do so “expeditiously”. After being granted leave to file a late Notice of Appeal, Appellant timely filed its appeal with this Court on October 27, 2010. This Court has jurisdiction to hear this appeal because this action does not involve any matter within the exclusive jurisdiction of the Missouri Supreme Court, as conferred upon it by Article V, Section 3 of the Constitution of the State of Missouri. Accordingly, jurisdiction is proper with this Court because this appeal falls within the general appellate jurisdiction of the Missouri Court of Appeals, Eastern District.

STATEMENT OF FACTS

Appellant is not aware of any dispute over the few relevant facts in this case. Respondent Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15, (“Respondent”) is a Missouri corporation. (Legal File (“LF”) 115). Appellant is a charter city formed pursuant to and governed by the Charter of the City of University City. (LF 115). Under its Charter, Art. II, Section 17, Subsection (4), Appellant “by ordinance” has the power to create police-related regulations and provide for their enforcement. (LF 115).

On January 5, 2009, Respondent sent Appellant a letter asking Appellant to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant’s police officers and sergeants for purposes of collective bargaining. (LF 115, 70-72). In that letter, Respondent claimed seventy-one (71%) of Appellant’s police officers and sergeants had signed authorization cards indicating they wanted Respondent to act as their exclusive bargaining representative with Appellant. (LF 70-72). On January 22, 2009, Appellant declined Respondent’s request. (LF 116, 73).

On January 27, 2009, Respondent sent another letter to Appellant asking Appellant to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant’s police officers and sergeants for purposes of collective bargaining. (LF 116, 74-76). In that letter, Respondent claimed the Missouri Supreme Court decision in Independence-National Educ. Ass’n. v. Independence School District, 223 S.W.3d 131 (Mo. 2007)) required Appellant to adopt a procedural framework that would allow its police officers and sergeants to bargain collectively with Appellant using Respondent as

their exclusive bargaining representative. (LF 116, 74-76). On January 30, 2009, Appellant declined Respondent's request again. (LF 116, 77).

On April 1, 2009, Respondent filed its Petition against Appellant seeking a declaratory judgment that Appellant has an affirmative duty, pursuant to Art. I, § 29, of the Missouri Constitution, to establish a detailed framework of procedures that allows Appellant's police officers and sergeants to organize and bargain collectively and seeking an injunctive order requiring Appellant to establish such a framework. (LF 116, 5-17).

On April 30, 2010, Respondent and Appellant filed their cross motions for summary judgment and briefs in support. (LF 28-39, 45-62). Respondent argued in its motion for summary judgment that Appellant was required by the holding in Independence School District to adopt a specific framework of procedures that would allow Appellant's police officers and sergeants to bargain collectively with Appellant. (LF 117, 28-39). Appellant argued in its motion for summary judgment that the separation of powers doctrine prohibits a court from ordering the injunctive relief sought by Respondent and that in any event it has no affirmative duty to adopt a particular procedure or framework for collective bargaining by its police officers or sergeants. (LF 117, 45-62).

On August 13, 2010, the trial court granted Respondent's motion for summary judgment and denied Appellant's motion for summary judgment. (LF 115-120). Therein, the trial court declared that Appellant's refusal to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant's police officers and sergeants, refusal to hold a certification election, and refusal to adopt a framework for collective bargaining

violated the constitutional rights of Appellant's police officers and sergeants. (LF 119-120) As a result, the trial court then ordered Appellant to expeditiously establish a framework for collective bargaining by Appellant's police officers and sergeants and requiring that such framework include (i) the scope of an appropriate bargaining unit which must include Appellant's police officers and sergeants; (ii) procedures for the election process for certifying Respondent as the exclusive bargaining unit for Appellant's police officers and sergeants, including a date, time, and place of an election; (iii) procedures for holding such an election; and (iv) procedures for the meet and confer process. (LF 120). Appellant filed its Notice of Appeal on October 27, 2010, (LF 123-124), and now appeals the Judgment of the trial court in several respects.

POINTS RELIED ON

- I. The trial court erred in ordering Appellant to expeditiously establish a specific framework for collective bargaining with Appellant's police officers and sergeants through exclusive representation by Respondent because the trial court lacked the legal authority to so order Appellant in that the separation of powers doctrine in Article 2, Section 1, of the Missouri Constitution prohibits a court from issuing such an order to a legislative body such as Appellant.

