IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

JOAN JUNGMEYER, GLEN JUNGMEYER, DENNIS KILLDAY, LINDA KILLDAY, TIMOTHY KING, KIM RUIZ-TOMPKINS, ROBERT DUNSTAN, BILL KOEBEL, VIRGIL CLARK,

Appellants,

v.

CITY OF ELDON, MISSOURI,

Respondent.

Case No. WD77922

Appeal from the Decision and Order of the 26th Judicial Circuit

Miller County, Missouri – Case No. 11ML-CC00029

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Miller County, Missouri, in a civil case, granting summary judgment in favor of Defendant-Respondent City of Eldon, Missouri, on all six counts of Plaintiffs-Appellants' First Amended Petition. This appeal calls into question the propriety of that grant of summary judgment, particularly taking into consideration the guidelines of Missouri Rule of Civil Procedure 74.04. The circuit court's Amended Judgment entered on August 25, 2014, disposed of all issues and theretofore pending motions, making the judgment final for purposes of appeal.

The six counts of Plaintiffs-Appellants' First Amended Petition are: Count I, Violation of the Hancock Amendment; Count II, a Request for Injunctive Relief as to certain properties; Count III, Regulatory Taking in Violation of Missouri Constitution article i, section 26; Count IV, Violation of the Due Process Clause of the Missouri Constitution; Count V, Violation of the Equal Protection Clause of the Missouri Constitution; and Count VI, Violation of Missouri Constitution article iii, section 40(30). Plaintiffs-Appellants request a declaratory judgment concerning the constitutionality of certain city ordinances adjusting water and sewer charges in light of the above.

Any party aggrieved by a final judgment of a circuit court in a civil case may appeal to a court having appellate jurisdiction, unless prohibited by the state constitution. **Sec. 512.020, RSMo (2012).** As to declaratory judgments, review thereof is specifically permitted by Section 527.070, RSMo (2012). Miller County Circuit Court lies in the territorial boundaries of Missouri's Western District Court of Appeals. **Sec. 477.070,**

RSMo (2012). None of the issues raised in this appeal involve the validity of a treaty or statute of the United States, the validity of a statute or provision of the state constitution, the construction of the state revenue laws, the title to any state office, or consideration of the death penalty, so as to be within the exclusive jurisdiction of the Missouri Supreme Court. **Mo. Const. art. v, § 3.**

Notice of Appeal was timely filed on September 4, 2014.

STATEMENT OF FACTS

A. On June 2, 2014, Respondent City of Eldon filed with the circuit court a Motion for Summary Judgment, served on Appellants via the U.S. mail, postage prepaid. **L.F. 81, 83.**

B. The following are the numbered paragraphs set forth as Respondent City of Eldon's Motion for Summary Judgment Statements of Fact:

1. No genuine issue of material fact exists regarding Plaintiffs' allegations in paragraph 86 of Plaintiffs' Petition that moneys collected by the City to finance the "operations and activities for the general population of the City" (*sic*).

Such allegations are not accompanied by facts supporting Plaintiffs' statements and are factually inaccurate because the water and sewer revenues are not

used to fund the general revenues of the City of Eldon (hereinafter "City"); (Affidavit of Deborah Guthrie). The rates at issue here are not in violation of Article X, Section 22 of the Missouri Constitution (hereinafter "Hancock" or "Hancock Amendment"); and Plaintiffs cannot establish that the ordinances at issue are subject to a Hancock analysis or violate the Hancock Amendment. (Ex. A, B, E, K). RSMo Section 67.042 RSMo (sic), Article X, Section 22, Missouri Constitution, Section 250.231, 250.240 RSMo, Section 250.233 RSMo.

2. No genuine issue of material fact exists regarding Plaintiffs' allegation in paragraph 87 [page 18].[1] of their Petition that the City established "higher water and sewer rates than necessary for improvements to its waterworks and sewer treatment works" rather than seeking a "revenue bond" or "increasing general revenues by other means such as by reducing expenditures of the City or streamlining services provided by the City."

[1]Appellants' counsel alerts the Court to a numbering error in Appellants' First Amended Petition. Appellants' counsel inadvertently restarted numbering at 85 after paragraph 100 on page 18 thereof. This resulted in two each of paragraphs numbered 85 to 100, so any reference in this Paragraph A to a paragraph of the petition includes the number of the page on which it appears. There is no explanation but unintentional scrivener's error.

3. Said allegations are conclusory and factually inaccurate as water and sewer services are not funded by general revenue. (Ex. E and J).

4. No genuine issue of material fact exists regarding Plaintiffs' allegation in paragraph 88 that a vote of the people must be taken prior to a water and sewer rate increase because Plaintiffs' allegation is factually and legally inaccurate. There is no legal requirement the City must take the steps alleged by Plaintiffs prior to increasing water and sewer rates. (Section 67.042 RSMo, Section 250.231 RSMo, Section 250.240 RSMo,).

5. An increase in water and sewer rates is not a tax requiring a vote of the people. (Section 67.042 RSMo, Section 240.231 RSMo, 250.240 RSMo).

6. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 89 and 90 of their Petition that the water and sewer rates charged by the City are based on existing meters or the number of individual units serviced by an individual meter and not on actual usage. The practice is not illegal and is legally permissible and part of the charge is based on usage (Ex. F, Question 10, Ex. E). (Section 67.042 RSMo, Section 250.231 RSMo, Section 250.240 RSMo, Ordinance 2156, Ordinance 2010-54, Ordinance 2010-55).

7. No genuine issue of material fact exists regarding Plaintiffs' allegations as set out in paragraph 91 of their First Amended Petition that the water and sewer rate increases by be City are a "new tax, license or fee" for purposes of providing "additional revenue for the general support of the City" because the rates charged by

the City are not a tax, and are not for the purpose of raising general revenue for the City. (Sections 67.042 RSMo, 250.231 RSMo, 250.240 RSMo,, Ex. D, Ex. E, Ex. K).

8. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 92-94 that rates are determined on a flat fee and consumption basis, that rates are based on existing meters or the number of individual units serviced by an individual meter, and that the amount charged is more than an amount necessary for the improvements to the City water and sewer works. These allegations do not demonstrate Plaintiffs are entitled to relief because such actions are not illegal and are legally permissible. (Sections 67.042 RSMo, 250.231, RSMo, 250.240 RSMo, Ordinances 2156, 2010-54, 2010-55).

9. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraph 95 that Plaintiffs have been damaged by the City's water and sewer rate increases, and that the water and sewer rate increases are for general revenue purposes are factually inaccurate because Plaintiffs' own statements and discovery responses fail to support their allegation, and because Plaintiffs' allegation that the rate increases are for general revenue purposes are factually incorrect. (Ex. C, question #7, Ex. D, Ex. E)

Plaintiffs are not entitled to recover their costs and reasonable attorney fees pursuant to the Hancock Amendment because no Hancock violation exists. (Sections 67.042, 250.231, 250.240 RSMo.).

10. No genuine issue of material fact exists as to Plaintiffs' allegations at Count II because Plaintiffs cannot prove their allegations at paragraphs 98-108 of their amended petition that the referenced ordinances do not apply to mobile home parks and that Plaintiffs are entitled to injunctive relief, because mobile home parks are "multi-residential properties" which the ordinances include.

Injunction is not proper because the mobile home parks fall within the ordinances at issue, and Plaintiffs, thus, cannot prove the elements necessary for injunction to issue. (Ordinance 2010-54, Ordinance 2010-55, Chapter 715-030, Code of Ordinances, City of Eldon, Ex. M).

11. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 109-112 of Count II that mobile home park owners cannot upgrade their mobile home parks, and have lost present and future earnings, because the ordinances at issue are properly applied to mobile home parks and the City is legally allowed to make such rate increases. (Sections 67.042, 250.230, 250.240 and 250.233 RSMo)

By their own records and statements Plaintiffs cannot prove any losses they claim to have incurred are (*sic*) a result of the water and sewer rate increases. In fact, their tax records shows (*sic*) the subject property to be earning at or near historical amounts. (Exhibit H, Ordinance 2010-54, Ordinance 2010-55).

12. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 113-122. Plaintiffs cannot prove a violation of Article 1, Section 26 of the Missouri Constitution as set out in paragraphs 113-122 of their amended petition

because the use of their property has not been altered by the ordinances. (Ex. K, Ex. G, King pg. 7, Dennis Killday, pg. 25, Virgil Clark pgs. 8-12, Bill Koebel pg. 21, Glen Jungmeyer pg. 6, Robert Dunstan, pg. 6, Ex. F. question 3A). Plaintiffs by their own records and admission were not deprived of all economic use of their property. (Ex. H).

Plaintiffs cannot prove that the City failed to read the meter of the property mentioned in paragraphs 113-122 of Plaintiffs' amended petition because the City did read Plaintiffs' meter; Plaintiffs cannot prove the imposition of water and sewer rate increases is illegal and a taking under Article I, Section 26 of the Missouri Constitution; (Ex. J). Plaintiffs (*sic*) use of their property as rental property has not been impinged. (Ex. F, question 3A, Ex. G, Plaintiffs' Depositions, Tim King, pg. 7, Robert Dunstan, pg. 6, Dennis Killday, pg. 25, Linda Killday pg. 18, Virgil Clark, pgs. 8-12, Bill Koebel, pgs. 21, 27, Glen Jungmeyer, pg. 6).

13. No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot show both as a matter of law and by their own admission, as they have alleged in their petition at paragraphs 123-132, that as a result of the increases in water and sewer rates, they were forced to remove property from the rental market, (Ex. F, question 3A) that they were deprived of financial gain or the ability to economically develop their property, that they are unable to sell their property or that the Ordinances at issue illegally imposed restrictions upon Plaintiffs' property such that a violation of Article 1, Section 26 of the Missouri Constitution

occurred. (Ex. G, Linda Killday pg. 9, Bill Koebel pg. 20, Virgil Clark pgs 9, 22, Kim Ruiz-Thompkins pgs. 14-16, Dennis Killday pgs. 19 and 42, Joan Jungmeyer pgs. 17; Ex. I, letter to Tim King, Ex. L, John Holland, Ex. K) Section 250.231 RSMo, Section 250.240 RSMo, Article 1, Section 26, Missouri Constitution.)

14. No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot prove as a matter of law they have an interest to be protected under which a due process claim can be brought as claimed in paragraphs 133-140 of their amended petition, because Plaintiffs have no property interest to be protected by procedural due process exists in the water and sewer rates (*sic*), *Jackson Co. V. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. Banc 1975). The rates enacted by the ordinances at issue bear a rational relationship to a legitimate public interest. Further, to the extent that Count IV of Plaintiffs' Amended Petition appears to plead for an injunction, Plaintiffs cannot prove they have suffered irreperable (*sic*) harm or that they have no adequate remedy at law. (Ex. H, Ex. G, King, pgs. 14, 24, Glen Jungmeyer, pg. 10, Kim Ruiz-Thompkins, pg. 12, Dennis Killday, pg. 24, Linda Killday, pgs. 7-8, Virgil Clark, pg. 23, Bill Koebel, pgs. 11-14, 16, Robert Dunstan, pg. 8, Ex. K).

15. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 135, 136 and 137 because Plaintiffs cannot prove their general, conclusory allegations at paragraphs 135, 136, and 137 that economic conditions in the City are caused by the increase in water and sewer rates. (Ex. F questions 9 and 13, Ex. C

questions 8, 9 and 10. Article 1, Section 10, Missouri Constitution, Section 250.231 RSMo, Section 250.240 RSMo).

16. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraph 141 - 145 because Plaintiffs cannot prove their allegations in paragraphs 141-145 that "other property owners have approached the City and received deals that significantly cut the fees imposed by the ordinances" because no such "deals" exist. (Ex. I and L).

Also, Plaintiffs cannot prove as a matter of law that the ordinances at issue violates (*sic*) Article I, Section 2 of the Missouri Constitution because the ordinances do not create a suspect class. (Ex. I, L.) and Plaintiffs cannot prove the ordinances are not rationally related to a governmental purpose or valid exercise of the police power. (Article I, Section 2, Missouri Constitution, Ex. B, Ex. I, Ex. L).

17. No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot show that the City's ordinances are applied in an arbitrary fashion such that a claim for lack of equal protection will lie, because the ordinances do not create a suspect class and Plaintiffs cannot prove such ordinances are not rationally related to a legitimate governmental purpose. (Article 1, Section 2, Missouri Constitution, Ex. B, Ex. I, Ex. L Ex. K).

18. No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 147-163 of their amended petition attempting to show the City has imposed a special tax on Plaintiffs by an increase in the City water and sewer rates.

However, Plaintiffs cannot show as a matter of law that the ordinances at issue are a tax or a special law because the ordinances apply alike to all of a given class and the classification has a reasonable basis. Article III, Section 40(30), Missouri Constitution, Ex. I, Ex. K).

19. No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs, at paragraph (*sic*) 164 of their amended petition allege (*sic*) they charged sales tax for residential property at a rate of 2% rather than a rate of 1 % as prescribed by ordinance; Plaintiffs are mistaken because the City only charges the proper rate and therefor (*sic*) the Plaintiffs cannot show as a matter of law that the City charges them other than the correct rate. (Ex. J).

L.F. 110-117.

C. On July 7, 2014, in response to Respondent City's Motion for Summary Judgment, Appellants moved the court for an order striking the City's motion, arguing that the numbered paragraphs set forth therein as Statements of Fact failed to meet the requirements of Rule 74.04, most particularly of subsections 74.04(c)(1) (regarding statements of fact) and 74.04(e) (regarding sufficiency of affidavits), as well as the evidentiary requirements of § 490.250, RSMo. (2012) (regarding admissibility requirements for city ordinances, etc.). **L.F. 13, 1023.** After a hearing thereon, the court requested an affidavit of Appellants' attorney attesting to the actual date Respondent's Motion for Summary Judgment was received in the mail. **L.F. 13.** Appellants' attorney's affidavit was timely filed, along with a Motion for Enlargement of Time to File Plaintiffs' Motion to Strike

Defendant's Motion for Summary Judgment or, in the Alternative, Motion for Enlargement of Time to File a Response to Defendant's Motion for Summary Judgment. **L.F. 14.**

D. Judgment was first entered on July 28, 2014, granting Respondent's Motion for Summary Judgment, but the court did not rule on Appellants' Motion for Enlargement of Time to File. **L.F. 14.** Upon Appellants' motion, the court entered an amended judgment, dated August 25, 2014, that disposed of all pending motions, making it final for appeal. **L.F. 15.**

POINT RELIED ON I

The circuit court erred in denying Appellants' Motion to Strike Respondent City's Motion for Summary Judgment, because Respondent's Motion for Summary Judgment's numbered paragraphs denominated as Statements of Fact failed to follow the mandates of Missouri Rule of Civil Procedure 74.04 requiring Respondent to "state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue" and give "specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts," in that Respondent's proffered numbered paragraphs set forth as statements of fact were nearly entirely single or multiple legal conclusions or opinions, and depended for evidentiary support on hearsay, irrelevant matters, matters that were outside the personal knowledge or competency of an affiant, statements of legal conclusions and opinions of affiants, broad citations to entire documents – one document being nearly 200 pages long, another over 250 pages – vague citations to uncertain discovery documents, improperly certified documents, statutory and constitutional provisions, or nothing at all, making an order striking the insufficient statements and evidence appropriate.

Brown v. Upjohn Co., 655 S.W.2d 758 (Mo. App. E.D. 1983)

CACH, LLC v. Askew, 358 S.W.3d 58 (Mo. banc 2012)

Jennings v. City of Kansas City, 812 S.W.2d 724 (Mo. App. W.D. 1991)

Scott v. Ranch Roy-L, Inc., 182 S.W.3d 627 (Mo. App. E.D. 2005)

Mo. R. Civ. P. 74.04 (2012), and subparts (c)(1), (c)(2), and (e)

Mo. R. Civ. P. 44.01(b)(2) (2013)

Mo. R. Civ. P. 55.25(c) (2012)

Mo. R. Civ. P. 55.27(e) (2012)

Sec. 432.070 RSMo (2012)

Sec. 490.240 RSMo (2012)

Sec. 490.460 RSMo (2012)

Sec. 490.680 RSMo (2012)

POINT RELIED ON II

The circuit court erred in denying Appellants' Motion for Enlargement of Time to File a Response to City's Motion for Summary Judgment, because Missouri Rule 44.01(b)(2) permits such enlargement "upon notice and motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect," in that Appellants' counsel filed for such enlargement of time while awaiting the circuit court's decision on Appellants' Motion to Strike Respondent City's Motion for Summary Judgment, such motion to strike being made as a good faith response to Respondent's motion, making such delay excusable and the grant of such enlargement of time would have better served the interests of justice.

Flowers v. City of Campbell, 384 S.W.3d 305 (Mo. App. S.D. 2012)

Mo. R. Civ. P. 74.04(c)(2) (2012)

Mo. R. Civ. P. 44.01(b)(2) (2013)

POINT RELIED ON III

The circuit court erred in granting Respondent City's Motion for Summary Judgment, because, even if all facts offered by Respondent it its motion are taken as true, Respondent failed to establish the absence of genuine issues of material fact and the right to judgment as a matter of law, in that the facts offered by Respondent were insufficient to support its arguments that Appellants have not been injured by the ordinances that are the subject of this suit in the ways set forth in each count of Appellants' First Amended Petition.

Bakewell v. Missouri State Employees' Retirement System, 668 S.W.2d 224 (Mo. App. W.D. 1984)

Brown v. Upjohn Co., 655 S.W.2d 758 (Mo. App. E.D. 1983)

Sears v. City of Columbia, 660 S.W.2d 238 (Mo. App. W.D. 1983)

Sprung v. Negwer Materials, Inc., 727 S.W.2d 883 (Mo. banc 1987)

Mo. R. Civ. P. 74.04 (2012), and subpart (c)(2)

Mo. R. Civ. P. 44.01(b)(2) (2013)

Mo. R. Civ. P. 55.27(e) (2012)

ARGUMENT - POINT RELIED ON I

The circuit court erred in denying Appellants' Motion to Strike Respondent City's Motion for Summary Judgment, because Respondent's Motion for Summary Judgment's numbered paragraphs denominated as Statements of Fact failed to follow the mandates of Missouri Rule of Civil Procedure 74.04 requiring Respondent to "state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue" and give "specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts," in that Respondent's proffered numbered paragraphs set forth as statements of fact were nearly entirely single or multiple legal conclusions or opinions, and depended for evidentiary support on hearsay, irrelevant matters, matters that were outside the personal knowledge or competency of an affiant, statements of legal conclusions and opinions of affiants, broad citations to entire documents – one document being nearly 200 pages long, another over 250 pages – vague citations to uncertain discovery documents, improperly certified documents, statutory and constitutional provisions, or nothing at all, making an order striking the insufficient statements and evidence appropriate.

Standard of Review – Denial of Motion to Strike

A circuit court's ruling on a motion to strike is reviewed for an abuse of discretion. ***Lero v. State Farm Fire and Cas. Co.,*** 359 S.W.3d 74, 79 (Mo. App. W.D. 2011). The circuit court's ruling is reversed only when it "'is clearly against the logic of the

circumstances and so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration.'" ***Id.*** (*quoting* ***Wareham v. Am. Family Life Ins. Co.,*** 922 S.W.2d 97, 100 (Mo. App. W.D. 1996)).

Regarding the Numbered Paragraphs / "Facts"

The circuit court entered judgment in favor of Respondent on Respondent's Motion for Summary Judgment, finding specifically that "Plaintiffs' 'Motion to Strike' is not a response as required by Rule 74.04(c)(2)." **Applnts.' Appx. A-1.** While a Motion to Strike is not the standard, expected response to a Motion for Summary Judgment, it is not unheard of. *See e.g.*, ***Rasse v. The City of Marshall,*** 185 S.W.3d 486, 494 (Mo. App. W.D. 2000) (defendant city filed amended motion for summary judgment in response to plaintiff's motion to strike the original motion); ***Bakewell v. Missouri State Employees' Retirement System,*** 668 S.W.2d 224, 227, n. 3 (Mo. App. W.D. 1984) (appellate court noted that the parties' failed by not moving to strike or otherwise object to defective affidavits offered to support facts in a motion for summary judgment).

Nearly all of Respondent's numbered paragraphs set forth in its Motion for Summary Judgment as statements of fact are entirely legal conclusions, and so are not admissible as facts. ***Scott v. Ranch Roy-L, Inc.,*** 182 S.W.3d 627, 635 (Mo. App. E.D. 2005). Such paragraphs are not statements of fact as contemplated under Rule 74.04(c)(1), and therefore need not be responded to at all under Rule 74.04(c)(2). ***Brown v. Upjohn Co.,*** 655 S.W.2d 758, 760 (Mo. App. E.D. 1983).

Below, Respondent's paragraphs are set forth again, but with all parts that are legal conclusions, or that fail to cite pleadings, discovery, exhibits or affidavits for support, struck through. The remaining allegations are in **bold**. The result shows that a Motion to Strike is an almost definitively proper response to Respondent's Motion.

1. Paragraph 1:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations in paragraph 86 of Plaintiffs' Petition that moneys collected by the City to finance the 'operations and activities for the general population of the City'~~ (*sic*).

