

IN THE SUPREME COURT OF MISSOURI

CITY OF LAKE SAINT LOUIS, MISSOURI, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. ) No. SC90790  
 )  
 CITY OF O'FALLON, MISSOURI, )  
 )  
 Defendant-Respondent. )

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SUBSTITUTE BRIEF OF APPELLANT CITY OF LAKE SAINT LOUIS

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Appeal from the Circuit Court of St. Charles County  
The Honorable Ted House, Circuit Judge

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## JURISDICTIONAL STATEMENT

Plaintiff-Appellant City of Lake Saint Louis filed a petition seeking a declaratory judgment as to the boundary between itself and Defendant-Respondent City of O'Fallon in the Circuit Court of St. Charles County. On June 15, 2009, the trial court entered a judgment dismissing the petition. On July 10, 2009, Lake Saint Louis filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District.

Jurisdiction was proper in the Court of Appeals because this action does not involve any matters over which this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. The Circuit Court of St. Charles County is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. § 477.050, RSMo.

On January 26, 2010, the Court of Appeals handed down an opinion reversing the judgment of the circuit court. On May 25, 2010, this Court sustained the respondent's application for transfer. This Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo. Const. art V, § 10.

POINT RELIED ON

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS PETITION BECAUSE THE PETITION STATED A CLAIM FOR RELIEF AND WAS NOT BARRED BY LIMITATIONS OR LACHES IN THAT THE PETITION SET FORTH FACTS SHOWING A JUSTICIABLE DISPUTE BETWEEN THE PLAINTIFF AND THE DEFENDANT AS TO THE BOUNDARY BETWEEN THEIR TWO CITIES, A DECLARATORY JUDGMENT IS THE APPROPRIATE METHOD FOR A BOUNDARY DETERMINATION, AND THE PETITION DID NOT SHOW ON ITS FACE THAT IT WAS BARRED BY LACHES OR LIMITATIONS.

*Walker Reorganized School Dist. R-4 v. Flint*, 303 S.W.2d 200 (Mo. App. 1957).

*Reorganized School Dist. R-I of Crawford County v. Reorganized School Dist. R-III of Washington County*, 360 S.W.2d 376 (Mo. App. 1962).

*State ex rel. Junior College Dist. of Sedalia v. Barker*, 418 S.W.2d 62 (Mo. banc 1967).

## STATEMENT OF FACTS

On March 26, 2009, Plaintiff-Appellant City of Lake Saint Louis filed a petition in the Circuit Court of St. Charles County. Legal File (“LF”) at 1. For the Court’s convenience, a copy of the petition is included in the appendix to this brief.

Lake Saint Louis alleged that it was a city of the fourth class located within St. Charles County, Missouri. LF at 3. The petition alleged that Defendant City of O’Fallon, Missouri, was a city of the third class located within St. Charles County, Missouri. LF at 3.

In 1982, Lake Saint Louis annexed property establishing its northern boundary as the northern right of way line of Interstate 70 west of O’Fallon Drive. LF at 3. The annexation ordinance was attached to the petition as Exhibit 1. LF at 3, 6. A current plat depicting the post-annexation northern boundary of Lake Saint Louis was attached as Exhibit 2. LF at 3, 13. A narrative description of the post-annexation northern boundary of Lake Saint Louis was attached as Exhibit 3. LF at 3, 14. The petition alleged that Lake Saint Louis had a legally protectable interest in enforcing its ordinances, collecting and administering taxes, and protecting the rights of the City and its residents within its boundaries. LF at 4.

The petition alleged that a dispute existed between Lake Saint Louis and O’Fallon as to the northern boundary of Lake Saint Louis. LF at 4. The petition alleged, ‘O’Fallon disputes the northern boundary of Lake Saint Louis and claims to have subsequently annexed property, issued permits, and taken other actions within the boundary of Lake Saint Louis as set forth in Exhibits 1, 2, and 3.’ LF at 4. On October 31, 2008, O’Fallon’s

counsel wrote to St. Charles County officials to dispute the northern boundary of Lake Saint Louis, stating in part that adjudication of the dispute between O'Fallon and Lake Saint Louis should take place in circuit court. LF at 4.