Giers Imp. Corp. v. Investment Service, 235 S.W.2d 355, 358 (Mo. 1951).

State on Information of Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. 1970).

Lenette Realty & Inv. Co. v. City of Chesterfield, 35 S.W.3d 399, 408 (Mo. Ct. App. 2000).

Constitution of Missouri, Art. II, § 1.

- II. The trial court erred in declaring that Appellant unlawfully refused, *inter alia*, to voluntarily establish a framework for collective bargaining with Appellant's police officers and sergeants through exclusive representation by Respondent because Respondent did not satisfy the "justiciable controversy" element of its declaratory judgment claim in that Appellant has no legally enforceable duty under Article 1, Section 29, of the Missouri Constitution to establish such a framework.

Missouri Soybean Ass'n v. Missouri Clean Water Com'n., 102 S.W.3d 10, 25 (Mo. 2003).

Camden County v. Lake of the Ozarks Council of Local Governments, 282

S.W.3d 850, 856 (Mo. Ct. App. 2009).

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

Constitution of Missouri, Art. I, § 29.

- III. The trial court erred in declaring that Appellant unlawfully refused, *inter alia*, to voluntarily establish a framework for collective bargaining with Appellant's police officers and sergeants through exclusive representation by Respondent because Respondent did not satisfy the "legally protectable interest" element of its declaratory judgment claim in that Respondent itself has no legally recognized interest in such declaratory relief.

Missouri Soybean Ass'n v. Missouri Clean Water Com'n., 102 S.W.3d 10,
25 (Mo. 2003).

Ste. Genevieve School District v. Board of Alderman of City of Ste.
Genevieve, 66 S.W.3d 6, 10 (Mo. 2002).

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

Missouri's Public Sector Labor Law, § 105.500, RSMo., *et seq.*

ARGUMENT

- I. The trial court erred in ordering Appellant to establish a framework for collective bargaining with Appellant's police officers and sergeants through exclusive representation by Respondent because the trial court lacked the legal authority to so order Appellant in that the separation of powers doctrine in Article 2, Section 1, of the Missouri Constitution prohibits a court from issuing such an order to a legislative body such as Appellant.

Applicable Standard of Review

This case is an action for declaratory judgment decided by summary judgment. (LF 5-17, 115-120). “When reviewing a declaratory judgment, an appellate court’s standard of review is the same as in any other court-tried case.” Guyer v. City of Kirkwood, 38 S.W.3d 412, 413 (Mo. 2001). In a court-tried case, the trial court’s decision is affirmed “unless there is no substantial evidence to support it, unless it is against the weight of evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” Id. The propriety of summary judgment is reviewed *de novo* because it is “purely an issue of law.” ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993). An appellate court “independently evaluates the trial court’s conclusions of law.” Weber v. Moerschel, 313 S.W.3d 220, 223 (Mo. Ct. App. 2010). In this argument for its appeal, Appellant challenges the trial court’s application of the separation of powers doctrine in Article 2, Section 1, of the Missouri Constitution, to the issue of whether the trial court had the

authority to order Appellant to take the legislative action required by the trial court's decision in this case.

Argument in Support of Reversal

The trial court committed reversible error because its judgment ordering Appellant to expeditiously establish a specific framework for collective bargaining with its police officers and sergeants violates the separation of powers doctrine. Appellant is a constitutional charter city within the meaning of Article VI, Section 19 of the Missouri Constitution. (LF 115); see also Giers Imp. Corp. v. Investment Service, 235 S.W.2d 355, 358 (Mo. 1951) (specifically recognizing Appellant as a charter city as defined by Missouri's constitution). A court must take judicial notice of Appellant's status as a constitutional charter city. See Giers Imp. Corp., 235 S.W.2d at 358. As a constitutional charter city, Appellant is a legislative body in its own right and has "all powers which the general assembly of the state of Missouri has authority to confer upon any city." City of Arnold v. Tourkakis, 249 S.W.3d 202, 205 (Mo. banc 2008) (citing to Mo. Const. Art. VI, Sec. 19(a)). Appellant can only officially act with any authority, other than in the performance of administrative functions, by the passage of an "ordinance". See Layne v. City of Windsor 442 S.W.2d 497, 500 (Mo. 1969).