~~Such allegations are not accompanied by facts supporting Plaintiffs' statements and are factually inaccurate because the water and sewer revenues are not used to fund the general revenues of the City of Eldon (hereinafter "City");~~ (Affidavit of Deborah Guthrie). ~~The rates at issue here are not in violation of Article X, Section 22 of the Missouri Constitution (hereinafter "Hancock" or "Hancock Amendment"); and Plaintiffs cannot establish that the ordinances at issue are subject to a Hancock analysis or violate the Hancock Amendment.~~ (Ex. A, B, E, K). RSMo Section 67.042 RSMo (sic), Article X, Section 22, Missouri Constitution, Section 250.231, 250.240 RSMo, Section 250.233 RSMo.

L.F. 110 ¶ 1.

2. Paragraph 2:

~~No genuine issue of material fact exists regarding Plaintiffs' allegation in paragraph 87 of their Petition that the City established "higher water and sewer rates than~~

~~necessary for improvements to its waterworks and sewer treatment works" rather than seeking a "revenue bond" or "increasing general revenues by other means such as by reducing expenditures of the City or streamlining services provided by the City."~~

L.F. 110 ¶ 2.

3. Paragraph 3: "~~Said allegations are conclusory and factually inaccurate as~~ **water and sewer services are not funded by general revenue**. (Ex. E and J)."

L.F. 110 ¶ 3.

4. Paragraph 4:

~~No genuine issue of material fact exists regarding Plaintiffs' allegation in paragraph 88 that a vote of the people must be taken prior to a water and sewer rate increase because Plaintiffs' allegation is factually and legally inaccurate. There is no legal requirement the City must take the steps alleged by Plaintiffs prior to increasing water and sewer rates.~~ (Section 67.042 RSMo, Section 250.231 RSMo, Section 250.240 RSMo,).

L.F. 110 ¶ 4.

Respondent fails to state how the allegation is "factually inaccurate." Respondent cites only to statutes, referencing nothing in the pleadings, discovery, exhibits or affidavits to demonstrate the lack of a genuine issue as to whether there was a vote.

5. Paragraph 5: "~~An increase in water and sewer rates is not a tax requiring a vote of the people.~~ (Section 67.042 RSMo, Section 240.231 RSMo, 250.240 RSMo)."

L.F. 111 ¶ 5. Note again that all citations are to statutes.

6. Paragraph 6:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 89 and 90 of their Petition that the water and sewer rates charged by the City are based on existing meters or the number of individual units serviced by an individual meter and not on actual usage. The practice is not illegal and is legally permissible and~~ part of the charge is based on usage (Ex. F, Question 10, Ex. E). (Section 67.042 RSMo, Section 250.231 RSMo, Section 250.240 RSMo, Ordinance 2156, Ordinance 2010-54, Ordinance 2010-55).

L.F. 111 ¶ 6.

7. Paragraph 7:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations as set out in paragraph 91 of their First Amended Petition that the water and sewer rate increases by be City are a "new tax, license or fee" for purposes of providing "additional revenue for the general support of the City" because~~ **the rates charged by the City** ~~are not a tax, and~~ **are not for the purpose of raising general revenue for the City.** (Sections 67.042 RSMo, 250.231 RSMo, 250.240 RSMo,, Ex. D, Ex. E, Ex. K).

L.F. 111 ¶ 7.

The bolded clause in numbered paragraph 7, "the rates charged by the City . . . are not for the purpose of raising general revenue for the City," should be stricken for lack of relevancy. Whether the *purpose* of the rates charged is to raise general revenue for the City is irrelevant and therefore inadmissible. ***Jennings v. City of Kansas City,*** 812 S.W.2d 724,

729 (Mo. App. W.D. 1991) (*citing* ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 255 (1986)). What *is* relevant is that the rates charged actually *do* raise the general revenue for the City. Where the monies collected through the rates charged are used for purposes other than for water or sewerage works, it puts them to use as general revenue.

8. Paragraph 8:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 92-94 that rates are determined on a flat fee and consumption basis, that rates are based on existing meters or the number of individual units serviced by an individual meter, and that the amount charged is more than an amount necessary for the improvements to the City water and sewer works. These allegations do not demonstrate Plaintiffs are entitled to relief because such actions are not illegal and are legally permissible.~~ (Sections 67.042 RSMo, 250.231, RSMo, 250.240 RSMo, Ordinances 2156, 2010-54, 2010-55).

L.F. 111 ¶8.

9. Paragraph 9:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraph 95 that Plaintiffs have been damaged by the City's water and sewer rate increases, and that the water and sewer rate increases are for general revenue purposes are factually inaccurate because Plaintiffs' own statements and discovery responses fail to support their allegation, and because Plaintiffs' allegation that the rate increases~~

~~are for general revenue purposes are factually incorrect~~. (Ex. C, question #7, Ex. D, Ex. E)

~~Plaintiffs are not entitled to recover their costs and reasonable attorney fees pursuant to the Hancock Amendment because no Hancock violation exists.~~ (Sections 67.042, 250.231, 250.240 RSMo.).

L.F. 112 ¶ 9.

10. Paragraph 10:

~~No genuine issue of material fact exists as to Plaintiffs' allegations at Count II because Plaintiffs cannot prove their allegations at paragraphs 98-108 of their amended petition that the referenced ordinances do not apply to mobile home parks and that Plaintiffs are entitled to injunctive relief, because mobile home parks are "multi-residential properties" which the ordinances include~~.

~~Injunction is not proper because the mobile home parks fall within the ordinances at issue, and Plaintiffs, thus, cannot prove the elements necessary for injunction to issue.~~ (Ordinance 2010-54, Ordinance 2010-55, Chapter 715-030, Code of Ordinances, City of Eldon, Ex. M).

L.F. 112 ¶ 10.

All that could have been properly set forth as fact is that the ordinances say what they say – if they are admissible (which, as shown below, in this case, they are not).

11. Paragraph 11:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 109-112 of Count II that mobile home park owners cannot upgrade their mobile home parks, and have lost present and future earnings, because the ordinances at issue are properly applied to mobile home parks and the City is legally allowed to make such rate increases~~. (Sections 67.042, 250.230, 250.240 and 250.233 RSMo)

~~By their own records and statements Plaintiffs cannot prove any losses they claim to have incurred are a result of the water and sewer rate increases. In fact, their tax records shows (*sic*) the subject property to be earning at or near historical amounts.~~ (Exhibit H, Ordinance 2010-54, Ordinance 2010-55).

L.F. 113 ¶ 11.

12. Paragraph 12:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 113-122. Plaintiffs cannot prove a violation of Article 1, Section 26 of the Missouri Constitution as set out in paragraphs 113-122 of their amended petition because the use of their property has not been altered by the ordinances.~~ (Ex. K, Ex. G, King pg. 7, Dennis Killday, pg. 25, Virgil Clark pgs. 8-12, Bill Koebel pg. 21, Glen Jungmeyer pg. 6, Robert Dunstan, pg. 6, Ex. F. question 3A). **Plaintiffs by their own records and admission were not deprived of all economic use of their property**. (Ex. H).

~~Plaintiffs cannot prove that the City failed to read the meter of the property mentioned in paragraphs 113-122 of Plaintiffs' amended petition because~~ **the City**

did read Plaintiffs' meter; ~~Plaintiffs cannot prove the imposition of water and sewer rate increases is illegal and a taking under Article I, Section 26 of the Missouri Constitution;~~ (Ex. J). ~~Plaintiffs use of their property as rental property has not been impinged.~~ (Ex. F, question 3A, Ex. G, Plaintiffs' Depositions, Tim King, pg. 7, Robert Dunstan, pg. 6, Dennis Killday, pg. 25, Linda Killday pg. 18, Virgil Clark, pgs. 8-12, Bill Koebel, pgs. 21, 27, Glen Jungmeyer, pg. 6).

L.F. 113 ¶ 12. The first remaining clause, "Plaintiffs by their own records and admission were not deprived of all economic use of their property" is irrelevant and mischaracterizes Appellants' allegations. Nowhere do Appellants state they were or are deprived of *all* economic use of their property. The next clause, "the City did read Plaintiffs' meter," is discussed *infra* as being supported with insufficient and inadmissible evidence.

13. Paragraph 13:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot show both as a matter of law and by their own admission, as they have alleged in their petition at paragraphs 123-132, that as a result of the increases in water and sewer rates, they were forced to remove property from the rental market, (Ex. F, question 3A) that they were deprived of financial gain or the ability to economically develop their property, that they are unable to sell their property or that the Ordinances at issue illegally imposed restrictions upon Plaintiffs' property such that a violation of Article 1, Section 26 of the Missouri Constitution occurred.~~ (Ex. G, Linda Killday pg. 9, Bill Koebel pg. 20, Virgil Clark pgs 9, 22, Kim Ruiz-Thompkins pgs. 14-16,

Dennis Killday pgs. 19 and 42, Joan Jungmeyer pgs. 17; Ex. I, letter to Tim King, Ex. L, John Holland, Ex. K) Section 250.231 RSMo, Section 250.240 RSMo, Article 1, Section 26, Missouri Constitution.)

L.F. 114 ¶ 13.

14. Paragraph 14:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot prove as a matter of law they have an interest to be protected under which a due process claim can be brought as claimed in paragraphs 133-140 of their amended petition, because Plaintiffs have no property interest to be protected by procedural due process exists in the water and sewer rates (*sic*), *Jackson Co. V. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. Banc 1975). The rates enacted by the ordinances at issue bear a rational relationship to a legitimate public interest. Further, to the extent that Count IV of Plaintiffs' Amended Petition appears to plead for an injunction, Plaintiffs cannot prove they have suffered irreperable (*sic*) harm or that they have no adequate remedy at law.~~ (Ex. H, Ex. G, King, pgs. 14, 24, Glen Jungmeyer, pg. 10, Kim Ruiz-Thompkins, pg. 12, Dennis Killday, pg. 24, Linda Killday, pgs. 7-8, Virgil Clark, pg. 23, Bill Koebel, pgs. 11-14, 16, Robert Dunstan, pg. 8, Ex. K).

L.F. 115 ¶ 14.

15. Paragraph 15:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 135, 136 and 137 because Plaintiffs cannot prove their general, conclusory allegations at paragraphs 135, 136, and 137 that economic conditions in the City are caused by the increase in water and sewer rates.~~ (Ex. F questions 9 and 13, Ex. C questions 8, 9 and 10. Article 1, Section 10, Missouri Constitution, Section 250.231 RSMo, Section 250.240 RSMo).

L.F. 115 ¶ 15.

16. Paragraph 16:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraph 141 - 145 because Plaintiffs cannot prove their allegations in paragraphs 141-145 that~~ **"other property owners have approached the City and received deals that significantly cut the fees imposed by the ordinances" because no such "deals" exist**. (Ex. I and L).