The petition prayed for the circuit court to enter judgment declaring that the northern boundary of the City of Lake Saint Louis was and had been since 1982 as depicted in Exhibits 2 and 3, declaring that Defendant City of O'Fallon had not annexed property within the boundary depicted in Exhibits 2 and 3, and awarding other relief.

On April 30, 2009, O'Fallon filed a motion to dismiss, asserting that the "exclusive remedy to test a City's right to disputed territory in a dispute over annexation, to challenge an annexation or to oust a city from jurisdiction over the disputed parcel is by *quo warranto* action." LF at 16. For the Court's convenience, a copy of the motion is included in the appendix to this brief. The motion to dismiss also declared that the petition was barred by "the statute of limitations and laches" because "Lake Saint Louis challenges an annexation by the City of O'Fallon occurring more than three years prior to the filing of this lawsuit." LF at 16.

On June 15, 2009, the trial court entered a judgment dismissing the petition. In its entirety, the judgment states: "Defendant's Motion to Dismiss is sustained. This case is dismissed. Costs are assessed to Plaintiff." LF at 21. On July 10, 2009, Lake Saint Louis filed a timely notice of appeal. LF at 22.

On January 26, 2010, the Court of Appeals handed down an opinion reversing the judgment of the circuit court. On May 25, 2010, this Court sustained the respondent's application for transfer.

## ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS PETITION BECAUSE THE PETITION STATED A CLAIM FOR RELIEF AND WAS NOT BARRED BY LIMITATIONS OR LACHES IN THAT THE PETITION SET FORTH FACTS SHOWING A JUSTICIABLE DISPUTE BETWEEN THE PLAINTIFF AND THE DEFENDANT AS TO THE BOUNDARY BETWEEN THEIR TWO CITIES, A DECLARATORY JUDGMENT IS THE APPROPRIATE METHOD FOR A BOUNDARY DETERMINATION, AND THE PETITION DID NOT SHOW ON ITS FACE THAT IT WAS BARRED BY LACHES OR LIMITATIONS.

The trial court's improper dismissal should be reversed. As a result of a dispute with the City of O'Fallon, the City of Lake Saint Louis filed a petition seeking a declaratory judgment as to its northern boundary. O'Fallon claimed that Lake Saint Louis was required to file a quo warranto action to 'bust' O'Fallon from jurisdiction over land that Lake Saint Louis had lawfully annexed in 1982. This is nonsense. Lake Saint Louis is not attempting to 'oust' O'Fallon; Lake Saint Louis merely seeks a declaration of where the boundary lies between the two cities.

O'Fallon's baseless argument proceeds from the assertion that it annexed *an area that had already been annexed by Lake Saint Louis*. O'Fallon does not allege that it ever filed a quo warranto action to oust Lake Saint Louis from the area that Lake Saint Louis annexed in 1982. How can it be that Lake Saint Louis is required to file a quo warranto action but O'Fallon was not?

O'Fallon also declared that the Lake Saint Louis petition was barred by a three-year statute of limitations and the doctrine of laches, but failed to cite any evidence in support. The record does not support the contention that the claim is time-barred. No facts are set forth in the petition to implicate limitations or laches.

**A. The dismissal is reviewed de novo.**

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. *Reynolds v. Diamond Foods & Poultry Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). It assumes that all of the plaintiff's averments are true and liberally grants to the plaintiff all reasonable inferences therefrom. *Id.* No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Id.* Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id.*

The granting of a motion to dismiss is reviewed de novo. *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 127-128 (Mo. App. 2009). Because a motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition, the Court may not address the merits of the case or consider evidence outside the pleadings. *Id.* If the petition asserts any set of facts that would, if proven, entitle the plaintiff to relief, the petition states a claim. *Id.*

Judged by these standards, the trial court certainly erred in dismissing the petition.

