

IN THE SUPREME COURT OF MISSOURI

CITY OF KANSAS CITY,)
MISSOURI,)
Respondent)
v.)
KANSAS CITY BOARD OF)
ELECTION COMMISSIONERS,)
ET AL.,)
Defendants,)
REV. SAMUEL E. MANN, ET AL.,)
Appellants.)

No. SC95368

Appeal from the Sixteenth Judicial Circuit Court
Jackson County, Missouri
The Honorable Justine E. Del Muro

REPLY BRIEF OF APPELLANTS

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REPLY OF APPELLANTS

INTRODUCTION

In its initial brief, Defendants/Appellants Samuel E. Mann, Lloyd Fields, Rodney Williams, Tex Sample, and Wallace S. Hartsfield (hereinafter “Defendants”) demonstrated that §67.1571 RSMo. and House Bill 722 (§285.055 RSMo.) are unconstitutional, that the trial court’s reliance on the statutes was in error, and their proposed ordinance should have moved forward to a vote of Kansas City, Missouri electors. *See*, Appendix (“A.”) 62-64. In response, Plaintiff/Respondent the City of Kansas City, Missouri (hereafter “Plaintiff”) states that the trial court was not asked to rule on the constitutionality of either statute, and as a result the constitutionality of both statutes is not preserved for appellate review.

In this regard, Plaintiff argues that Defendants’ affirmative defenses, arguments during trial, post-trial brief, and their Motion for New Trial were insufficient to preserve the constitutional issues because the challenge should have occurred via a counterclaim in the form of either a declaratory judgment or writ of mandamus. However, Plaintiff also argues that a declaratory judgment counterclaim would be inappropriate to preserve the constitutional issues because the Attorney General was never a party to the action. Similarly, Plaintiff further argues that a writ of mandamus counterclaim would also be improper to preserve the issues because such actions may not be used to determine the constitutionality of statutes. In essence, Plaintiff claims that Defendants had absolutely no right of recourse to challenge Plaintiffs’ decision to stop the voters of Kansas City,

Missouri from deciding on Defendants' proposed ordinance because any opposition would be procedurally prohibited.

Plaintiff's arguments are disingenuous for two reasons. First, on Friday, September 18, 2015, Plaintiff filed its Petition to stop the proposed ordinance from being considered by the voters. *See*, Legal File ("L.F.") 2-26. Although Plaintiff now claims the justification for the filing was a decision by a St. Louis Court, and not because the Governor's veto of House Bill 722 (§285.055 RSMo.) was overturned, its Petition belies such a claim. Plaintiff alleged there were two primary reasons for the filing, the passage of House Bill 722 (§285.055 RSMo.) and the cost of the election. *See*, L.F. 8 ¶¶14-22; Transcript ("TR.") 6-12.

Moreover, in spite of the fact that Plaintiff was aware of Defendants' clear an unequivocal interest in seeing Defendants' proposed ordinance proceed to the voters for a decision, it failed to name Defendants as parties to the lawsuit. Plaintiff also requested and received an expedited hearing on its Petition which was set for the following Monday, September 21, 2015. *See*, L.F. 2. Plaintiff alleged that if the Court failed to act on or before September 22, 2015, the election would have to proceed. *See*, L.F. 8 ¶¶24-23. Defendants' only avenue for responding to the expedited proceeding was to seek to intervene, file an Answer, and assert affirmative defenses including the constitutionality of the statute relied on in Plaintiff's Petition. The trial court recognized the right of Defendants to intervene, and in their first responsive pleading Defendants asserted that House Bill 722 (§285.055 RSMo.) was unconstitutional. *See*, L.F. 31, 35, A. 63-64. It

was only during the four day period (two of which were Saturday and Sunday) that Defendants had the opportunity to become involved in the case and assert their constitutional defenses. There simply was no time to pursue a separate declaratory judgment action and involve the Attorney General because the trial court had to respond to Plaintiff's Petition prior to September 22, 2015.

The second reason why Plaintiff presents a disingenuous argument is because Plaintiff passed its own, similar, local minimum wage ordinance in the face of and to challenge the constitutionality of §67.1571 RSMo. See, L.F. 7 ¶10; TR.14, 31-33 Presumably, Plaintiff had reached its own decision that the statute was unconstitutional, given the previous court ruling in *Missouri Hotel and Motel Association v. City of St. Louis*, 146 DLR E-1 (2001). Plaintiff's apparent distinction between the language prohibiting a minimum wage increase under §67.1571 RSMo. and the language in House Bill 722 (§285.055 RSMo.) is all the more puzzling in light of the fact that the prohibitive language in the respective statutes is almost identical. Moreover, §67.1571 RSMo. was never mentioned in Plaintiff's Petition as a basis for the decision to stop the election from going forward. See L.F. 5-11. As a result, any reliance by Plaintiff on §67.1571 RSMo., in support of its decision to stop Defendants' proposed ordinance from being considered by the voters of Kansas City, Missouri is simply disingenuous.