Appellant's status as a legislative body that can only act by passage of an ordinance protects it from being ordered to take legislative action by the judiciary. The separation of powers doctrine set out in 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 belong to one of those departments, shall exercise any power properly belonging to either of the others, except in instances in this constitution expressly directed or permitted.

Mo. Const. Art. 2, § 1. Any “encroachment upon [a legislative body] by this court” would “do violence to that separation of powers so fundamentally vital to our form of government.” State on Information of Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. 1970). The Missouri Supreme Court has “consistently held that the doctrine of separation of powers as set forth in Missouri’s constitution, is ‘vital to our form of government’ ... because it ‘prevents[s] the abuses that can flow from centralization of powers.’” Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 132 (Mo. 1997) (multiple citations omitted).

The trial court’s judgment in this case ordering Appellant to establish a collective bargaining framework requires Appellant to pass an ordinance. Thus the order is an unconstitutional encroachment on Appellant’s legislative function. This Court has recognized and upheld the limitations on the judiciary’s authority to order a municipality to engage in particular, affirmative conduct. See Lenette Realty & Inv. Co. v. City of Chesterfield, 35 S.W.3d 399, 408 (Mo. Ct. App. 2000) (citing Huttig v. City of Richmond Heights, 372 S.W.2d 833, 844 (Mo. 1963)).

In Lenette Realty, the plaintiff filed suit against the defendant municipality requesting that the court declare the municipality’s zoning ordinance unconstitutional,

order the municipality to rezone the subject property to accommodate the plaintiff's plans for the property, and award the plaintiff its attorneys' fees. See id. at 403. There, the plaintiff had entered into a contract to purchase three parcels of land, subject to rezoning of those parcels so they could be developed as planned by the plaintiff. See id. at 402. The plaintiff petitioned the defendant on multiple occasions for rezoning of the three parcels. Each time the petitions were denied. See id. at 404. In its judgment and order, the trial court found that "the present zoning as applied to the subject property is arbitrary, capricious, and unreasonable" and declared it "null and void." Id. The trial court refused to order the municipality to rezone the parcels as requested by the plaintiff. See id. On the plaintiff's appeal of that issue, this Court "decline[d] [the plaintiff's] invitation to reverse the trial court and order adoption of [the plaintiff's] proposed development." Id. at 409. This Court reasoned that "[a]ny such judicial command to a legislative body raises serious questions regarding the constitutionally mandated distinction between the legislative and judicial branches of this state's government." Id. at 408.

Likewise in this case, the trial court's command to Appellant that it establish a procedural framework allowing its police officers and sergeants to organize into a labor union and to select Respondent as their exclusive bargaining representative would require Appellant to pass an ordinance. See Layne, 442 S.W.2d at 500 (recognizing that a municipality can only officially act with any authority, other than in the performance of administrative functions, by the passage of an "ordinance"). Indeed, Appellant's Charter, Article II, Section 17, Subsection (4), specifically states that it is "by ordinance" that

Appellant has the “power” to adopt regulations or other laws and provide for their enforcement. (LF 115). Passing an ordinance to establish a framework for collective bargaining would be an exercise Appellant’s legislative functions. Ordering Appellant to do so raises serious questions regarding the clear and long-held distinction between the legislative and judicial branches of government. The trial court committed reversible error in ignoring this distinction.

Even the Missouri Supreme Court’s decision in Independence School District, the principle case Respondent relies on for its argument in this matter, recognizes the important restrictions on a court’s authority to order a legislative body to legislate. In that case, the Court referred to the “role of the General Assembly ... to set the framework for these public employees to bargain collectively through representatives of their own choosing.” Independence School District, 223 S.W.3d at 136. To the extent the Court suggested the employer in Independence School District also had a role in setting the framework for its employees to bargain collectively through a representative of their choosing, such a role is not required of Appellant in this case.

The holding of Independence School District does not grant a trial court the authority to order a legislative body to legislate. There is an important distinction between the school district in that case and the Appellant in this case that proves the point. In that case, the school district had already contractually obligated itself to a framework that allowed its employees to organize and bargain collectively. See Independence School District, 223 S.W.3d at 136 (saying “it is noteworthy that prior to this controversy, the district in effect recognized the teachers’ right to bargain

collectively through its discussion procedure”). Further, the school district, by its very nature as such, was not a legislative body. In stark contrast, the employer in this case, Appellant, has no contractual obligations to take the action demanded by Respondent and *is* a legislative body as established by Article VI, Section 19 of the Missouri Constitution. These important factual distinctions between the employer in Independence School District and the employer here severely limit the applicability of the decision in Independence School District to the dispute in this case.

