

**IN THE MISSOURI SUPREME COURT**

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**ELBERT A. WALTON, JR.**                      **NO. SC87996**  
**Respondent/Plaintiff**

**Vs.**

**CITY OF BERKELEY, MO**  
**Appellant/Defendant**

Appeal From The Twenty-First Judicial Circuit

County of St. Louis, Missouri

Cause No. 01CC-336 \* Division No. 12

Honorable Steven H. Goldman, Judge, Presiding

**RESPONDENT'S**

**STATEMENT, BRIEF AND ARGUMENT**

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## **JURISDICTIONAL STATEMENT**

The appeal was first heard in the Court of Appeals and is now before the Supreme Court by transfer under Supreme Court Rule 83.03.

## **STATEMENT OF FACTS**

The appellant/defendants' statement of facts are supplemented with the following:

During the trial the court entered an Order amending the plaintiff's petition to conform to the evidence. On remand after the second appeal, the Plaintiff formally amended his claim to conform to the evidence presented in the prior trial making equitable claims for wrongful termination as well as legal claims for breach of contract. The legal claims were alleged as follows:

“Comes now the Plaintiff and for his cause of action states:

1. That Article V, Section 13 of the Charter of the City of Berkeley, Missouri provides that the City Manager, shall, with the approval of the City Council, appoint a City Attorney who shall have been licensed to practice law in the State of Missouri.
2. That on or about the November 19, 1996, plaintiff was appointed by the City Manager of the City of Berkeley with the approval of the City Council of the City of Berkeley as City Attorney of the City of Berkeley.
3. That the Charter furthermore provides that the compensation of the City Attorney shall be fixed by the City

Council.

4. That at the time of the appointment of plaintiff as City Attorney, the usual course and practice of the City of Berkeley was to pay the City Attorney a fixed monthly retainer in the sum of \$2,500.00 per month plus an hourly rate for any litigation handled by the City Attorney as well as for extraordinary legal services plus reimburse said City Attorney for his expenses.

5. That Section 432.070 RSMo requires that contracts with municipal corporation be in writing.

6. That the City Council duly passed and enacted an ordinance or resolution setting forth in writing a contract or agreement and the terms of the employment of plaintiff as city attorney.

7. That said ordinance or resolution fixed the compensation of the City Attorney at a monthly retainer of \$2,500 plus hourly rates for extraordinary services plus reimbursement of expenses as well as charges for personnel employed by the City Attorney.

8. That on or about March 1, 1997, Defendant's City Manager or agent, as authorized by the City Charter, and

Plaintiff executed a written agreement or contract which was in substantial and sufficient compliance with Missouri statutes requiring contracts with municipal corporations to be in writing and which was substantially and sufficiently the same or in compliance with the agreement or contract enacted or adopted by the City Council.

9. That as a result of the execution of said agreement by plaintiff and defendant, plaintiff agreed to render legal services to the Defendant and Defendant agreed to pay Plaintiff fees for such services rendered plus expenses.

10. That on or about April 1, 1998, Defendant and Plaintiff entered into a written agreement or contract for modification of the contract dated March 1, 1997 by which Plaintiff agreed to render legal services to the defendant and Defendant agreed to pay Plaintiff attorney's fees plus expenses in consideration therefore.

11. That the agreements, contracts and modifications thereof between plaintiff and defendant substantially and sufficiently complied with statutes requiring contracts with municipal corporations to be in writing.

12. That plaintiff has so rendered the legal services to Plaintiff as provided under said contracts or agreements.

13. That Plaintiff in breach of said agreement has failed to pay to defendant the monthly retainer, attorney fees and expenses as agreed upon.

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**WHEREFORE**, the Petitioner prays that this Honorable Court issue a permanent injunction against the Defendants enjoining them from in anywise attempting to enforce the termination of Plaintiff as City Attorney of the City of Berkeley, declaring the letter of removal of plaintiff as city attorney null and void, voiding all actions taken to effect the removal of plaintiff as City Attorney, issue a judgment ordering the defendants to reinstate plaintiff as city attorney, award the plaintiff compensatory damages in such sum as is reasonable in excess of \$25,000.00, including back pay, unpaid retainers, unpaid extraordinary services, unpaid expenses including the costs of staff employed by the plaintiff, plus pre and post suit interest, plus attorneys fees associated with the prosecution of this matter, plus a sum in excess of \$1,000,000.00 as punitive

damages for the wrongful removal of plaintiff as city attorney without the approval of the City Council, and for his costs herein expended, and that the defendants be enjoined from removing and preventing the plaintiff from exercising the authority as city attorney until such time as the City Manager and City Council shall afford the plaintiff notice and a hearing and approve the removal of plaintiff as city attorney.”

(Emphasis mine) (See full amended petition in appendix)

The defendant filed an answer thereto.