**B. The dismissal is a final judgment.**

Generally, when a trial court does not specify in its judgment whether a dismissal is with or without prejudice, it is deemed to be without prejudice. Rule 67.03. Ordinarily, a dismissal without prejudice is not a final judgment and thus not appealable. *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340 (Mo. App. 2008). Nevertheless, when the effect of the order is to dismiss the plaintiff's action and not merely the pleading -- effectively constituting an adjudication on the merits -- then the judgment entered is final and appealable. *Id.*

A party can appeal from a dismissal that has the practical effect of terminating the action in the form cast. *Manzella v. Dorsey*, 258 S.W.3d 501, 503 (Mo. App. 2008). In this case, the trial court's judgment sustaining the motion to dismiss has the practical effect of ending the litigation. The defendant's motion to dismiss asserted that Lake Saint Louis was barred as a matter of law from proceeding on its petition. LF at 16. The motion did not allege that the petition was lacking, but rather that Lake Saint Louis was not entitled to any relief under the facts alleged. The trial court sustained the motion and ordered that the "case is dismissed." LF at 21. This judgment is appealable. *See American Eagle*, 272 S.W.3d at 340; *Manzella*, 258 S.W.3d at 503. In the Missouri Court of Appeals, O'Fallon did not dispute that the judgment was appealable.

**C. The petition states a claim for relief.**

The trial court's dismissal amounts to a ruling that Lake Saint Louis and its people are not entitled to a declaratory judgment of their rights. This ruling misapprehends the question presented by a motion to dismiss in a declaratory judgment case.

To state a claim for declaratory judgment, the petition need only allege facts that invoke substantive legal principles that entitle the petitioner to relief. *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340 (Mo. App. 2008). The question “is not whether the petition shows that the plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states, but rather it is whether under the averments of the petition he is entitled to a declaration of rights at all.” *Id.*

It is not the function of the trial court on a motion to dismiss (or of this Court on appeal from a judgment of dismissal) to make an analysis of the law under which the rights are claimed or to determine on the merits whether the plaintiff is entitled to the declaratory relief it seeks. *Id.* If under the facts pleaded a plaintiff is entitled to a declaration of rights *at all*, the petition is sufficient for that purpose even though it advances a mistaken contention of law. *Id.* A plaintiff's standing to claim declaratory relief and to assert a legally protectable interest is not impaired by the possibility that ultimately the plaintiff might not prevail. *Id.* at 341.

An action for a declaratory judgment is an appropriate vehicle to determine property boundaries. *Shuffit v. Wade*, 13 S.W.3d 329 (Mo. App. 2000) (declaratory judgment action to establish the boundaries of property); *Dillon v. Norfleet*, 813 S.W.2d 31 (Mo. App. 1991); *Southern Missouri Dist. Council of Assemblies of God v. Hendricks*, 807 S.W.2d 141 (Mo. App. 1991) (declaratory judgment establishing boundary line).

In cases similar to this one, courts have held that they were empowered to declare and determine the boundaries between political subdivisions. *Oak Ridge Reorganized School Dist. No. R-6 v. Jackson Reorganized School Dist. No. R-2*, 830 S.W.2d 45 (Mo.

App. 1992), affirmed a judicial determination of the boundary between two school districts. In *Witter v. St. Charles County*, 528 S.W.2d 160 (Mo. App. 1975), the plaintiff was the owner of an island in the Missouri River. Because of a change in the river channel, both St. Charles County and St. Louis County claimed the island to be within their boundaries. Each county claimed the right to assess and collect taxes and to exercise jurisdiction over the island. The owner prayed for a declaratory judgment that the island was located in St. Charles County. The trial court found the island to be in St. Charles County, and the judgment was affirmed.

In the particular context of a dispute between two governmental entities over which has jurisdiction over an area, it is well settled that an action for a declaratory judgment is proper. In *Walker Reorganized School Dist. R-4 v. Flint*, 303 S.W.2d 200 (Mo. App. 1957), two school districts claimed jurisdiction over an area. The Walker School District filed a petition praying for a declaratory judgment that the former Coal Creek School District had become a part of the plaintiff district by annexation. The Vernon County School District intervened, claiming that it had annexed the Coal Creek School District and praying for a declaratory judgment. The trial court entered a judgment declaring that the area was part of the Walker School District. *Id.* at 204.