In sum, the separation of powers doctrine unquestionably prevented the trial court from ordering Appellant to take the affirmative action it was ordered to take. The trial court did not have the constitutional authority to order Appellant to pass legislation regarding the unionization of its police officers and sergeants. The trial court’s judgment should be reversed with instructions that the trial court enter judgment for Appellant accordingly.

II. The trial court erred in declaring that Appellant unlawfully refused, *inter alia*, to voluntarily establish a framework for collective bargaining with Appellant’s police officers and sergeants through exclusive representation by Respondent because Respondent did not satisfy the “justiciable controversy” element of its declaratory judgment claim in that Appellant has no legally enforceable duty under Article 1, Section 29, of the Missouri Constitution to establish such a framework.

Applicable Standard of Review

As articulated in Point I above, this case is an action for declaratory judgment decided by summary judgment. (LF 5-17, 115-120). “When reviewing a declaratory

judgment, an appellate court's standard of review is the same as in any other court-tried case." Guyer, 38 S.W.3d at 413. In a court-tried case, the trial court's decision is affirmed "unless there is no substantial evidence to support it, unless it is against the weight of evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Id. The propriety of summary judgment is reviewed *de novo* because it is "purely an issue of law." ITT Commercial Finance Corp., 854 S.W.2d at 376. An appellate court "independently evaluates the trial court's conclusions of law." Weber, 313 S.W.3d at 223. Appellant challenges the trial court's decision finding that Respondent satisfied the "justiciable controversy" element of its declaratory judgment claim and thus declaring the law required Appellant to establish a specific framework for collective bargaining with Appellant's police officers and sergeants.

Argument in Support of Reversal

The trial court committed reversible error in declaring that Appellant's refusal to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant's police officers and sergeants, refusal to hold a certification election, and refusal to adopt a framework for collective bargaining violated the constitutional rights of Appellant's police officers and sergeants. Appellant does not have a lawfully enforceable duty to take the action the trial court declared it should have taken. Therefore, no "justiciable controversy" exists in this case.

For a trial court to properly issue a declaratory judgment, it must find, *inter alia*, that a "justiciable controversy" exists between the parties. See Missouri Soybean Ass'n v. Missouri Clean Water Com'n., 102 S.W.3d 10, 25 (Mo. 2003). There is no justiciable

controversy between Respondent and Appellant that entitles Respondent to the relief the trial court declared to it. A controversy is “justiciable” when it is “a real, substantial, presently existing controversy” that requires “specific relief.” Camden County v. Lake of the Ozarks Council of Local Governments, 282 S.W.3d 850, 856 (Mo. Ct. App. 2009). In other words, “[a] question is justiciable only where the judgment will declare a fixed right and accomplish a useful purpose.” Id. at 857 (citing to Local Union 1287 v. Kansas City Area Transp. Auth., 848 S.W.2d 462, 463 (Mo. banc 1993)).

It is not entirely clear on what grounds the trial court found that a “justiciable controversy exists between Appellant and Respondent in this case in deciding that a declaratory judgment in Respondent’s favor was warranted. In its ruling, the trial court found that Appellant’s refusal to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant’s police officers and sergeants, refusal to hold a certification election, and refusal to adopt a framework for collective bargaining violated the constitutional rights of Appellant’s police officers and sergeants. (LF 119-120). Appellant’s refusal to take this action does not create the “justiciable controversy” necessary to support the declaratory judgment Respondent was awarded by the trial court.

There is nothing about the decision in Independence School District or Article I, Section 29 of the Missouri Constitution, that gives Respondent a “fixed right” to a procedural framework for collective bargaining or recognition as an exclusive bargaining agent for Appellant’s police officers and sergeants. See Camden County, 282 S.W.3d at 856. The holding in Independence School District is straightforward: the express language in the Missouri Constitution, Article I, Section 29, adopted in 1945, states

“employees shall have the right to organize and to bargain collectively through representatives of their own choosing” and thus employees in the public sector have the right to organize and bargaining collectively. Independence School District, 223 S.W.3d at 133 (citing to Mo. Const., Art. I, Sec. 29).