~~Also, Plaintiffs cannot prove as a matter of law that the ordinances at issue violates (*sic*) Article I, Section 2 of the Missouri Constitution because the ordinances do not create a suspect class~~. (Ex. I, L.) ~~and Plaintiffs cannot prove the ordinances are not rationally related to a governmental purpose or valid exercise of the police power.~~ (Article I, Section 2, Missouri Constitution, Ex. B, Ex. I, Ex. L).

L.F.116 ¶ 16.

17. Paragraph 17:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs (*sic*) cannot show that the City's ordinances are applied in an arbitrary fashion such that a claim for lack of equal protection will lie, because the ordinances do not create a suspect class and Plaintiffs cannot prove such ordinances are not rationally related to a legitimate governmental purpose.~~ (Article 1, Section 2, Missouri Constitution, Ex. B, Ex. I, Ex. L Ex. K).

L.F. 116 ¶ 17. Appellants cannot glean any facts from this enigmatic paragraph. It is entirely legal posturing with no factual elements relative to this case.

18. Paragraph 18:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at paragraphs 147-163 of their amended petition attempting to show the City has imposed a special tax on Plaintiffs by an increase in the City water and sewer rates. However, Plaintiffs cannot show as a matter of law that the ordinances at issue are a tax or a special law because the ordinances apply alike to all of a given class and the classification has a reasonable basis~~. Article III, Section 40(30), Missouri Constitution, Ex. I, Ex. K).

L.F. 116 ¶ 18.

19. Paragraph 19:

~~No genuine issue of material fact exists regarding Plaintiffs' allegations at Plaintiffs, at paragraph (*sic*) 164 of their amended petition allege (*sic*) they charged sales tax for residential property at a rate of 2% rather than a rate of 1 % as prescribed by~~

~~ordinance; Plaintiffs are mistaken because the City only charges the proper rate and therefor (*sic*) the Plaintiffs cannot show as a matter of law that the City charges them other than the correct rate.~~ (Ex. J).

L.F. 117 ¶ 19.

Respondent's statement that "the City only charges the proper rate and therefor (*sic*) the Plaintiffs cannot show as a matter of law that the City charges them other than the correct rate" is meaningless fact-wise. "Proper rate" and "correct rate" are not defined. No ordinances are cited to suggest what the proper or correct rate is. Suttmoller's clerk affidavit, Exhibit J, is no help to Respondent as she would be expressing a legal conclusion, which is as inadmissible in an affidavit as in a statement of facts for summary judgment.

Regarding the Evidence

Per Rule 74.04, statements of fact are to be supported by "a copy of all discovery, exhibits or affidavits on which the motion relies." **Mo. R. Civ. P. 74.04(c)(1).** Not only are most of Respondent's numbered paragraphs entirely legal conclusions, the documents cited in support of the statements are insufficient or otherwise inadmissible as evidence to be considered in ruling on a motion for summary judgment. The required procedure for summary judgment motions as set forth in Rule 74.04(c) "is not discretionary; it is mandatory and must be followed." ***Margiotta v. Christian Hosp. Northeast Northwest,*** 315 S.W.3d 342, 344 (Mo. banc 2010).

In several paragraphs, Respondent cites to statutes and state constitutional provisions, which are not contemplated as evidence for statements of fact for a motion for

summary judgment. Rule 74.04(c) requires citation to specific portions of discovery, exhibits or affidavits for such support. "A summary judgment motion that . . . fails to specifically reference the record is legally defective and cannot serve as the basis for the circuit court's grant of summary judgment." ***State ex rel. Nixon v. Hughes,*** 281 S.W.3d 902, 908-909 (Mo. App. W.D. 2009) (*citing* ***Hanna v. Darr,*** 154 S.W.3d 2, 5 (Mo. App. E.D. 2004)).

> "Rule 74.04(e) requires that supporting and opposing affidavits be based on personal knowledge, set forth facts that would be admissible in evidence, and affirmatively show that the affiant is competent to testify to the matters stated therein." Conclusory statements by a witness "are inadmissible and cannot be used to support summary judgment." Courts may disregard statements in a supporting affidavit that attempts to draw conclusions regarding the legal effects of documents.

Jordan v. Peet, 409 S.W.3d 553, 561 (Mo. App. W.D. 2013) (*quoting* and *citing* ***Scott***, 182 S.W.3d at 634–635) (internal cites omitted). Affidavits cited by Respondent in support of its numbered paragraphs frequently run afoul of this directive.

A look at the failings of each exhibit is in order, as follows:

EXHIBIT A – Affidavit of James A. Guthrie, II

EXHIBIT B – Affidavit of Steve Johnson

Statements in these affidavits violate the mandatory directives of Rule 74.04(e).

Missouri Rule 74.04(e) (2012) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

See also ***St. Charles County v. Dardenne Realty, Co.,*** 771 S.W.2d 828, 830 (Mo. banc 1989)).

- **Guthrie and Johnson lack the personal knowledge and competency to testify on these matters, as required by Rule 74.04(e):**

Respondent's Exhibit A, the affidavit of James A. Guthrie (June 2, 2014), states at paragraph 4: "Based on my knowledge and review of City records, including engineering reports and maps, the City has operated and maintained said waste-water collection and a treatment facility since at least the 1920s." **L.F. 119.** Similarly, Respondent's Exhibit B, the affidavit of Steve Johnson (May 30, 2014), states at paragraph 4: "Based on my knowledge and review of City documents including engineering reports and maps, the City has operated and maintained said water district (*sic* - distribution?) system since at least the 1920s." **L.F. 122.**

These men cannot, unless they are ***very*** old, have personal knowledge concerning what might otherwise be the most useful evidentiary paragraph in their affidavits. Lacking this personal knowledge makes them incompetent to testify to the matters stated therein. **Mo. R. Civ. P. 74.04(e).**

- **Facts set forth are inadmissible in evidence for lack of relevancy.**

The relevancy of the information in paragraph 4 of each affidavit is questionable, and may be inadmissible for that reason alone. ***Strable v. Union Pac. R.R. Co.,*** 396 S.W.3d 417, 424 (Mo. App. E.D. 2013) ("'Before a document may be received in evidence, it must meet a number of foundational requirements including relevancy, authentication, best evidence rule, and hearsay.'" ***Id.*** (*quoting* ***Asset Acceptance v. Lodge,*** 325 S.W.3d 525, 528 (Mo. App. E.D.2010)).); **Mo. R. Civ. P. 74.04(e).** Nothing in Respondent's Motion for Summary Judgment is based on the information presented in this paragraph.

- **City records referred to are not sworn to, certified, attached to the affidavit or served therewith as required by Rule 74.04(e).**

Lacking personal knowledge on the matters, Guthrie and Johnson base their assertions on hearsay and conclusions from unprovided and unauthenticated City records. This violates Rule 74.04(e)'s requirement that such records be sworn to, certified, attached to or served with the affidavits referencing them. **Mo. R. Civ. P. 74.04(e).**

- **Johnson lacks competency to testify on the following matters in his affidavit:**

At paragraph 5 of Johnson's affidavit, he states:

> It is estimated that the City will need to expend 7.8 million dollars for work to upgrade the water distribution system mains for fire department use, and several more as yet unknown millions to conform to the Voluntary Compliance Agreement entered into by the between (*sic*) the City and Department of Natural Resources.

L.F. 123-124. There is no evidence presented that Johnson himself made those estimates or that he is competent to testify concerning them. This again runs afoul of Rule 74.04(e), making the statement inadmissible.

- **The facts set forth in paragraph 5 of Johnson's affidavit are inadmissible in evidence as they are hearsay, opinion and speculation.**

Lacking competency to testify concerning the estimated costs, Johnson bases his statement on hearsay, and it is therefore inadmissible. ***Strable,*** 396 S.W.3d at 424; **Mo. R. Civ. P. 74.04(e).** "Only evidentiary materials that are admissible or usable at trial can sustain or avoid a summary judgment." ***American Family Mut. Ins. Co. v. Lacy,*** 825 S.W. 2d 306, 311 (Mo. App. W.D. 1991). Johnson's statements as to estimated costs of upgrades and conformance with the Voluntary Compliance Agreement are "opinions, conclusions and speculations neither admissible nor usable at trial." ***Id.***

- **The Voluntary Compliance Agreement referred to in the Johnson affidavit is not sworn to, certified, attached to the affidavit or served therewith as required by Rule 74.04(e).**

EXHIBIT C – Discovery / RFPs

Use of the Requests for Production violates the mandates of Rule 74.04(c)(1).

Missouri Rule 74.04(c)(1) (2012) provides, in pertinent part:

> A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts.

- **Respondent's references to its Exhibit C (Discovery / RFPs) lack necessary specificity to comply with Rule 74.04(c)(1).**

There are two sets of "First" Requests for Production, one from 2011, the other from 2012. **L.F. 125-194.** Respondent does not make it clear which year it intends, and it makes a difference.

Respondent included *some,* but not all, responses for both years in its Exhibit C. Neither Appellants nor the Court can be certain as to which edition of Requests for Production Respondent intends. The Court and Appellants are entitled to know the specific parts of the discovery response on which Respondent relies. ***Brown,*** 655 S.W.2d at 759.

Appellants' counsel cannot divine the intended references, and it is not the Court's responsibility to sift through the record in an attempt to determine, the basis for the motion. ***Hughes,*** 281 S.W.3d at 908 (*citing* ***Miller v. Ernst & Young,*** 892 S.W.2d 387, 389 (Mo. App. E.D.1995)). A summary judgment motion that "fails to specifically reference the record is legally defective and cannot serve as the basis for the circuit court's grant of summary judgment." ***Id.*** (*citing* ***Hanna,*** 154 S.W.3d at 5).

- **Failure to include the documents in response to the referenced Requests for Production cannot demonstrate the lack of a genuine issue as to the numbered paragraph statement.**

Respondent included *none* of the documents produced in response to either edition (2011 or 2013) of the requests referenced in its statement of facts. This omission leaves the evidence mischaracterized and incomplete, thus, it cannot demonstrate the non-existence of a genuine issue of material fact. ***Brown,*** 655 S.W.2d at 760.

EXHIBIT D – Evers Audits

Use of the affidavit in conjunction with the audit reports comprising this exhibit violates the mandatory directives of both Rule 74.04(c)(1) regarding specific references to pleadings, discovery and exhibits, and Rule 74.04(e) regarding personal knowledge and competency of an affiant to testify, and admissibility of evidence. Evidence must be admissible to sustain summary judgment. *American Family Mut. Ins.*, 825 S.W. 2d at 311; *also, United Petroleum Serv., Inc. v. Piatchek*, 218 S.W.3d 477, 481 (Mo, App. E.D. 2007).