On appeal, the court noted that *an individual* must bring an action in quo warranto to contest the jurisdiction of a school district. A declaratory judgment action is not available to individual plaintiffs, who are only indirectly affected by the reorganized district, and an attempted action by individual plaintiffs is in the nature of a collateral

attack. *Id.* at 205. The court held that the same rule did not apply in the dispute *between two school districts*:

Both plaintiff and intervenor are public school districts. Each in its public corporate capacity is claiming the same territory, the Coal Creek District. Each claims that this district is legally a part of its corporate territory. . . . Both [school districts] have a direct interest in the matter. There is no threat of harassment by individuals questioning the validity of a school district. *To permit [the school districts], in a declaratory judgment action, to determine the question of which took the first valid step to acquire the Coal Creek District does not appear to violate any of the reasons for the rule that an individual cannot question in legality of the organization of a school district by a declaratory judgment action, but must proceed, if at all, by quo warranto in the name of the State. Since the reason for that rule fails as applied to this case we do not apply the rule.*

*Id.* at 205-206 (emphasis added). The court held that a declaratory judgment action was an appropriate remedy for the determination of the question of which of the two school districts acquired the Coal Creek District. *Id.* at 206.

Later, in a similar case, the Crawford County and Washington County School Districts sought a declaratory judgment fixing the boundary between the districts. *Reorganized School Dist. R-I of Crawford County v. Reorganized School Dist. R-III of Washington County*, 360 S.W.2d 376 (Mo. App. 1962). The court held that a declaratory judgment was a proper remedy:

Ordinarily matters affecting the legality of the organization of a school district cannot be inquired into except by quo warranto in the name of the state. This action, however, is between two school districts. In the case of *Walker Reorganized School District R-4 v. Flint*, Mo. App., 303 S.W.2d 200, it was held in a well reasoned opinion by the Kansas City Court of Appeals that a declaratory judgment action will lie in a dispute such as this between two school districts. We are in accord with that holding.

*Id.* at 378.

This Court cited the foregoing analysis with approval in *State ex rel. Junior College Dist. of Sedalia v. Barker*, 418 S.W.2d 62, 65 n.1 (Mo. banc 1967), in which individuals sought an action for declaratory judgment, injunction, and a petition for review challenging the validity of a school board. The trial court granted relief, and the junior college district appealed. *Id.* at 63-64. The junior college's primary argument was the trial court exceeded its jurisdiction when it granted injunctive relief because the junior

college district's formation and existence could not be challenged by individuals by declaratory judgment action, injunction, or petition for review because it is a public corporation. It argued that the individuals' exclusive remedy was through quo warranto. *Id.* at 65. This Court agreed, holding that the validity of a public entity's organization cannot be challenged by individuals. *Id.* The Court included a footnote contrasting its holding with *Walker* and *Crawford County*:

Compare: *Walker Reorganized School District R-4 v. Flint et al.*, Mo.App., 303 S.W.2d 200, 205-206 [2], cited by respondent, holding that one school district can maintain an action against another school district for a judgment declaring that defendant district had become a part of plaintiff district by annexation. In so holding the court referred specifically to page 21 of the Spiking case (245 S.W.2d) and noted “\* \* \* that the Supreme Court has been careful to leave the door open for the decision that the cases in which individuals are endeavoring to attack the validity of an annexation or a reorganization through a proceeding other than by quo warranto in the name of the State are not necessarily controlling where two school districts are claiming the same territory.” However, as to the individual parties in the *Walker* case, the court held (303 S.W.2d l.c. 206 [3]) that the Spiking case was controlling and they had no right to question the

validity of the purported annexation. See also: Reorganized School District R-I of Crawford County v. Reorganized School District R-III of Washington County, Mo.App., 360 S.W.2d 376, 378 [1-2].

*Id.* at 65 n.1. Thus, the Court has approved *Walker* and *Crawford County*. An action between two governmental entities for a determination of their common boundaries can properly be brought as a declaratory judgment action.

**D. *Cherry* is not relevant to this action between two public bodies.**

In its brief before the Court of Appeals in this case, O'Fallon failed to address the analysis in *Walker* and *Crawford County*. Ignoring these cases, O'Fallon placed its heaviest reliance on a case that could not be more clearly distinguishable. See *Cherry v. City of Hayti Heights*, 563 S.W.2d 72 (Mo. banc 1978). As this Court explained, *Cherry* does not involve any disputes between governmental entities, but rather “a ***collateral challenge by a private party to the incorporation of a municipality***.” *Id.* at 74 (emphasis added). This is precisely the set of facts that requires an action in quo warranto for the reasons explained in *Walker* and *Crawford County*.