The declaration of the trial court that the holding of Independence School District gives Appellant’s police officers and sergeants a right to a specific framework for collective bargaining and thus establishes a duty on the party of the City to establish the framework for collective bargaining” plainly ignores binding Missouri Supreme Court precedent. In Quinn v. O.J. Buchanan, 298 S.W.2d 413 (Mo. banc 1957) (which the trial court never even mentioned in its Order and Judgment despite Appellant’s extensive reliance on Quinn in its motion for summary judgment), the Court specifically held that Section 29, Article I of the Missouri Constitution “is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations as plaintiffs seem to claim” rather the provision is “a declaration of a fundamental right of individuals” that otherwise “*provides for no required affirmative duties concerning this right*” and “*does not cast upon all employers a correlative obligation.*” Quinn, 298 S.W.2d at 418-19 (emphasis added). The Missouri Supreme Court went on to say in that case “implementation of any right to require any affirmative duties of an employer concerning [an employee’s right to organize and collectively bargain] is a matter for the Legislature.” Id. at 419. Plainly put, the Court in Quinn holds that an employee’s constitutional right to organize and bargain collectively does *not* impose upon an employer a corresponding duty to take any action. Therefore, the trial court erred when it

declared that a police officer's constitutional right to organize and bargain collectively, as set out in Article I, Section 29, of the Missouri Constitution, correspondingly means Appellant has a duty to pass an ordinance allowing its police officers and sergeants to exercise that right.

Respondent may argue that Independence School District overturned Quinn (even though Independence School District never mentioned or cited Quinn) to the extent Quinn held that Article I, Section 29 does not impose on an employer an affirmative duty to take any action with respect to its employees organizing and bargaining efforts because the employer in Independence School District was ultimately required to recognize and bargain with the unions chosen by its employees. That argument can be summarily rejected by looking at the *source* of the obligation of the employer in Independence School District to bargain with its employees' unions. The source of that obligation was *not* the Missouri constitution. The source was the employer's own contractual agreements with its employees. In Independence School District, the Court did not order the employer to bargain with its employee unions because of the language in Article I, Section 29 but instead simply found that the plain words of Article I, Section 29, apply to public employees as well as private-sector employees. See Independence School District, 223 S.W.3d at 136-137. Rather, the employer in Independence School District was required to bargain with its employees' unions because it had contractually obligated itself to do so. See Independence School District, 223 S.W.3d at 139-140. In this case, Appellant has not contractually obligated itself to collectively bargain with its police officers and sergeants. Therefore, the Independence School District decision cannot be

used by Respondent to argue that the holding in Quinn is no longer good law or otherwise argue that an employee's constitutional right to organize and bargain collectively imposes upon an employer a corresponding duty to take any action.

In sum, to grant a declaratory judgment, the trial court had to find there was a "justiciable controversy" between Respondent and Appellant. There is no such controversy because Appellant had no duty to recognize Respondent as the exclusive bargaining representative of Appellant's police officers and sergeants, to hold a certification election, or to adopt a framework for collective bargaining and thus Respondent had no "fixed right" at stake in this litigation. Therefore, the trial court's judgment in Respondent's favor should be reversed with instructions that the trial court enter judgment for Appellant accordingly.

III. The trial court erred in declaring that Appellant unlawfully refused, *inter alia*, to voluntarily establish a framework for collective bargaining with Appellant's police officers and sergeants through the representation by Respondent because Respondent did not satisfy the "legally protectable interest" element of its declaratory judgment claim in that Respondent itself has no legally recognized interest in such declaratory relief.

Applicable Standard of Review

As articulated in Points I and II above, this case is an action for declaratory judgment decided by summary judgment. (LF 5-17, 115-120). "When reviewing a declaratory judgment, an appellate court's standard of review is the same as in any other court-tried case." Guyer, 38 S.W.3d at 413. In a court-tried case, the trial court's

decision is affirmed “unless there is no substantial evidence to support it, unless it is against the weight of evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.* The propriety of summary judgment is reviewed *de novo* because it is “purely an issue of law.” ITT Commercial Finance Corp., 854 S.W.2d at 376. An appellate court “independently evaluates the trial court’s conclusions of law.” Weber, 313 S.W.3d at 223. In this argument for its appeal, Appellant challenges the trial court’s decision finding that Respondent satisfied the “legally protectable interest” element of its declaratory judgment claim and thus declaring the law required Appellant to establish a specific framework for collective bargaining with Appellant’s police officers and sergeants.