- **Respondent's references to its Exhibit D (Evers Audits) lack necessary specificity to comply with Rule 74.04(c)(1).**

Exhibit D is referenced only twice in Respondent's numbered paragraphs, once at numbered paragraph 7, which (one assumes) attempts to use it to support the statement that ". . . the rates charged by the City are not a tax, and are not for the purpose of raising general revenue for the City," then again at numbered paragraph 9, which seeks its support for the

statement, "Plaintiffs' allegation that the rate increases are for general revenue purposes are factually incorrect." **L.F. 112.** Each time, Exhibit D is cited in its entirety. According to Suttmoller's business record affidavit included in Exhibit D, the audit report comprising the balance of the exhibit is made up of "252 pages of records consisting of Independent Auditor's reports for the City of Eldon for the years ended 2009, 2010, 2011 and 2012." **L.F. 450, ¶ 3.** There is no indication of just where in the 250+-page stack of records Appellants' counsel or the Court is supposed to look, forcing the Court to do the work properly required of Respondent's counsel. "It is not the function of [the] court to sift through a voluminous record, separating fact from conclusion, admissions from disputes, the material from the immaterial, in an attempt to determine the basis for the motion." ***Miller,*** 892 S.W.2d at 389. That being the case, the audits and the statements relying on them are inadmissible. **Mo. R. Civ. P. 74.04(c)(1).**

- **The Evers Audits, prepared by Evers & Company, CPAs, do not qualify as Respondent City's business records and therefore are inadmissible as hearsay.**

Respondent presents the audit reports, prepared by Evers & Company, CPAs, with a business record affidavit executed by City clerk Fran Suttmoller.[3] **L.F. 195-451.** There

[3]Suttmoller's business records affidavit is attached to three separate exhibits: Exhibit D, Evers Audits; Exhibit J, Affidavit of Fran Suttmoller (which includes another affidavit by Suttmoller as city clerk); and Exhibit K, Ordinances.

is no affidavit from anyone with the competent authority and personal knowledge to interpret and explain the audit reports, thus failing the mandates of Rule 74.04(e).

Section 490.680, RSMo, allows business records to be admitted as competent evidence as an exception to the hearsay prohibition if all the requirements listed in the statute are met. ***CACH, LLC v. Askew,*** 358 S.W.3d 58, 63 (Mo. banc 2012). A document prepared by one business cannot qualify for the business records exception merely based on another business's records custodian testifying that it appears in the files of the business that did not create the record. ***Id.*** The business records exception to the hearsay rule applies only to documents generated by the business itself, not merely holding in the file documents created by another business. ***Id.*** The City is *not* Evers & Company CPAs. Such documents are inadmissible under the statute and the custodian of records does not meet the statute's requirements simply by "serving as 'conduit to the flow of records' and not testifying to the mode of preparation of the records in question." ***Id.*** (*quoting* ***C.&W. Asset Acquisition v. Somogyi,*** 136 S.W.3d 134, 140 (Mo. App. S.D. 2004)).

Exhibit D's noncompliance with § 490.680, RSMo, leaves it unprotected by the business record exception and inadmissible as hearsay. **Mo. Rule Civ. P. 74.04(e); *St. Charles,* 771 S.W. 2d at 830.**

- **Exhibit D fails admissibility due to lack of relevance.**

Reference to Exhibit D at numbered paragraph 7, fails admissibility for lack of relevance as it does nothing to demonstrate the *purpose* of the rates charged. ***Strable,*** 396 S.W.3d at 424.

EXHIBIT E – Affidavit of Deborah Guthrie

Statements in this affidavit violate the mandatory directives of Rule 74.04(e).

- **Guthrie lacks personal knowledge to testify to the matters set forth in paragraph 5 of her affidavit.**

Respondent's Exhibit E, the affidavit of Deborah Guthrie, states at paragraph 5:

> Said water and sewer funds were at all times prior to the enactment of ordinances 2156, 2010-54 and 2010-55, which are the subject of this lawsuit, and after the enactment of these ordinances allocated separately and maintained in conformance with state law, and were not used for general revenue of the City of Eldon.

S.L.F. 1.

According to paragraph 2 of her affidavit, Guthrie did not work for the City during such times as to have personal knowledge of "all times prior to the enactment" and "all times after the enactment" of the ordinances at issue. **S.L.F. 1 ¶ 2.** "[T]he rule requires the affidavit to follow substantially the same form as if the affiant were testifying," and "[a]n affidavit failing to meet the criteria set forth in Rule 74.04(e) should not be considered by the court in ruling on [a] summary judgment motion." ***Bakewell,*** 668 S.W.2d at 227.

- **Lacks competency to testify to the matters in paragraph 5.**

Guthrie cannot competently attest that "[s]aid water and sewer funds were . . . maintained in conformance with state law." This is a legal conclusion and not a statement of fact, which she merely states as though it were unassailable. "An affidavit functions to state facts, not conclusions." ***Jennings,*** 812 S.W.2d at 732 (*citing* ***Bakewell,*** 668 S.W.2d

at 227). The affidavits required under Rule 74.04(e) are meant to set forth admissible evidence meeting "the substantive evidentiary burden that would serve as a benchmark for a trier of fact evaluating the same evidence." ***Jennings,*** 812 S.W.2d at 729 (*citing* ***Anderson,*** 477 U.S. at 254-255). Conclusory statements by a witness "are inadmissible and cannot be used to support summary judgment." ***Jordan,*** 409 S.W.3d at 561 (*quoting* ***Scott,*** 182 S.W.3d at 635). "'[C]onclusions of law that are in affidavits are of no effect and are not sufficient to sustain a motion for summary judgment.'" ***Id.*** at 561 (*quoting* ***Stoffel v. Mayfair–Lennox Hotels, Inc.,*** 387 S.W.2d 188, 192 (Mo. App. E.D. 1965)). They "cannot be relied upon to support summary judgment when set forth in an affidavit, [and] cannot be relied upon when set forth as uncontroverted facts that were purportedly drawn from affidavits or witness statements." ***Id.*** (alterations added).

Respondent cites to Exhibit E for support of its numbered paragraph 7. **L.F. 111.** Apart from the legal conclusions that make up most of the numbered paragraph, Respondent states that "the rates charged by the City . . . are not for the purpose of raising general revenue for the City." **L.F. 111.** Guthrie's statement as to the "purpose" of the rates is "opinion[], conclusion[] and speculation[] neither admissible nor usable at trial." ***American Family Mut. Ins. Co.,*** 825 SW 2d at 311. Evidence that rests on speculation has a "quality of conjecture, opinion and supposition [that] deprive[s] it of that certainty that marks a statement of an existing fact, and hence, competent evidence." ***Id.*** (alterations added). Guthrie's statement does not meet the required "substantive evidentiary burden."

Jennings, 812 S.W.2d at 729. Only evidence admissible at trial can be used to sustain summary judgment. ***United Petroleum Serv., Inc.,*** 218 S.W.3d at 481.

- **Statements in Guthrie's affidavit lack relevance and are thus inadmissible as evidence.**

Respondent cites to Exhibit E for support of its numbered paragraph 3. **L.F. 111.** Nowhere in Guthrie's affidavit does she state that "water and sewer services are not funded by general revenue," making her statement irrelevant and so inadmissible to support this paragraph. ***Strable,*** 396 S.W.3d at 424. Rule 74.04(e) requires "[s]upporting . . . affidavits . . . [to] set forth such facts as would be admissible in evidence." Statements proffered, even in affidavits, lack relevance if they do not support the intended facts.

Respondent cites to Exhibit E for support of its numbered paragraph 6. **L.F. 111.** Nowhere in the affidavit does it state that "part of the [water and sewer services] charge is based on usage," again rendering this part of her affidavit irrelevant and inadmissible as evidence in support of the paragraph. **L.F. 111; *Strable,*** 396 S.W.3d at 424; **Mo. R. Civ. P. 74.04(e).**

EXHIBIT F – Interrogatories

Respondent's use of Exhibit F, Interrogatories, violates the mandates of Rule 74.04(c)(1) requiring specific references to discovery, and the requirement that evidence be admissible to sustain summary judgment. Mo. R. Civ. P. 74.04(e); *American Family Mut. Ins.*, 825 S.W. 2d at 311; *United Petroleum Serv., Inc.*, 218 S.W.3d at 481.

- **Lacks specific references to the record.**

Exhibit F was cited to support only four of Respondent's numbered paragraphs, and only three interrogatory responses were cited to, *i.e.*, numbers 3A, 9 and 10. **L.F. 125-194.** As with Exhibit C (Discovery / RFPs), there were two sets of "first" interrogatories, one served in 2011, then, after a first motion to dismiss was granted and an amended petition filed, another set of "first" interrogatories in early 2012. **L.F. 125-194.** In both, Interrogatory 3A merely requests that Appellants list all properties affected by the ordinances at issue. Interrogatories with the same numbers from 9 through the end of the interrogatories ask different questions depending on the edition. Both sets are in Exhibit F, but the citations do not make the intended reference clear. As with Exhibit C, Appellants' counsel cannot determine which references are intended, and it is not the Court's responsibility to do so. ***Hughes,*** 281 S.W.3d at 908. "Failure to specifically reference the record renders the motion legally defective and cannot serve as the basis for the circuit court's grant of summary judgment." ***Id.*** (*citing* ***Hanna,*** 154 S.W.3d at 5).

- **Lacks relevance and it thus inadmissible as evidence.**

Respondent cites to Exhibit F, Interrogatory 3A, which requests a list of all properties affected by the ordinances, for support of its numbered paragraphs 12, 13 and 15. Numbered paragraph 12 wants that list to demonstrate that "the use of [Appellants'] property has not been altered by the ordinances" and "Plaintiffs use of their property as rental property has not been impinged." **L.F. 113.** Respondent's numbered paragraph 13, wants to use it to demonstrate that ". . . as a result of the increases in water and sewer

rates, [Appellants] were forced to remove property from the rental market." **L.F. 114.** Respondent's numbered paragraph 15 wants the list of properties to show that, "Plaintiffs CANNOT prove that economic conditions in the City are caused by the increase in water and sewer rates." **L.F. 115.** Such lists cannot prove these "facts." Exhibit F, question 3A, supports none of the statements invoking it, and so is irrelevant and inadmissible. ***American Family Mut. Ins.*, 825 S.W. 2d at 311; *also, United Petroleum Serv., Inc.*, 218 S.W.3d at 481.**

EXHIBIT G – Depositions

This use of Exhibit G, Depositions, violates the mandates of Rule 74.04(c)(1) requiring specific reference to discovery.