*Cherry* does not purport to say anything about the intergovernmental dispute in this case. It does not purport to reverse *Walker* and *Crawford County*. Indeed, *Cherry* does not mention *Walker* or *Crawford County*, and there is no reason why it should, since it is a case in an entirely different context.

In its brief before the Court of Appeals, the only basis on which O'Fallon attempted to distinguish *Walker* and *Crawford County* was to declare that “the cases were decided before the Missouri Supreme Court’s opinion in Hayti Heights.” Respondent’s Brief at 11 n.4. This statement is true enough, but it does nothing to explain how *Cherry* (an action by an individual) is in any way relevant to the continued force of *Walker* and *Crawford* (stating the law applicable to actions between two governmental entities).

*Cherry* is one of three cases that O'Fallon discussed at any length in its briefing before the Court of Appeals. Respondent’s Brief at 7. O'Fallon also discussed *White v. City of Columbia*, 461 S.W.2d 806, 807 (Mo. banc 1970), another action by individuals attacking the regularity of annexation proceedings. Respondent’s Brief at 8-9. The third case that received extended discussion in O'Fallon’s brief was *City of Town & Country v. Goldman*, 778 S.W.2d 300, 301 (Mo. App. 1989), in which a landowner filed an action for declaratory judgment, requesting a declaration that an annexation more than thirty years earlier was void as to his property. Respondent’s Brief at 7-8. These cases do nothing to limit the effect of *Walker* and *Crawford*.

**E. *Lake Lotawana* does not support the dismissal in this case.**

In the circuit court and in the Court of Appeals, the defendant cited dicta in *State ex inf. Sanders ex rel. City of Lee’s Summit v. City of Lake Lotawana*, 220 S.W.3d 794 (Mo. App. 2007), relating to a dispute in which two Jackson County municipalities were concurrently attempting to annex approximately 1200 acres situated between the two cities. *Lake Lotawana* is readily distinguishable from this case. Lake Saint Louis and O'Fallon are not attempting to annex an area at the same time. The facts, which are

undisputed for the purposes of the defendant's motion to dismiss, show that Lake Saint Louis annexed an area in 1982 and O'Fallon "claims to have subsequently annexed property, issued permits, and taken other actions within the boundary of Lake Saint Louis." LF at 4. The action before this Court seeks only a declaration as to the location of the boundary between these two cities in light of these facts.

The *Lake Lotawana* case is irrelevant to a resolution of this case. After Lake Lotawana completed annexation of the tract, Lee's Summit initiated a quo warranto action to oust Lake Lotawana from exercising jurisdiction over the tract. Lee's Summit coupled the action with a declaratory judgment action in which it asked the circuit court to declare that it took the first valid step toward annexing the tract (and therefore had superior claim to it) and that Lake Lotawana's annexation was defective. The circuit court entered judgment for Lee's Summit. The circuit court issued an order in quo warranto ousting Lake Lotawana from the tract, declaring that Lake Lotawana's annexation was void. The judgment further declared that Lee's Summit had "prior jurisdiction" over the tract and enjoined Lake Lotawana from proceeding with annexation until Lee's Summit had an opportunity to complete its annexation process. *Id.* at 798.

The Western District affirmed the quo warranto portion of the judgment. Having already ruled in favor of Lee's Summit, the court then went on to state that the circuit court had erred in not dismissing Lee's Summit's request for a declaratory judgment and injunction: "The circuit court should not have issued injunctive relief because quo warranto was Lee's Summit's exclusive remedy." *Id.* at 808.

With the highest respect for the Western District, this statement is wrong. As noted above, in the case of two governmental entities that seek a determination as to which is entitled to an area, a declaratory judgment is proper. *See Walker; Crawford County; State ex rel. Junior College Dist. of Sedalia v. Barker*, 418 S.W.2d 62, 65 n.1 (Mo. banc 1967).

The error in *Lake Lotawana* is easily explained. The Western District cited *State ex rel. Kansas City v. Harris*, 357 Mo. 1166, 212 S.W.2d 733, 735 (1948), for the proposition that quo warranto and not injunction is the proper action for testing a city's right to disputed territory in a dispute over annexation. *Harris*, however, was a prohibition case in which the underlying action was one "brought as a class action by residents of Clay County living in the area sought to be annexed by Kansas City." *Id.*, 212 S.W.2d at 734. It was not an action between two governmental entities, but rather one brought by individuals.