Argument in Support of Reversal

The trial court committed reversible error in declaring that Appellant’s refusal to voluntarily recognize Respondent as the exclusive bargaining representative of Appellant’s police officers and sergeants, refusal to hold a certification election, and refusal to adopt a framework for collective bargaining violated the constitutional rights of Appellant’s police officers and sergeants. Respondent does not have a “legally protectable interest” in the dispute of this case.

For a trial court to properly issue a declaratory judgment, it must find, *inter alia*, that the plaintiff has a “legally protectable interest” at stake in the controversy between the parties. See Missouri Soybean Ass’n., 102 S.W.3d at 25. Respondent does not have such an interest in this case. Respondent is a labor organization. Nothing about the Missouri Constitution or the Missouri Supreme Court case upon which Respondent relies

to assert its interests in this case actually give *it* an interest in the issues raised here. A “legally protectable interest” is at stake for purposes of a declaratory judgment when “the plaintiff is directly and adversely affected by the action in question or if the plaintiff’s interest is conferred by statute.” Ste. Genevieve School District v. Board of Alderman of City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. 2002).

It is unclear on what grounds, if any, the trial court found that Respondent has a “legally protectable interest” in this case in deciding that a declaratory judgment in Respondent’s favor was warranted. Respondent asserted in this case that its “legal interest” exists because a “significant showing” of Appellant’s police officers and sergeants have selected Respondent as their “exclusive bargaining representative.” (LF 14, ¶ 27). But nothing in the Missouri Constitution or the Independence School District decision gives Respondent any right to be the *exclusive* bargaining agent for Appellant’s police officers or sergeants.

The only “law” in Missouri that addresses the notion of an *exclusive* bargaining representative for a group of public employees is the Missouri Public Sector Labor Law. That law *does not apply to police officers*. See Mo. Ann. Stat. § 105.510 (West 2010).¹

¹ An “‘exclusive bargaining representative’ means an organization which has been designated or selected by a majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining.” § 105.500, RSMo. In other words, when a bargaining representative is the “exclusive” representative, it represents all the employees in the “bargaining unit” even when a minority of those employees did not want to be represented by the representative. In contrast, a “representative” who is not the “exclusive” representative would only represent the interests of those employees who actually wanted to be represented. The National Labor Relations Act likewise does not address the concept of “exclusive

Even if Appellant were found to have some duty to create a framework for bargaining with its police officers and sergeants, there is no requirement that the framework provide for a selection of an “*exclusive* bargaining representative.” Certainly nothing in the Independence School District decision would require a framework that provides for the selection of an “*exclusive* bargaining representative.” There, the Missouri Supreme Court’s *dicta* regarding the Public Sector Labor Law acknowledges as much when it opined that the Labor Law “describes” the following actions the Labor Law allows: employees can present proposals, through their representatives, to their employer; the employer meets, confers, and discusses the proposals; and the results of the discussion are put in writing and presented to the employer for adoption, modification, or rejection. See Independence School District, 223 S.W.3d at 138 (recognizing that nothing in the law requires a public employer (unlike in the case of a private employer) to actually agree to or adopt in any form the proposals made by the employees or their representative).

In addition, even assuming *arguendo* that a significant showing by Appellant’s police officers and sergeants have said they want Respondent to be their “exclusive bargaining agent”, Respondent cannot maintain this suit on their behalf and thus has no interest in it. The Missouri Supreme Court opinion in Quinn again settles that issue in Appellant’s favor. In that case, the plaintiffs (the employees) asked the court to order the defendant (the employer) to bargain with the union the employees had selected as their “representative”. See Quinn, 298 S.W.2d at 416. The claim was that the employer’s

bargaining representative” for University City police officers. That Act does not apply to any public employee. See 29 U.S.C.A. § 152(2) (West 2010)).

refusal to bargain with the union was a violation of the employees' and the union's constitutional rights guaranteed by Article I, Section 29. See id. One "important question" decided by this case addressed whether the union that had been selected by the employees to be their representative could maintain the suit on behalf of the employees. Id. at 418. The Missouri Supreme Court very clearly held the union was "*not* an entity that can sue and be sued as such *in the absence of statutory authorization.*" Id. (emphasis added). That holding alone defeats any notion in this case that Respondent has a legally protectable interest in the issues of this case or is otherwise entitled to the relief it has sought on behalf of Appellant's police officers and sergeants. Again, the only statutory authorization that allows for "exclusive bargaining representation" for public employees is the Missouri Public Labor Law, which does not apply to the employees at issue here.