1. Appellants Properly Preserved Their Constitutional Challenges to §67.1571 RSMo. and House Bill 722 (§285.055 RSMo.).

Plaintiff's initial argument is that the focus of Defendants' trial court involvement was to make certain the election went forward rather than declaring §67.1571 RSMo. and House Bill 722 (§285.055 RSMo.) unconstitutional. *See*, A. 62-64. As a result, Plaintiff argues that Defendants failed to properly raise their constitutional challenges and that they are not preserved for appellate review. Plaintiff initially proposes that Defendants only had two ways to respond to its Petition if they sought to challenge the constitutionality of a statute: via a declaratory judgment action or a writ of mandamus. Thereafter, Plaintiff proclaims that neither action would be appropriate in this circumstance.

However, Plaintiff's contention that filing a declaratory judgment action or writ of mandamus were the only ways to raise and preserve constitutional challenges is simply not true. Unlike the Defendants in the instant case, in *Hill v. Boyer*, 2015 Mo. App. LEXIS 641, there was an issue of a party failing to raise the constitutionality of the challenged statute in his initial pleading. However, the issue was subsequently raised during trial and the parties also briefed the issue. Thereafter, the trial court ultimately ruled against the plaintiff by upholding the challenged statute. On appeal, the Court of Appeals ultimately decided that the issue had been properly preserved, and jurisdiction was with this Court because the case involved a challenge to the constitutional validity of a Missouri statute. *Id.*

Moreover, as noted in *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. banc 2014), to properly raise a constitutional challenge, a party must: (1) raise the constitutional question at the first opportunity; (2) state with specificity the constitutional provision on which the challenge rests, either by explicit reference to the article and section or by quoting the provision itself; (3) set forth facts showing the violation; and (4) preserve the constitutional question throughout the proceedings for appellate review. This rule is intended to prevent surprise to the opposing party and accord the trial court an opportunity to fairly identify and rule on the issue. *Id.*; See also *Dodson v. Ferrara*, 2016 Mo. LEXIS 114 (not final); *Nolte v. Ford Motor Co.*, 458 S.W.3d 368 (Mo. App. 2014); *Collins-Camden P'ship, L.P. v. County of Jefferson*, 425 S.W.3d 210 (Mo. App. 2014); *Willits v. Peabody Coal Co.*, 400 S.W.3d 442 (Mo. App.2013).

In the present case, the remedy sought in Plaintiff's Petition was to stop the election and any consideration of Defendants' proposed ordinance by the voters of Kansas City, Missouri. Undoubtedly, Defendants wanted the voters to consider their proposed ordinance and they pursued multiple arguments in justification of their position. However, Defendants' primary justification for their position was the fact that the only statute relied on by Plaintiff, House Bill 722 (§285.055 RSMo.), was unconstitutional. *See*, L.F. 5-26; TR. 7-12. Thereafter, Defendants met each required step of the test to preserve the constitutional question for this Court's review.

Given Plaintiff's stated justification that the Petition was necessitated as a result of the Governor's veto of House Bill 722 (§285.055 RSMo.) being overridden, Defendants' first opportunity to raise the issue of the statute's constitutionality was as an affirmative defense in their Answer. *See*, L.F. 5-26, 31-34. Similarly, during trial, when Plaintiff argued the fact that a similar statute, §67.1571 RSMo., existed and also prohibited Defendants' proposed ordinance, Defendants raised the issue of Plaintiff's disingenuous argument based on the passage of its own similar ordinance, and the fact that another Missouri Circuit Court had ruled that §67.1571 RSMo. was unconstitutional. *See*, TR 13-42. Again, that was the first opportunity Defendants had to raise the issue of the statute's constitutionality. The detailed arguments that followed regarding both statutes were specific and concerned the facts showing the perceived violation. TR 13-42. Thereafter, in their post-trial briefs, and in their Motion for New Trial, Defendants continued to argue that both statutes were unconstitutional. *See*, L.F. 40-48, 67-76.

In this regard, *Dodson* provides an excellent discussion of preserving constitutional challenges. *Dodson*, 2016 Mo. Lexis 114. In that case, the defendants argued that the plaintiffs failed to preserve a constitutional challenge because the issue was not raised in a reply to the Answer. *Id.* at 8-10. The *Dodson* court held that the issue was first raised via suggestions in opposition to a motion, and the trial court heard exhaustive arguments by both parties and issued its ruling. *Id.* at 10-11. As a result, the *Dodson* court found that the issue was properly preserved because the defendants suffered no surprise that impeded their ability to effectively respond to the constitutional

claims. *Id.* at 11. The same basic facts are present in the instant case. After review of the transcript of the oral argument in this case, there can be little doubt that the constitutionality of §67.1571 RSMo. and House Bill 722 (§285.055 RSMo.) were front and center as primary issues in this dispute. TR. 13-49.