In *Lake Lotawana*, the Western District also relied on *State ex rel. Members of Board of Education of Everton R-III School District v. Members of Board of Education of Greenfield R-IV School District*, 572 S.W.2d 899 (Mo.App.1978), for the proposition that "quo warranto was the only proper remedy to resolve a dispute over the change of school boundaries when two school districts claimed jurisdiction over the same property." *Lake Lotawana*, 220 S.W.3d at 808. Respectfully, however, *Everton* does not support this contention. Pursuant to a state statute, the Everton and Greenfield school districts submitted an appeal over annexation to the state board of education, which resulted in the appointment of a board of arbitration that approved a boundary change. This arbitration

transferred property formerly included in the Everton district to the Greenfield district. Everton filed an action against Greenfield seeking mandamus and a declaratory judgment, challenging the change of boundaries between the two districts. *Everton*, 572 S.W.2d at 899. The trial held that Everton's exclusive remedy was in quo warranto and entered judgment in favor of Greenfield. *Id.*

The Springfield District of the Court of Appeals declined to address Everton's argument on appeal on the merits, finding the issue "can only be determined in quo warranto since it is clear to us that the dispute in this case involves claim of jurisdiction over the same property by two school districts." *Id.* at 900. The court quoted *State ex rel. Purdy Reorganized School District v. Snider*, 470 S.W.2d 805 (Mo. App. 1971), which stated, "[T]he public interest is involved and the rights of the respective districts should be settled in Quo Warranto." *Id.*

The quoted statement from *Purdy*, however, is mere dicta. In *Purdy*, the state, on relation of the school district, sought mandamus to compel the clerk of the county court to extend tax books to include certain real estate claimed to be within the school district's boundaries. *Id.* at 806. The trial court refused the writ, and the school district appealed. *Id.* After finding the school district did not carry its burden of showing that it was entitled to relief, the Springfield District declined to address the remaining issues, explaining that the real controversy -- not raised in the case before the court -- appeared to be which of two school districts properly had jurisdiction over the tract of land. The court stated: "That controversy cannot be settled on this record, nor for that matter in mandamus. Where two school districts claim jurisdiction over the same territory, as is

the case here with the southern part of the tract plotted on exhibit one, the public interest is involved and the rights of the respective districts should be settled in Quo Warranto.” *Id.* at 809. This statement is plainly dicta, and plainly wrong in light of *Walker, Crawford County, and Junior College District*.

In addition to relying upon *Purdy*, the *Everton* case also cited *State ex inf. Dalton ex rel. Hough v. Eckley*, 347 S.W.2d 704 (Mo. banc 1961), for the proposition that quo warranto “is a proper remedy to test the jurisdiction of a school board over territory claimed by another school district.” *Everton*, 572 S.W.2d at 900. A plain reading of this sentence makes clear that the *Hough* decision held that quo warranto was *one* proper remedy, as opposed to *the* proper remedy or the *only* proper remedy.

Thus, the dicta statement about quo warranto in *Everton* does not support the dicta statement about quo warranto in *Lake Lotawana*. As the Court of Appeals explained in its opinion in this case, “By misconstruing and restricting the holding in *Hough*, and relying upon dicta in *Purdy*, we believe *Everton* improperly fashioned quo warranto into the exclusive remedy, rather than the customary, preferred, or optional remedy it has evolved into since the analysis offered in *Walker*.” Opinion at 14.

In this case, the Court of Appeals was entirely correct in reversing the judgment of the circuit court for the reasons set forth in its opinion:

As a result, we find the analysis in *Lake Lotawana* and the cases it relies upon to be faulty, and therefore, we decline to follow them for the proposition that Lake St. Louis’ exclusive remedy in this case was to proceed in quo warranto. *Walker*

and its progeny have carved out an exception which permits governmental entities, such as municipalities and school districts, to bring a declaratory judgment action to resolve boundary disputes because concerns compelling the traditional use of quo warranto are absent. This is not to say an action in quo warranto will not lie. Rather, we believe Missouri precedent supports the election of either remedy to resolve these disputes. Therefore, we hold the trial court erred in dismissing Lake St. Louis' petition because quo warranto was not the exclusive remedy it could pursue to resolve its boundary dispute with O'Fallon.