Respondent may again argue that Independence School District overturned Quinn to the extent Quinn held that a union was not an entity that could sue or be sued in the absence of statutory authorization because the unions in Independence School District were ultimately allowed to proceed against the school district in that case. But as noted above, any such argument by Respondent can be summarily rejected by looking at the source of the unions authority to sue the school district in that case. The source of that authority was *not* the Missouri constitution. The source was the contractual agreements the school district had entered into with its employees whereby the employees were allowed to select an exclusive bargaining representative to represent their interests with the school district. In Independence School District, the Court did not find that the unions there had a protectable interest in the case because of the language in Art. I,

Section 29. See Independence School District, 223 S.W.3d at 136-137. Rather, to the extent the Court implicitly found that the unions in Independence School District were allowed to sue the school districts on behalf of the employees, the authority to do so must have arisen from the fact that the school district had contractually obligated itself to recognize and bargain with the unions chosen by its employees. See Independence School District, 223 S.W.3d at 139-140. In this case, Appellant has not contractually obligated itself to collectively bargain with its police officers and sergeants. Therefore, the Independence School District decision cannot be used by Respondent to argue that the holding in Quinn is no longer good law or otherwise argue that an employee's constitutional right to organize and bargain collectively gives Respondent authority to proceed in this action on behalf of Appellant's police officers and sergeants.

In sum, to grant a declaratory judgment, the trial court had to find that Respondent has a "legally protectable interest" at stake in this litigation. Respondent does not have such an interest because it has no right to being selected as the exclusive bargaining representative of Appellant's police officers and sergeants. Therefore, the trial court's judgment in Respondent's favor should be reversed with instructions that the trial court enter judgment for Appellant accordingly.

CONCLUSION

For the foregoing reasons, the trial court's judgment in this case should be reversed in its entirety. It violated the separation of powers doctrine by ordering Appellant to take legislative action to expeditiously establish a specific framework for collective bargaining by Appellant's police officers and sergeants. It erroneously declared Respondent was entitled to judgment when there was no legal basis to find that a justiciable controversy existed between the parties in this case or that Respondent has a legally protectable interest in the controversy of this case. Consequently, Appellant respectfully requests this Court find that Appellant is entitled to judgment in its favor and instruct the trial court to enter such judgment for Appellant.

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.**

A large, stylized handwritten signature in black ink, appearing to read 'T. A. Garnett', is written over a horizontal line.

Timothy A. Garnett (Mo. Bar No. 30414)

Nathan J. Plumb (Mo. Bar No. 56547)

7700 Bonhomme, Suite 650

St. Louis, MO 63105

Telephone: (314) 802-3935

Facsimile: (314) 802-3936

tim.garnett@ogletreedeakins.com

nathan.plumb@ogletreedeakins.com

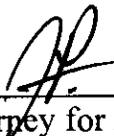
ATTORNEYS FOR APPELLANT CITY OF
UNIVERSITY CITY

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2011, a copy of the foregoing was served via U.S. Mail, postage prepaid, and via electronic mail, to the following:

Gregory Kloeppe
Danielle Thompson
The Kloeppe Law Firm
9620 Lackland Rd.
St. Louis, Missouri 63114
Telephone: 314-423-8003
Facsimile: 314-423-8054
gregkloeppe@kloepplaw.com
danielle.thompson@mofop15.org

ATTORNEYS FOR RESPONDENT



Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this Brief is typed in Times New Roman, 13 point type, Microsoft Word. This Brief contains 6353 words, which is in compliance with the 15,500 word count allowed. This Brief is otherwise in compliance with Rule 84.06(b) and Local Court Rule 360.

I also certify that an electronic mail message attaching a copy of this brief in Word for Windows format has been filed in lieu of a floppy disk to moapped@courts.mo.gov. I also certify that the attachment has been scanned for viruses and was at the time of scanning found to be virus free.



Attorney for Appellant