Upon retrial on said amended pleadings, the trial court filed a document captioned “FINDINGS AND JUDGMENT” which stated, inter alia:

“This case is submitted upon stipulation by the parties to the evidentiary record of the trial herein. \*\*\* The Court finds that attorney’s fees and expenses are owed and that the amounts found herein are reasonable.

In addition, the Court finds that the first contract between the parties (Exhibit 3, 1997) is enforceable under the doctrine of substantial compliance, notwithstanding that the city manager

signed the contract when the enabling Ordinance (Exhibit 4)  
authorized only the mayor to sign.” (Emphasis mine)

The court then went on to enforce the contract in favor of the plaintiff  
by an award of damages in the sum of \$181,049.82. The full Judgment and  
Finding of the Trial Court is set forth in the appendix attached hereto.

The defendant then appealed.

**POINTS RELIED ON**

**POINT I**

**THE TRIAL COURT DID NOT GRANT EQUITABLE RELIEF ON PLAINTIFF'S AMENDED CLAIM BUT INSTEAD ENTERED JUDGMENT UNDER THE LAW FOR BREACH OF CONTRACT**

**State ex rel. Kansas City Ins. Agent's Ass'n v. Kansas City**, 4 S.W.2d 427 (Mo.banc 1928)

**Farm & Home Inv. Co. v. Gannon**, 622 S.W.2d 305 (Mo.App.E.D. 1981)

**Public Water Supply District No. 16 v. City of Buckner**, 44 S.W.3d 860 (Mo.App.W.D. 2001)

**POINT II**

**THE TRIAL COURT DID NOT ERR TO THE EXTENT THAT IT GRANTED PLAINTIFF RELIEF BASED ON CONTRACT OR BREACH THEREOF, RES JUDICATA DID NOT BAR THE CONTRACT CLAIM, AS THE PRIOR JUDGMENT OF THE TRIAL COURT HAD BEEN VACATED BY THE APPELLATE COURT, AND THUS,**

**UPON REMAND, THE TRIAL COURT'S VACATED  
JUDGMENT CANNOT BE CONSIDERED A FINAL  
JUDGMENT ON THE MERITS FOR PURPOSES OF RES  
JUDICATA**

**Hermel, Inc. v. State Tax Commission**, 564 S.W. 2d 888 (Mo. S.Ct. 1978)

**Lincoln County Ambulance Dist. v. Pacific Employers Ins. Co.**, 15 S.W. 3d 739, rehearing, transfer denied (Mo. App. E.D. 1998)

**Robin Farms, Inc. v. Beeler**, 991 S.W. 2d 182 (Mo. App. W.D. 1999)

**Adams v. Adams**, 165 S.W. 2d 675 (Mo. S.Ct. 1942)

**Petrie v. Levan**, 762 S.W. 2d 627, 799 W.W.2d 632 (Mo. App. W.D. 1988)

**Brolin v. City of Independence**, 138 S.W. 2d 741 (Mo. App. 1940)

**Butcher v. Main**, 426 S.W. 2d 356 (Mo. S. Ct. 1968)

## ARGUMENT

### POINT I

#### **THE TRIAL COURT DID NOT GRANT EQUITABLE RELIEF ON PLAINTIFF'S AMENDED CLAIM BUT INSTEAD ENTERED JUDGMENT UNDER THE LAW FOR BREACH OF CONTRACT**

The Plaintiff, on remand, amended his Petition to allege both an equitable claim for wrongful termination and a legal claim for breach of contract and prayed for equitable relief and damages.

The trial court found that contract in question was in substantial compliance with the Ordinance passed by the city council and therefore Plaintiff was entitled to recover under the contract. (see Findings & Judgment, Appendix 1-3) In **State ex rel. Kansas City Ins. Agent's Ass'n v. Kansas City**, 4 S.W.2d 427 (Mo.banc 1928), the Court held that the requirement of a written contract was met when a city council enacted an ordinance and the other party accepted the ordinance in writing. *Id.* at 430. In the case at bar Appellant accepted the contract both in writing and by performance under the contract. In **Farm & Home Inv. Co. v. Gannon**, 622 S.W.2d 305 (Mo.App.E.D. 1981), the court rejected a challenge to an

agreement between the City of DeSoto and developers for the construction and maintenance of a water line. Even though it appeared that a substantial portion of the consideration had been performed before the execution of a written contract, the court upheld the agreement stating, summarily and without citation to authority, "[b]ut the consideration to be received by [the developers], such as DeSoto's maintenance of the line, was to occur after the contract's execution; hence, there was no violation of § 432.070." Id. at 307. So it was in the case at bar. The Respondent, in the case at bar, began to perform under the contract prior to the passage of the Ordinance and by its language said Ordinance fixed Appellant's compensation retroactive to the date of the commencement of performance. In **Public Water Supply District No. 16 v. City of Buckner**, 44 S.W.3d 860 (Mo.App.W.D. 2001), although the court stated that the requirements of the statute are mandatory, it held that "substantial compliance may, in some circumstances, be sufficient." Id.