Moreover, Plaintiff alleges the Defendants did not want the Court to determine that the statutes were unconstitutional. However, Defendants explicitly argued that the statutes were unconstitutional in their Answer, in oral arguments and in their trial briefs. L.F. 31-34, 40-48, 67-76; TR. 13-49. Plaintiff also alleges that the Court did not engage in an analysis of the statutes. However, the transcript clearly shows the trial court questioning both parties at length about the constitutionality of both statutes. TR. 13-49. Moreover, the trial court's judgment states that the two statutes "clearly and unequivocally prohibit Plaintiff from establishing a minimum wage." A. 1-2. In this regard, a "constitutional issue may be presented by a defendant in the trial court, and in the event of a ruling thereon adverse to the appellant, the issue may, if preserved for appellate review establish exclusive appellate jurisdiction in this court." *State ex rel. State Highway Com. v. Wiggins*, 454 S.W.2d 899, 901 (Mo. 1970).

Additionally, in rare circumstances, unpreserved points, including, and especially, constitutional claims, may be reviewed on appeal under the plain error review standard. See *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. App. E.D. 2012); see also Rule 84.13(c) MRCP. Although plain error review of such unpreserved points is solely within the discretion of the appellate court, and, in fact, is

rarely granted in a civil case, such a review is always a possibility. *Id.* Although it is unnecessary in the present case because the constitutionality of the challenged statutes was preserved for appeal, given the gravity of the claims made by Defendants, and the fact that other Circuit Courts have declared one of the challenged statutes to be unconstitutional, this Court has an alternate justification for finding that the issue was preserved for appeal.

2. Plaintiff Cannot Rely on Unconstitutional Statutes to Circumvent the Initiative Process.

Defendants will not repeat the arguments made in their previous brief in which they discuss, at length, the fact that the proposed ordinance can be read consistently with Missouri's minimum wage law (§290.502 et seq. RSMo.). *See*, A. 70. Nevertheless, Plaintiff argues in response that it cannot pass an ordinance that is unlawful, and that it had every right to seek pre-election review of the initiative petition. First and foremost, Plaintiff's Petition did not seek any pre-election review of Defendants' proposed ordinance. The Petition simply sought court intervention to stop the election as a result of the governor's veto of House Bill 722 (§285.055 RSMo.) being overridden by the Missouri legislature. Plaintiff's justifications for stopping the election were that the new statute preempted the proposed ordinance from moving forward, and the costs associated with the election. *See*, L.F. 5-26; TR 6-12. It was only after the trial began that Plaintiff included §67.1571 RSMo. as an additional justification. *See*, TR. 13-42. The trial court, quite appropriately, asked Plaintiff's counsel if she believed the proposed ordinance

conflicted with §67.1571 RSMo., and also asked why Plaintiff did not oppose the proposed ordinance before it was placed on the ballot. Plaintiff admitted that prior to House Bill 722 (§285.055 RSMo.) being overridden, it agreed with Defendants' position that §67.1571 RSMo. is unconstitutional. TR. 22-25. Again, there is little distinction between the prohibitive language in §67.1571 RSMo. and §285.055 RSMo., and the process by which the respective statutes were adopted is equally flawed. Thereafter, the sole basis for the trial court's decision declaring the proposed ordinance unconstitutional was its reliance on the constitutionality of §67.1571 RSMo. as well as House Bill 722 (§285.055 RSMo.). *See*, L.F. 62-63.

Plaintiff mistakenly relies on *Noel v. Bd. of Election*, 465 S.W.3d 88, 92 (Mo. App. 2015) and *Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W. 3d 457, 469 (Mo. App. E.D. 2000) as support for the trial court's decision. The facts of both cases are not remotely similar to the facts of the instant case. In *Noel* the intervenors opposing removal of their proposed ordinance did not argue that the statutes relied on were unconstitutional. 465 S.W.3d at 89. Similarly, in *Klos*, the citizens who sought to use the initiative process did not claim that the statutes relied on were unconstitutional. 35 S.W. 3d at 463. Moreover, in neither of Plaintiff's cited cases had a Missouri Circuit Court previously ruled one of the supporting statutes unconstitutional nor had the opposing party previously taken an inconsistent position with regard to the constitutionality of such statutes.