- **Lacks specific references to the deposition transcript.**

Appellants' counsel cannot determine what specific references to the deposition transcripts are intended in Respondent's citations to Exhibit G in any of its numbered paragraphs that cite it, *i.e.*, paragraphs 12, 13, and 14. **L.F. 113, 114, 115.** Entire deposition transcripts are included, printed with four reduced pages on each page of the exhibit. Consequently, references to "Ex. G, King pg. 7, Dennis Killday, pg. 25, Virgil Clark pgs. 8-12, Bill Koebel pg. 21, Glen Jungmeyer pg. 6, Robert Dunstan, pg. 6" (**L.F. 113 ¶ 12)**; "Ex. G, Linda Killday pg. 9, Bill Koebel pg. 20, Virgil Clark pgs 9, 22, Kim Ruiz-Thompkins pgs. 14-16, Dennis Killday pgs. 19 and 42, Joan Jungmeyer pgs. 17" (**L.F. 113 ¶ 14)**; and "Ex. G, King, pgs. 14, 24, Glen Jungmeyer, pg. 10, Kim Ruiz-Thompkins, pg. 12, Dennis Killday, pg. 24, Linda Killday, pgs. 7-8, Virgil Clark, pg. 23,

Bill Koebel, pgs. 11-14, 16, Robert Dunstan, pg. 8" (**L.F. 115 ¶ 14)**, lack sufficient specificity to determine if the page referred to is the transcript page or the exhibit page. Due to the lack of specificity, the exhibit is rendered useless to support the statements and for grant of summary judgment. ***Hughes,*** 281 S.W.3d at 908; **Mo. R. Civ. P. 74.04(c)(1)**.

EXHIBIT H – Taxes

This use of Exhibit H, Tax Documents, violates Rule 74.04(c)(1) mandates regarding specific references to pleadings, discovery and exhibits, and the mandates regarding admissibility . Evidence must be admissible to sustain summary judgment. ***American Family Mut. Ins.*****, 825 S.W. 2d at 311;** ***United Petroleum Serv., Inc.*****, 218 S.W.3d at 481.**

- **Lacks specific references to the record.**

The 198 pages of tax documents are cited to in their entirety, not specifically to any particular figures or other data. **L.F. 113 ¶ 12, 115 ¶ 14.** This forces Appellants' counsel and the Court to sift through the several pages "the material from the immaterial, in an attempt to determine the basis" for the statement (***Miller,*** 892 S.W.2d at 389) and violates Rule 74.04(c)(1)'s requirement for specific references to the record. Exhibit H, Taxes, is the lone evidence cited in support of this clause from numbered paragraph 12, "Plaintiffs by their own records and admission were not deprived of all economic use of their property." It is unclear to Appellants what the exhibit is supposed to support in numbered paragraph 14.

- **Fails admissibility due to hearsay.**

The tax documents are cited not for data contained therein, but for interpretation of that data. **L.F. 113 ¶ 12, 115 ¶ 14.** Such interpretation cannot be properly obtained without testimony of the preparer(s). Without such testimony, the conclusions derived from the information contained in the tax documents is nothing more than hearsay, unsupported and conclusory, and is thus inadmissible as for summary judgment. ***CACH,*** 358 S.W.3d at 63; ***Strable,*** 396 S.W.3d at 424; ***Scott,*** 182 S.W.3d at 635. "Only evidentiary materials that are admissible or usable at trial can sustain or avoid a summary judgment." ***American Family Mut. Ins. Co.,*** 825 S.W. 2d at 311.

EXHIBIT I – Affidavit of Frank Schoenboom

EXHIBIT L – Affidavit of John Holland

Statements in these affidavits violate the mandates of Rules 74.04(c)(1) and 74.04(e); and the exhibit attached thereto, the "Voluntary Compliance Agreement," does not meet the authorization requirements of Section 432.070, RSMo (2012), nor the admissibility requirements of Section 490.460, RSMo (2012).

- **Statements in the affidavit are inadmissible as conclusory.**

Schoenboom and Holland's affidavit paragraphs numbered 4 are identical, stating:

> The City enacted the above referenced ordinances as a necessary means to provide for upgrades of the city's water and sewer works as required by state and federal law and to collect funds to service and maintain its water and sewer works system which were operating at a loss prior to enactment of the ordinances.

L.F. 978, 1010 ¶ 4. The statement is conclusory as there is nothing factually offered to substantiate that the water and sewer works system was operating at a loss prior to enactment of the ordinances.

Their affidavits' paragraphs 5 state, identically:

> The City had entered into a voluntary compliance agreement with the Missouri Department of Natural Resources ("DNR") on September 15, 2010, which required the City to make improvements to its water and sewer system within five (5) years with a potential five (5) year extension to comply with the Clean Water Act implemented through the DNR. These improvements will require the City to expend extensive amounts of money to meet the terms of the agreement. (Exhibit 1, attached).

L.F. 978 - 979, 1010 - 1011 ¶ 5. These, too, are conclusory as Holland and Schoenboom each offer nothing but his own opinion and conjecture that the "improvements will require the City to expend extensive amounts of money to meet the terms of the agreement."

The affidavits' paragraphs 10 identically state: "The letter was not a 'special deal' for Mr. King since all residences in the City of Eldon connected to the water and sewer system were treated the same under ordinances." **L.F. 979 - 980, 1011 – 1012 ¶ 10.** This is also conclusory as it states only Holland's and Schoenboom's opinion without any substantiating facts.

"An affidavit functions to state facts, not conclusions." ***Jennings,*** 812 S.W.2d at 732. Conclusory statements by a witness "are inadmissible and cannot be used to support summary judgment." ***Jordan,*** 409 S.W.3d at 561. Conclusions of law in affidavits are

insufficient to sustain a motion for summary judgment. ***Id.*** at 561 (*citing* ***Stoffel,*** 387 S.W.2d at 192). They "cannot be relied upon to support summary judgment when set forth in an affidavit, [and] cannot be relied upon when set forth as uncontroverted facts that were purportedly drawn from affidavits or witness statements." ***Id.*** (brackets added).

- **The Voluntary Compliance Agreement and ordinances referenced in these affidavits are not sworn to or certified. L.F. 981, 1013.**

Failure of the Voluntary Compliance Agreement and ordinances referred to in the affidavits to be sworn to or certified renders statements regarding the compliance agreement and ordinances inadmissible for violation of Rule 74.04(e).

- **Affiant Schoenboom is not competent to testify concerning the Voluntary Compliance Agreement referenced in and attached to Exhibit I, and his testimony is inadmissible as hearsay.**

The Voluntary Compliance Agreement appears to be between the Missouri Department of Natural Resources and (City Mayor) John Holland. **L.F. 986, 1018.** Schoenboom is not a party to the agreement and as such cannot competently testify as to the effects of its contents. **Mo. R. Civ. P. 74.04(e).**

- **Void Voluntary Compliance Agreement is inadmissible for lack of relevancy as well as being statutorily inadmissible.**

It appears that John Holland is a party to the agreement and as such can competently testify as to the intentions of its contents; however, he cannot be said to sign the agreement on behalf of the City unless he had written authorization by the City to enter into such

agreement, otherwise the contract is void. ***Moynihan v. City of Manchester,*** 265 S.W.3d 350, 354 (Mo. App. E.D. 2008); **Sec. 432.070, RSMo (2012).**

Section 432.070, RSMo, "'specifically requires that all contracts entered into by a city be in writing and that the authority for such contracts must also be in writing.' Accordingly, a contract, even though in writing and signed by a city's mayor, 'is not valid unless duly authorized by the Board of Alderman.'" ***Moynihan,*** 265 S.W.3d at 354 (*quoting* ***State ex rel. State Highway Commission v. City of Sullivan,*** 520 S.W.2d 186, 189 (Mo. App. E.D. 2008)). "The requirements of section 432.070 are mandatory, not discretionary, and a contract made in violation of section 432.070 is void, rather than voidable." ***Moynihan,*** 265 S.W.3d at 354 (*citing* ***ORF Construction, Inc. v. Black Jack Fire Protection Dist.,*** 239 S.W.3d 685, 687 (Mo. App. E.D. 2007).

The affidavit fails to show any Board of Aldermen action concerning the contract and therefore it "may not serve as evidence of substantial compliance with the written authorization requirement of section 432.070." ***Moynihan,*** 265 S.W.3d at 356. "[A] governing body of a municipality can act only as a body and the individual action of any member or unofficial act or agreement of all or part of the members are ineffectual and without binding force." ***Id.*** (*citing* ***State ex rel. Dussault v. Board of Adjustment, City of Maryland Heights,*** 901 S.W.2d 318, 320 (Mo. App. E.D. 1995)).

If the Voluntary Compliance Agreement is, as it appears to be, a void contract, it is irrelevant and cannot be considered evidence for Respondent's motion. **Mo. R. Civ. P. 74.04(e);** ***CACH,*** 358 S.W.3d at 63.

The Voluntary Compliance Agreement also fails to meet the admissibility requirements of § 490.460, RSMo, which provide that:

> Copies of contracts entered into by individuals with the state, or any officer thereof, or with any county, or with any person for the benefit of any county, under or by authority of any law, or the lawful order of any court, the originals of which are, by law or the lawful order of any court, in the custody and keeping of any officer, duly certified and attested by the official seal of such officer, or, if such officer have no official seal, then verified by the affidavit of such officer, may be sued upon, and shall be received in evidence, to all intents and purposes, as the originals themselves.

Section 490.460, RSMo (2012). There is no certification, attestation or verification apparent on this document. It was not even included in Suttmoller's business records affidavit. Therefore, it is hearsay, irrelevant and therefore inadmissible. **Mo. R. Civ. P. 74.04(e);** ***CACH,*** 358 S.W.3d at 63.

- **Holland's affidavit Exhibit 2 is inadmissible hearsay; also not sworn to or certified.**

Paragraph 9 of Holland's affidavit is worthy of note. It states: "Because these units would not then be connected to the City's water and sewer system, City Administrator, Frank Schoenboom, sent Mr. King a letter dated December 13, 2010, and attached as Exhibit 2, advising the City would only charge for the units using the City's water and sewer system." **L.F. 1011, 1019.** Holland did not draft the letter referenced in

paragraph 9 and attached as its exhibit 2, it is therefore inadmissible hearsay and he has no competence to testify to its contents. ***CACH,*** 358 S.W.3d at 63; ***Jordan,*** 409 S.W.3d at 561; ***Jennings,*** 812 S.W.2d at 732. It is not included in Suttmoller's business records affidavit, so cannot claim such exception. It is not sworn to or certified as required by Rule 74.04(e).

EXHIBIT J – Affidavit of Fran Suttmoller

Respondent's Exhibit J consists of the affidavit of Fran Suttmoller as City Clerk (**L.F. 989 ¶¶ 1, 2)** ("clerk affidavit"); the affidavit's exhibit 1, alleged to be evidence of the City's tax rates (**L.F. 990 ¶ 6, 991**); the affidavit's exhibit 2, a copy of what is alleged to be a page from the book logging water meter readings as taken by the City's meter reader (**L.F. 990 ¶ 7, 992**); and a Business Records Affidavit attesting attachment thereto of certain records (**L.F. 993 ¶ 3**).