Upon remand of the case at bar, by stipulation of the parties, plaintiff's claims, as amended, for wrongful termination and breach of contract, were resubmitted to the judgment of the trial court. The trial court again found against the Respondent on his claim for wrongful termination and thus declined to grant equitable relief, however, the trial court found in

favor of the Respondent on his claim for breach of contract and entered judgment on the contractual claim for plaintiff and against defendant, basically finding that there had been substantial compliance with the provisions of Section 432.070 RSMO requiring the city council to approve all contracts entered into by the city, found that the plaintiff performed his duties and obligations under said contract by providing legal services and advancing costs and expenses on behalf of the defendant when rendering said legal services, that plaintiff breached said contract by failing to pay plaintiff for legal services rendered and costs and expenses advanced under said contract, and, thus, enforced said contract by entering judgment for Plaintiff and ordered the defendant to pay plaintiff damages in the sum of \$181,049.82.

That the trial court entered judgment on the contract and awarded damages is found in the specific language of the judgment which stated, inter alia:

“In addition, the Court finds that the first contract between the parties (Exhibit 3, 1997) is enforceable under the doctrine of substantial compliance, notwithstanding that the city manager signed the contract when the enabling Ordinance

(Exhibit 4) authorized only the mayor to sign.” (Emphasis mine)

The court then clearly found an enforceable contract and then went on to enforce the contract in favor of the plaintiff and against the defendant by an award of damages in the sum of \$181,049.82. (The full Judgment and Finding of the Trial Court is set forth in the appendix attached hereto.) Thus the trial court did not grant equitable relief but instead entered a judgment under the law for breach of contract.

## **POINT II**

**THE TRIAL COURT DID NOT ERR TO THE EXTENT THAT IT GRANTED PLAINTIFF RELIEF BASED ON CONTRACT OR BREACH THEREOF, RES JUDICATA DID NOT BAR THE CONTRACT CLAIM, AS THE PRIOR JUDGMENT OF THE TRIAL COURT HAD BEEN VACATED BY THE APPELLATE COURT, AND THUS, UPON REMAND, THE TRIAL COURT’S JUDGMENT CANNOT BE CONSIDERED A FINAL JUDGMENT ON THE MERITS FOR PURPOSES OF RES JUDICATA**

The case was back before the trial court on general remand. The Plaintiff amended Plaintiff's Petition, defendant filed answer thereto, and on stipulation of the parties that the case would be resubmitted on the evidence presented in the prior trial, under the amended Pleadings, the trial court then entered judgment for plaintiff and awarded plaintiff damages for breach of contract. **Adams v. Adams**, 165 S.W. 2d 675 (Mo. S.Ct. 1942) Where a plaintiff is unable to prevail on one equitable theory, on remand, he should be permitted to amend his pleading to state a cause of action on the equitable theory found to be actionable by the appellate court or on contract. **Petrie v. Levan**, 762 S.W. 2d 627, 799 W.W.2d 632 (Mo. App. W.D. 1988) Where the reviewing court specifies the theory of recovery embodied in the amendment, and evidence relied on in the amendment had been received in the former trial, the trial court should allow amendment of the plaintiff's petition setting forth the theory embodied in the opinion of the court of appeals. **Brolin v. City of Independence**, 138 S.W. 2d 741 (Mo. App. 1940) Where the case is remanded generally, all issues are open to consideration on a new trial, and pleadings may be amended or new and controlling facts produced at the new trial. **Butcher v. Main**, 426 S.W. 2d 356 (Mo. S. Ct. 1968)

Moreover, upon such a remand, the vacated or reversed judgment has no collateral estoppel nor res judicata effects. In **Hermel, Inc. v. State Tax Commission**, 564 S.W. 2d 888 (Mo. S.Ct. 1978), the Supreme Court held that upon reversal of the State Tax Commission's determination of value of improvements on a taxpayer's property and remand to the Commission for rehearing, additional evidence could be received, the Commission's original determination of value had no res judicata effect and the Commission's original determination that the assessor's valuation was not correct did not preclude the Commission from subsequently concluding that it was the proper valuation. Further, in **Lincoln County Ambulance Dist. v. Pacific Employers Ins. Co.**, 15 S.W. 3d 739, rehearing, transfer denied (Mo. App. E.D. 1998), the court held that a judgment that was vacated on appeal has no res judicata or collateral estoppel effect on remand. Finally, in **Robin Farms, Inc. v. Beeler**, 991 S.W. 2d 182 (Mo. App. W.D. 1999), the court noted that when an appellate court vacates a judgment, the lower court's judgment cannot be considered a final judgment on the merits for purposes of collateral estoppel or res judicata. The fact is a vacated judgment is no judgment at all. Therefore, the Appellant's argument under Point II, that the judgment

of the trial court in the previous trial was res judicata on the issue of breach of contract, is without merit.

### **CONCLUSION**

For the reasons stated above, the Supreme Court should sustain the verdict or judgment of the trial court.

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**APPENDIX**  
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