While Defendants recognize that the initiative petition process is not unlimited, certainly one limitation would be the reliance on unconstitutional statutes to support decisions that circumvent the initiative process. In the present case, the trial court implicitly ruled House Bill 722 (§285.055 RSMo.) and the existing statute, §67.1571 RSMo. were constitutional, and because the proposed ordinance was in conflict with the two statutes the proposed ordinance was unconstitutional. *See*, L.F. 62-63. No other basis is stated for the trial court's judgment. However, if the underlying basis of the trial court's decision was an incorrect determination regarding the constitutionality of the challenged statutes, the election should have gone forward and the voters of Kansas City, Missouri should have decided on the passage of Defendants' proposed ordinance.

3. Defendants' Proposed Ordinance is not Unconstitutional.

Plaintiff repeats the trial court's judgment and argues that Defendants' proposed ordinance is unconstitutional and void because it conflicts with House Bill 722 (§285.055 RSMo.), §67.1571 RSMo., and violates Article VI §19a of the Missouri Constitution. Again, neither the trial court nor Plaintiff present any additional argument in support of the claim that Defendants' proposed ordinance is unconstitutional for any other reason. As previously discussed, the proposed ordinance does not conflict with Missouri's minimum wage law as stated in §290.502 RSMo. *et seq.* *See*, A. 70. As stated in detail in Defendants' previous brief, the purpose of that law is to impose obligations upon employers in order to protect employees. *Tolentino v. Starwood Hotels & Resorts Worldwide Inc.*, 437 S.W.3d 754, 761 (Mo. banc 2014).

In this regard, Plaintiff certainly had no qualms about allowing the proposed ordinance to proceed forward to a vote of the people in the face of §67.1571 RSMo., thereby conceding that it also felt the statute was unconstitutional and that the proposed ordinance was constitutional. It was only the fact that the Governor's veto of House Bill 722 (§285.055 RSMo.) was overridden that Plaintiff filed its Petition. *See*, TR 22-25. Nevertheless, because the sole basis for Plaintiff's and the trial court's opposition to the proposed ordinance is a faulty reliance on the constitutionality of House Bill 722 (§285.055 RSMo.) and §67.1571 RSMo., Defendants' proposed ordinance should proceed to a vote of the citizens of Kansas City, Missouri when this Court overturns the trial court's decision and remands the case for further proceedings.

4. Defendants had Good Reasons for not Seeking a Writ of Mandamus Regarding Plaintiff's Duty to Hold an Election.

Plaintiff next relies on a straw man argument in alleging that even if Defendants' claims at the trial court stage of the proceedings could be viewed as a request for a writ of mandamus, such claims are inappropriate to directly challenge the validity or constitutionality of a statute. Plaintiff cites the case of *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994), in support of its position. However, as previously noted, Defendants did not file a counterclaim seeking a writ of mandamus to force the election to go forward in the face of existing statutes. Instead, they properly answered Plaintiff's Petition, asserted appropriate affirmative defenses, argued the fact

that both challenged statutes were unconstitutional, and extensively briefed the arguments in all subsequent briefs. See, L.F. 31-34, 40-48, 67-76; TR. 13-42.

By taking the consistent position that the challenged statutes were unconstitutional as a defense to the claims set forth in Plaintiff's Petition, Defendants properly preserved their constitutional challenges before this Court. Defendants did not seek, through a writ of mandamus, to force Plaintiff to go forward with the election. As noted in *Lohman*, such action would have been an inappropriate response and inconsistent with Defendant's claim that the basis of Plaintiff's decision was an unconstitutional statute. *Id.* at 37. However, as discussed by the court in *Lohman*, a party does not directly challenge the constitutionality of a statute and violate the referenced mandamus prohibition when the challenge is raised as a matter of defense to the enforcement of an existing statute. *Id.* at 28. Defendants neither sought nor intended to seek a writ of mandamus and their challenge to the referenced statutes was raised as a matter of defense. In fact, the cited authority supports Defendants' position that it properly raised the instant constitutional challenge.

CONCLUSION

This Court should reverse the trial court's Judgment, remand this case for further proceedings, and declare that §67.1571 RSMo and House Bill 722 (§285.055 RSMo.) are unconstitutional.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), and according to the word count function of Word, by which the Reply Brief of Appellant was prepared, it contains 3,186 words, exclusive of the cover, the Certificate of Compliance, the Certificate of Service and the signature block.

The undersigned further certifies that the electronic copy of the Appellant's Brief filed with the Court is in PDF format, complies with the Missouri Supreme Court Rules, and is virus free.

/s/Taylor Fields

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2016, a copy of the Reply Brief of Appellants was filed electronically with the Clerk of Court by operation of the Court's electronic filing system and served upon the following:

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