- **Statements in this affidavit are conclusory and therefore inadmissible.**

The first sentence of the affidavit's paragraph 3 states that Suttmoller's duties "include records maintenance accounting for the City." **L.F. 989 ¶ 3.** She then dives into the conclusory and otherwise unsubstantiated assertion, "At all times relevant to this action and to the present, the City has not used water and sewer funds for general revenue or general expenses." **L.F. 989 ¶ 3.** As a conclusory statement rather than a fact, it is inadmissible. ***Jennings,*** 812 S.W.2d at 732.

- **Affiant's statement at paragraph 4 is unintelligible.**

Paragraph 4 of Suttmoller's affidavit states, "The only transfers from water and sewer are reimbursements to the City fund for expenditures made form the general fund for monies that can't be separated such as a portion of administrative duties expended on water and sewer issues." (*Sic.*) **L.F. 989 ¶ 4.** First, Appellants' counsel cannot interpret the meaning of this sentence. Next, it appears to be another unsubstantiated conclusion that cannot be properly admitted as evidence. ***Jennings,*** 812 S.W.2d at 732.

- **Affiant's statement at paragraph 5 is inadmissible hearsay, Suttmoller not being sufficiently competent or having personal knowledge adequate to testify to the statements in the paragraph.**

Paragraph 5 states, "These transfers have been reviewed by Evers & Company CPAs and they have never stated them to be improper or contrary to law." **L.F. 989 ¶ 5.** Not only is this hearsay, but the *best* Suttmoller could honestly declare concerning this is that "they have never stated *to me* that the transfers were improper or contrary to law." She would have no personal knowledge of anything other than that. The paragraph is hearsay, and Suttmoller lacks personal knowledge to make the declaration as is; it is inadmissible, objectionable, and must be stricken. ***CACH,*** 358 S.W.3d at 63; ***Jordan,*** 409 S.W.3d at 561; **Mo. R. Civ. P. 74.04(e).**

- **Paragraph 6 violates Rule 74.04(e) requiring documents referred to in an affidavit be sworn to or certified; states legal conclusions; includes inadmissible hearsay; and affiant lacks personal knowledge of matters contained therein.**

Paragraph 6 reads, "The tax rate in Miller County for metered services is one (1%) percent. The City tax rate is also one (1%) percent for these services. Therefore in town users billed at two (2%) percent is proper. See attached Exhibit 1." **L.F. 990 ¶ 6, 991.** To begin with, the affidavit's exhibit 1 is unidentified, uncertified, not the best evidence, and is not even included in the business records affidavit attached to this Exhibit J, making Exhibit J's own exhibit 1 inadmissible. **Mo. R. Civ. P. 74.04(e); *CACH,*** 358 S.W.3d at 63. The third sentence of paragraph 6, claiming that the two percent billing is proper is an inadmissible conclusion. ***Jennings,*** 812 S.W.2d at 732.

"Meters are read periodically" – (what is the period?) – "and at each month Plaintiffs Jungmeyer allege their meter at 10 Hwy 54 was not read said meter was in fact, read. Please see attached Exhibit 2, meter log book." **L.F. 990 ¶ 7.** Suttmoller nowhere claims to have personally read the meter at 10 Highway 54, so she would have no personal knowledge of that. The copy of the page from the meter log book attached to Exhibit J as its exhibit 2 is uncertified, though it is referenced in the attached business records affidavit. **L.F. 993 ¶ 3.** The entire paragraph suffers from hearsay, unsubstantiated evidence and lack of personal knowledge of the declarations made therein. It is therefore inadmissible. ***CACH,*** 358 S.W.3d at 63; ***Jordan,*** 409 S.W.3d at 561; ***Jennings,*** 812 S.W.2d at 732.

EXHIBIT K – Ordinances

EXHIBIT M – Municipal Code City of Eldon Section 715.030

- **The Exhibits are statutorily inadmissible.**

Exhibits K and M each fail to comply with the provisions of § 490.240, RSMo (2012) regarding admission of such evidence. The statute provides, in pertinent part:

> Printed copies of ordinances ... of any city ... purporting to be published by authority of such city ... and manuscript or printed copies of such ordinances ... certified under the hand of the officer having the same in lawful custody, with the seal of such city ... annexed, shall be received as evidence in all courts ... in this state, without further proof; and any printed pamphlet or volume, purporting to be published by authority of any such ... city, and to contain the ordinances ... of such ... city, shall be evidence, in all courts and places within this state, of such ordinances....

City of Kansas City v. Mullen, 690 S.W.2d 421, 422-423 (Mo. App. W.D. 1985) (condensing § 490.240, RSMo (unamended since 1939)). Under § 490.240, then, the City has two ways to prove its ordinances:

> (1) in accordance with the first clause of section 490.240, the [City] can enter a handwritten or printed certified copy of the ordinances into evidence, *Mullen*, 690 S.W.2d at 422–423; (2) alternatively, in accordance with the second clause of section 490.240, the [City] has the choice of "lugging into a court a printed volume of the current municipal ordinances published by the city and proving the existence and provisions of the ordinances in question by reference to that volume." *Id.* at 423.

City of Joplin v. Klein, 345 S.W.3d 351, 354 (Mo. App. S.D. 2011) (alterations added).

In this case, Respondent City offers its Exhibit K, consisting of a business records affidavit signed by Fran Suttmoller and purported copies of City of Eldon ordinances 2156,

2010-54, 2010-55, 976, 977, and 881. **L.F. 995.** The included business records affidavit states that "[t]he records attached hereto are the original or exact duplicates of the original" (**L.F. 1008 ¶ 5**); however, that affidavit is not a certificate signed by the city clerk and bearing the imprint of the seal of the City. The affidavit references several different types of records attached thereto, including some ordinances; however, ordinances 2156, 2010-54, 2010-55 are not included therein. **L.F. 1007 ¶ 3.** The documents alleged to be the ordinances are obviously photocopies of printed pages rather than original publications, but without proper certification pursuant to § 490.240, this evidence is inadmissible for proof of a material fact in a motion for summary judgment. **Mo. R. Civ. P. 74.04(e); § 490.240, RSMo.** "The trial court may not take judicial notice of an ordinance that is not properly introduced into evidence." ***Mullen,*** 690 S.W.2d at 422.

- **Ordinances included in Exhibit K lack relevance and are inadmissible.**

The ordinances that are included in both Exhibit K and the business records affidavit are nowhere cited in Respondent's alleged statements of facts, and so are irrelevant and consequently inadmissible. ***CACH,*** 358 S.W.3d at 63.

Regarding Propriety of Motion to Strike

According to Rule 55.27(e), concerning motions to strike a pleading, the motion is to be made by a party *before* responding to a pleading. **Mo. R. Civ. P. 55.27(e) (2012).** It may be that a motion for summary judgment is not a pleading as contemplated under Rule 55.27, but an argument can be made that it is. In ***Sprung v. Negwer Materials, Inc.,*** 727 S.W.2d 883 (Mo. banc 1987), the Supreme Court cited a 1923 case that stated:

> While it is true that ordinarily motions in a cause both before and after judgment are not pleadings . . . yet motions, even though in the same case, may initiate independent proceedings, in which case they are in the nature of pleadings and will be so considered....

Id. at 887 (*quoting* ***Scott v. Rees,*** 253 S.W. 998, 1000 (1923)). A motion for summary judgment appears to initiate an independent proceeding, in that it derails the course on the way to trial, in its own way leading to judgment.

Bearing that premise in mind, Rule 55.25(c) provides in pertinent part that:

> (**c**) **Effect of Filing Motions on Time to Plead.** The filing of any motion provided for in Rule 55.27 alters the time fixed for filing any required responsive pleadings as follows, unless a different time is fixed by order of the court: If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within ten days after notice of the court's action . . .. [T]he time for filing of the responsive pleading shall be no less than remains of the time which would have been allowed under this Rule if the motion had not been made.

Mo. R. Civ. P. 55.25(c) (2012). While Appellants cited no particular rule in their motion to strike, the principles of Rules 55.25(c) and 55.27(e) were borrowed and applied. The circuit court denied (in effect) Appellants' motion to strike Respondent's Motion for Summary Judgment, so ten days should have been allowed for Appellants' to respond otherwise.

Whether the Court agrees with the reasoning on this point is not so important as that the Court realize that it underlay Appellants' decision to move to strike Respondent's motion rather than responding to it in the fashion set forth in Rule 74.04(c)(2). It was intended to expedite the finality of the suit by preventing inadmissible "facts" and evidence from going before the Court and wasting its time. ***Scott,*** 182 S.W.3d at 635; ***Bakewell,*** 668 S.W.2d at 227. This indicates good cause on the part of Appellants in filing the motion to strike, as it "'is not intentionally or recklessly designed to impede the judicial process.'" ***Central America Health Sciences University, Belize Medical College v. Norouzian,*** 236 S.W.3d 69, 75 (Mo. App. W.D. 2007) (*quoting* ***Brueggemann v. Elbert,*** 948 S.W.2d 212, 214 (Mo. App. E.D. 1997)).

Conclusion of Argument I

The statements of fact and the evidence offered in support of those statements are repeatedly and excessively so deficient and violative of Rule 74.04, it was difficult if not impossible to properly respond as the circuit court expected. The failure of Respondent to properly offer support for – or actually offer – allegations of fact in its motion for summary judgment as provided in Rule 74.04 does not obligate Appellants to "respond by affidavit or otherwise." ***Brown,*** 655 S.W.2d at 760. Appellants' inability to respond to conjectural allegations cannot constitute an admission of the discovery responses as support for any allegations as provided for in Rule 74.04(e). ***Id.*** Lacking proper evidentiary support, Respondent's allegations fail to demonstrate lack of genuine issues of material fact. ***Id.***

The circuit court found, per its judgment, that a motion to strike was not an appropriate response to Respondent's motion for summary judgment, and therefore Appellants violated Rule 74.04 by not "serv[ing] a response." The court failed to consider that Respondent initially and seriously violated the mandates of Rule 74.04 as detailed in the above argument. Appellants pray this Court find that Appellants were under no obligation to respond to a seriously deficient motion for summary judgment; that a motion to strike was a proper response to Respondent's motion; that the circuit court abused its discretion in failing to grant Appellants' motion to strike; and that the court's grant of judgment in Respondent's should be reversed and the case remanded to circuit court for a decision on the merits.

