

IN THE SUPREME COURT OF MISSOURI

FIREMENS RETIREMENT SYSTEM, et al.,)
)
Plaintiffs/Respondents,)
)
vs.) No. SC87977
)
CITY OF ST. LOUIS et al.,)
)
Defendants/Appellants.)

Substitute Reply Brief of Appellants
City of St. Louis, Missouri, Francis G. Slay, James Shrewsbury, and Darlene Green.

Appeal from the Circuit Court of St. Louis City
The Honorable David Dowd, Circuit Judge

Jay A. Summerville #24824
Jeffery T. McPherson #42825
Deanna M. Wendler Modde #54091
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102
314-621-5070 FAX 314-621-5065

Attorneys for Appellants
City of St. Louis, Missouri, Francis G.
Slay, James Shrewsbury, and Darlene
Green

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STATEMENT OF FACTS

FRS implies that appellants' statement of facts is defective but never indicates how. Respondents proceed to rely on and quote heavily from the trial court's conclusions and judgment, none of which are binding in this court's *de novo* review. The facts set forth by FRS are not relevant to the issues presented on appeal.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE FRS VIOLATES THE HANCOCK AMENDMENT (ARTICLE X, SECTIONS 16-24, OF THE MISSOURI CONSTITUTION) IN THAT THE HANCOCK AMENDMENT PROHIBITS THE STATE FROM REQUIRING INCREASED EXPENDITURES BY OTHER POLITICAL SUBDIVISIONS BEYOND THE FUNDING LEVEL IN 1981, AND THE UNDISPUTED FACTS SHOW THAT THE FRS CERTIFIED AMOUNT EXCEEDS THE FUNDING LEVEL IN 1981.

Respondents ('FRS') first attempt to avoid the merits by claiming that the City has waived its Hancock Amendment argument by not raising it in the Point Relied On. Contrary to FRS' assertion that the City failed to identify which of the trial's court's rulings are erroneous and the legal reasons supporting the claim of error, Point I complies with Rule 84.04(d)(1), which requires that the point shall (A) identify the trial court ruling or action challenged (i.e. the entry of summary judgment in favor of FRS); (B) state the legal reasons for reversible error (i.e. the certified amount violates the Hancock Amendment); and (C) explain in summary fashion why those legal reasons support the claim of reversible error (i.e. the state cannot require increased expenditures without appropriation, and the certified amount exceeded the funding required in 1981). The City is entitled to appeal because it is aggrieved by the judgment. § 512.020, RSMo. It is aggrieved because the judgment declares that the City must pay out millions of dollars in

violation of the Hancock Amendment. Point I fully sets forth the basis of the City's argument.

The cases relied upon by FRS are not on point. In *Schmidt v. Warner*, 955 S.W.2d 577 (Mo. App. S.D. 1997), the appellants' first point relied asserted that the trial court erred in finding that there was no evidence of the existence of land between a right-of-way and a contour line because there was a survey and testimony by a surveyor establishing the existence and location of such land. As part of the argument following the first point, the appellants presented a different theory or hypothesis regarding *use* of a portion of the right-of-way. The Southern District noted that this argument yielded no clue as to how the appellants' hypothesis demonstrated trial court error, nor was it contained in the first point.

Similarly, *In re Adoption of T.J.D.*, 186 S.W.3d 488 (Mo. App. S.D. 2006), the appellant's point relied on suggested that the trial court's denial of a grandfather's petition for adoption was against the weight of the evidence because the facts established the adoption would have been in the best interests of the children. The appellant proceeded to spend five pages arguing that trial court 'initially erred' in removing the children from the grandfather's custody without showing how this error related to the Court's judgment about adoption and its finding that adoption by foster parents was in the best interests of the children. *T.J.D.*, 186 S.W.3d at 494. The Southern District observed that the point relied on was nothing more than a mere abstract conclusion of law and that the issue regarding the removal of custody from Grandfather was not raised in the point relied on.

Unlike *Schmidt* and *T.J.D.*, the City's point relied on clearly challenges the trial court's action in granting summary judgment to FRS. The point relied on specifies the legal reasons why the trial court erred and why they support reversal in stating that the Hancock Amendment was violated in that the certified amount was improper. The argument is addressed to the issue raised by the point relied on. As stated by this Court in *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978), the function of this rule is to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review.