Opinion at 14.

**F. The petition could not properly be dismissed for limitations or laches.**

In moving to dismiss, O'Fallon mentioned laches and limitations. The circuit court's dismissal cannot be supported under either theory. Indeed, in the Court of Appeals, O'Fallon abandoned any reliance on limitations.

When an affirmative defense is asserted, such as a statute of limitations, a petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. banc 1995); *Cox v. Ripley County*, 233 S.W.3d 225, 227 (Mo. App. 2007). In determining whether a petition is

barred, the Court allows the pleading its broadest intendment, treats all facts alleged as true, and construes the allegations favorably to the plaintiff. *Sheehan*, 901 S.W.2d at 59.

Laches requires that a party with the knowledge of facts giving rise to its rights unreasonably delays asserting them for an excessive period of time and that the other party suffers legal detriment as a result. *State ex rel. Sasnett v. Moorhouse*, 267 S.W.3d 717, 723 (Mo. App. 2008). In determining whether to apply the doctrine of laches, courts examine the length of delay, the reasons for the delay, how the delay affected the other party, and the overall fairness in permitting the assertion of the claim. *Id.*

Similarly, a statute of limitations begins to run when one “has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him.” *Community Title Co. v. U.S. Title Guar. Co., Inc.*, 965 S.W.2d 245, 253 (Mo. App. 1998).

The petition in this case plainly does not show on its face that it is barred by laches or limitations. The petition does not set forth any dates from which to determine when any alleged statute of limitations could begin to run. The defendant never asserted any time when a cause of action accrued. Indeed, the defendant never cited a statute of limitations. The judgment of the trial court cannot be supported by laches or limitations.

In particular, O’Fallon’s motion to dismiss never asserted that Lake Saint Louis had knowledge or notice of any purported annexation by O’Fallon. In appropriate circumstances, Chapter 71 of the Missouri Revised Statutes allows a city to “annex unincorporated areas” (which would not include areas already annexed and incorporated into another city). *See, e.g.*, § 71.012, RSMo. The statute does not provide for notice to

adjacent municipalities. There is no basis in the record for the Court to determine that Lake Saint Louis ever had notice of any purported annexation by O'Fallon so as to commence the running of any statute of limitations or period of laches.

The judgment should also be reversed if the trial court relied on O'Fallon's bare assertion in its motion to dismiss that its purported annexation occurred more than three years ago. Under Rule 55.27(b), if matters outside the pleadings are considered by the court, "the motion shall be treated as one for summary judgment." The parties are entitled to be given reasonable opportunity to present all relevant materials for a summary judgment motion. *Id.* In order to consider the "matters outside the pleadings" and treat the motion as one for summary judgment, however, the court must give notice to the parties that it is going to do so. *Platonov v. The Barn, L.P.*, 226 S.W.3d 238, 240 (Mo. App. 2007).

If matters outside the pleadings were considered by the trial court (such as the date of the purported O'Fallon annexation), the trial court was required to treat the motion to dismiss as a motion for summary judgment under the mandatory language of Rule 55.27(b). *See Platonov*, 226 S.W.3d at 240. The court therefore was also required to give notice to Lake Saint Louis that it was doing so and afford it an opportunity to prepare a response accordingly. The record shows that no such notice was provided. If the court decided the motion to dismiss on the issue of limitations, the court erred in not expressly converting the motion to one for summary judgment and in not notifying the parties that it was doing so. *Id.*

## CONCLUSION

The petition plainly alleges that a dispute exists between Lake Saint Louis and O'Fallon as to the location of the boundary between the two cities. Lake Saint Louis invoked the power of the circuit court to declare the rights of the parties. § 527.010, RSMo; Rule 87. Nothing within the four corners of the petition justifies the court's refusal to resolve the dispute. The continued existence of this dispute is no benefit to the citizens of either city. The trial court should be directed to resolve this matter on the merits.

For the foregoing reasons, the judgment of the circuit court should be reversed and the matter should be remanded for a resolution of the dispute between the parties. In the alternative, this appeal should be retransferred to the Court of Appeals for reentry of its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this brief and a disc containing a copy of this brief were mailed, first-class postage prepaid, on July 9, 2010, to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,040, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the brief and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

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