ARGUMENT - POINT RELIED ON II

The circuit court erred in denying Appellants' Motion for Enlargement of Time to File a Response to City's Motion for Summary Judgment, because Missouri Rule 44.01(b)(2) permits such enlargement "upon notice and motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect," in that Appellants' counsel filed for such enlargement of time while awaiting the circuit court's decision on Appellants' Motion to Strike Respondent City's Motion for Summary Judgment, such motion to strike being made as a good faith response to Respondent City's motion, making such delay excusable and the grant of such enlargement of time would have better served the interests of justice.

Standard of Review – Denial of Motion for Enlargement of Time to File Response to City's Motion for Summary Judgment

The denial of a Motion for Enlargement of Time to File a Response to a Motion for Summary Judgment is reviewed for abuse of discretion. ***Flowers v. City of Campbell,*** 384 S.W.3d 305, 314 (Mo. App. S.D. 2012) (*citing* ***Inman v. St. Paul Fire & Marine Ins. Co.,*** 347 S.W.3d 569, 575 (Mo. App. [S.D.] 2011)). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." ***Id.*** "If reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion." ***Id.***

Rule 44.01(b) states, in pertinent part:

> **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... (2) upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 52.13, 72.01, 73.01, 75.01, 78.04, 81.04 and 81.07 or for commencing civil action.

Mo. R. Civ. P. 44.01(b)(2) (2013). This subpart of Rule 44.01 applies to a request for an enlargement of time to file a response to a motion for summary judgment after the time to respond has expired. ***Flowers,*** 384 S.W.3d at 314 (*citing* ***Crabtree v. Bugby,*** 967 S.W.2d 66, 72 (Mo. banc 1998)).

Due to the near impossibility of providing a response to what were supposed to be statements of fact supported by admissible evidence, but were not, rather than respond in strict accordance with Rule 74.04(c)(2), Appellants objected to the statements and defective evidence by way of a motion to strike. While waiting on the court's determination regarding the motion to strike, when it appeared possible it could be denied, Appellants hurriedly revised the motion to strike into a motion for enlargement of time. It even appeared that the court could rule against Appellants based on the time the motion to strike was filed. This was evident when the court requested an affidavit from Appellants'

counsel verifying the actual date Respondent's motion for summary judgment was actually received by Appellant's counsel in the mail. **L.F. 13, 1132.**

Conclusion of Argument II

Denying Appellants the opportunity to submit a more court-approved response to Respondent's motion for summary judgment in this circumstance "is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." ***Flowers,*** 384 S.W.3d at 314. "If reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion." ***Id.*** Considering the excessively deficient statements of fact and the evidence offered in their support, it is difficult to see how reasonable minds could differ as to the *im*propriety of the court's action. The denial of Appellants' motion for an enlargement of time was an abuse of discretion by the court.

POINT RELIED ON III

The circuit court erred in granting Respondent City's Motion for Summary Judgment, because, even if all facts offered by Respondent it its motion are taken as true, Respondent failed to establish the absence of genuine issues of material fact and the right to judgment as a matter of law, in that the facts offered by Respondent were insufficient to support its arguments that Appellants have not been injured by the ordinances that are the subject of this suit in the ways set forth in each count of Appellants' First Amended Petition.

Standard of Review – Grant of Motion for Summary Judgment

Appellate review of a grant of summary judgment is essentially de novo. To prevail, the movant must show that there is no dispute of material fact and establish entitlement to judgment as a matter of law. Where, as here, the circuit court's order does not state the reasons for its grant of summary judgment, it is presumed to be the grounds specified in the movant's motion for summary judgment. ***Sherf v. Koster,*** 371 S.W.3d 903, 905 (Mo. App. W.D. 2012).

The trial court's judgment states the reasons for its grant of summary judgment, those being that 1) Appellants failed to adhere to Rule 74.04's mandatory directive by filing a motion to strike instead of serving a response, and, therefore, 2) this allows "the facts set forth in Respondent's Motion for Summary Judgment [to be] taken as true." **Appllnts.' Appx. A-1.**

"Summary judgment is **only** proper if there is no genuine issue of material fact **and** the moving party is entitled to judgment as a matter of law." ***Ameristar Jet Charter, Inc. v. Dodson Intern. Parts,*** 155 S.W. 3d 50, 58 (Mo. banc 2005) (emphasis added). "The key to summary judgment is the undisputed right to judgment as a matter of law, not simply the absence of a fact question." ***Zerebco v. Lolli Bros. Livestock Market,*** 918 S.W.2d 931, 934 (Mo. App. W.D. 1996)**,** (*citing* ***ITT Commercial Fin. Corp.. v. Mid-Am. Marine Supply Corp.,*** 854 S.W.2d 371, 380 (Mo. banc 1993).

Even if there is no fact question, Respondent must still show an undisputed right to judgment as a matter of law. This reason is not given in the Court's Judgment, and Appellants contend it should not be; Respondent has not shown a right to such judgment. When a motion for summary judgment lacks evidentiary support, as Respondent's does, such lack does not demonstrate the non-existence of a genuine issue of material fact. ***Brown,*** 655 S.W.2d at 760. Where Appellants do not respond as per the directives of Rule 74.04(c)(2), it does not constitute and admission of the unsupported "facts". ***Id.***

Since Respondent's motion for summary judgment was unsupported by admissible evidentiary material, it effectively became a motion judgment on the pleadings, similar to a motion to dismiss. **Mo. R. Civ. P. 55.27(b) (2012); *Bakewell,*** 668 S.W.2d at 228. Such a motion should be granted only if the facts pleaded by Appellants in their petition, together with the benefit of all reasonable inferences drawn therefrom, show that they cannot prevail under any legal theory. ***Id.*** "Stated another way, the motion should not be granted if from the face of the pleadings a material issue of fact exists and the moving party is not entitled

to judgment on the pleadings as a matter of law." ***Id.*** The ultimate facts pleaded by Appellants in their first amended petition, along with all reasonable inferences drawn from the allegations, indicate possible grounds upon which Appellants could prevail. ***Brown,*** 655 S.W.2d at 760. This was shown early on when the Court denied Respondent's second motion to dismiss (order entered February 9, 2012).

The fundamental facts, expounded upon in the Petition, are that the City passed new ordinances requiring water and sewer charges be based on the number of units in a building, regardless of the number of meters servicing the building, and regardless of whether the unit was actually occupied. The facts also set forth, generally and specifically, the effect of the ordinances on the Plaintiffs. Facts in all counts challenge the constitutionality of the ordinances as being unreasonable, arbitrary, capricious, oppressive, confiscatory and/or an abuse of power. While "there is a presumption the legislative action taken cannot be overturned in the courts unless clearly arbitrary" or otherwise unreasonable, etc., "under certain circumstances ordinances generally valid may be held invalid as being unreasonable and arbitrary" or otherwise overly burdensome, oppressive or confiscatory. ***Sears v. City of Columbia,*** 660 S.W.2d 238, 246 (Mo. App. W.D. 1983); *see also* ***Nafziger Baking Co. v. City of Salisbury,*** 48 S.W.2d 563, 564 (Mo. 1932); ***City of Washington v. Reed,*** 70 S.W.2d 121, 123 (Mo. App. St.L. 1934); ***Browning-Ferris Indust. of Kansas City v. Dance,*** 671 S.W.2d 801, 810 (Mo. App. W.D. 1984).

A motion to dismiss does not consider the merits of a claim but is "solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom [with no] attempt [] to weigh any facts alleged as to whether they are credible or persuasive." ***Nazeri v. Mo. Valley Coll.***, 860 S.W.2d 303, 306 (Mo. banc 1993). All well-pled facts are deemed true and the averments construed liberally, "drawing all reasonable and fair inferences from the facts pleaded." ***Wright v. Dept. of Corrections,*** 48 S.W.3d 662, 664 (Mo. App. W.D. 2001). "'[T]he court cannot dismiss [a] petition for failure to state a claim by finding in favor of respondent on the merits.' Dismissal under these circumstances is reversible error." ***Id.*** at 666, *quoting* ***Sandy v. Schriro***, 39 S.W.3d 853, 856 (Mo. App. W.D. 2001). Appellants alleged sufficient facts that, when considered true and in Appellants' favor, are adequate to state each claim.

Summary judgment in Respondent's favor should be reversed.

CONCLUSION

Summary judgment is an extreme and drastic remedy that appellate courts exercise great caution in affirming, because it cuts off the nonmovant's day in court. ***ITT Comm'l Fin.,*** 854 S.W.2d at 377. Since summary judgment is a drastic remedy, it is inappropriate unless the prevailing party demonstrates, by unassailable proof, the absence of a genuine issue of material fact and a right to judgment as a matter of law. ***Jordan v. Peet,*** 409 S.W.3d 553, 561 (Mo. App. W.D. 2013) (*citing* ***Bakewell,*** 668 S.W.2d at 226). Failing to do so, Respondent was not entitled to summary judgment. ***Id.***

Admittedly, a primary goal of the judicial system is finality. ***Sprung,*** 727 S.W.2d at 887. The ***Sprung*** Court stated well that:

> Litigation must end if the public is to have confidence in the court's ability to resolve disputes. If judgments are too easily vacated, then the public will not be able to rely on the court's decisions to formulate a future course of conduct. On the other hand, a primary goal of the judicial system is to seek the truth and to do justice between the parties. To promote this goal a case must be decided on the merits; procedural 'niceties' should not pose insurmountable barriers. These competing goals of efficiency, finality, and justice must be carefully balanced to ensure the public's confidence in the court system.

Id. (*quoting* Laughrey, Default Judgments in Missouri, 50 Mo.L.Rev. 841, 843-44 (1985) (footnotes omitted)).

Allowing the judgment to stand prejudices Appellants by cutting off their day in court. Appellants should not be harmed in this way because of their counsels' reasonable mistake.

In the interest of justice, the Court should pronounce that, where movant's motion for summary judgment fails to meet the mandatory directives of Rule 75.04(c)(1), the non-movant is justified in moving to strike the summary judgment motion. Moreover, the Court should vacate the July 28, 2014 Judgment and remand this case for a decision on the merits.

Respectfully Submitted,

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JOAN JUNGMEYER, et al.,	)	
	)	
Appellants,	)	
	)	**Case No. WD77922**
v.	)	
	)	
CITY OF ELDON, MISSOURI,	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Brief complies with the limitations set forth in Rule 84.06(b), as it contains 15,977 words, and complies with the limitations set forth in Western District Local Rule XLI, as it contains 14,955 words, as counted by the word-processing software used.

Respectfully Submitted,

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	)	
Appellants,	)	
	)	**Case No. WD77922**
v.	)	
	)	
CITY OF ELDON, MISSOURI,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies on behalf of Appellant that one copy of the foregoing Appellants' Brief was automatically served upon counsel for Respondent City of Eldon by the Court of Appeals, Western District's efiling system on this, the 29th day of December, 2014, as indicated below:

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