The Court does not exercise discretion to disregard a point unless a deficiency impedes disposition on the merits. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. banc 1997). A brief impedes disposition on the merits where it is so deficient that it fails to give notice to this Court and to the other parties as to the issue presented on appeal. *Id.* In this case, assertion of the Hancock Amendment as a basis for relief and the standing to make such an assertion is fairly within the scope of the point. The argument further makes clear the City's challenge to the trial court's entry of summary judgment. Finally, the public interest would not be served by ignoring the City's constitutional arguments. Millions of public dollars are at issue. The FRS was certainly able to discern the City's argument and provide a vigorous response. As in *Wilkerson*, the City's first point provides sufficient notice to the Court and FRS regarding the issue of the Hancock Amendment presented on appeal. The public interest would not be served by gratifying the FRS's desire to avoid a decision on the merits.

A. The City has standing to raise the Hancock issue.

The FRS contends that because the City is not a taxpayer, it is not allowed to raise the Hancock Amendment as a defense. The FRS's reliance on *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 919 (Mo. banc 1995), and *State ex rel. Board of Health Center Trustees v. County Comm'n of Clay County*, 896 S.W.2d 627, 631 (Mo. banc 1995), ignores the interests sought to be protected by the City. As noted in the City's first brief, *Fort Zumwalt* and *Clay County* are distinguishable and do not support the FRS's standing argument. If the Court were to find *Fort Zumwalt* and *Clay County* to apply, however, they were wrongly decided, and the Court should use this case as an opportunity to clarify the law in this area.

The central purpose of the Hancock Amendment "is to limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be exceeded without voter approval." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981). To achieve this goal, the Hancock Amendment added three key provisions to the Missouri Constitution. *See Boone County Court v. State*, 631 S.W.2d 321, 325-26 (Mo. banc 1982). Article X, section 18, limits state revenues and expenditures. Section 22 limits local government revenues in the form of taxes, licenses, or fees. Section 21 prevents the state from requiring local government to assume a greater proportion of currently shared financial responsibilities and eliminates the state's power to mandate new or increased levels of service or activity by local government without state funding. *See Boone County*, 631 S.W.2d at 325-26. The official ballot title presented to the voters when they passed the Hancock Amendment showed these three

purposes: “[1] Limits state taxes except for yearly adjustments based on total incomes of persons in Missouri or emergencies; [2] prohibits local tax or fee increases without popular vote. [3] Prohibits state expansion of local responsibility without state funding.” *Buchanan*, 615 S.W.2d at 13.

Section 18 (‘the general assembly . . . shall not increase taxes or fees without voter approval’) and section 22 (‘Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees . . . without the approval of the required majority of the qualified voters’) are both protections explicitly created for the benefit of taxpayers. Thus, it makes sense that only taxpayers have standing to complain of violations of section 18 or section 22. *See, e.g., City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001) (holding taxpayers have standing to complain of illegal tax while city does not).

Section 21, by its plain terms, is not directed to taxpayers, but rather is explicitly designed for the protection of local government entities: ‘The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of **counties and other political subdivisions**. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of **counties or other political subdivisions**, unless a state appropriation is made and disbursed to pay the **county or other political subdivision** for any increased costs.’ Mo. Const. Art. X, § 21 (emphasis added).

Taxpayers are not mentioned in section 21. The interests of individual taxpayers are directly implicated by sections 18 and 22 because those sections relate to the imposition of taxes. A violation of section 21, on the other hand, affects taxpayers only indirectly. In these circumstances, it is appropriate for the local government entity to have the ability to contest a violation of section 21 of the Hancock Amendment, as the Court permitted in, for example, *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982), and *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). As a body corporate and politic with the ability to sue and be sued, the City is the appropriate entity to raise a Hancock defense.

It is apparent how any confusion arose over a local government entity's standing to contest a violation of section 21 of the Hancock Amendment. *Clay County* holds that a county lacks standing to raise a Hancock objection to a tax imposed on taxpayers: "The Commission has no standing in such a matter." 896 S.W.2d at 631.

Fort Zumwalt was decided the same day as *Clay County* and, according to the FRS, extended the *Clay County* holding (only taxpayers can object to a tax levy) to a context in which it is illogical. In *Fort Zumwalt*, the state unconstitutionally reduced the proportion of funding it provided to school districts for special education services. The Court cited *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. banc 1995), for the straightforward proposition that school districts are not considered real parties in interest in tax protests before the State Tax Commission (and it is true that school districts are only indirectly affected by changes in levies imposed on taxpayers). The Court than

declared that the school districts in *Fort Zumwalt* were without standing to bring an action to enforce Article X, Section 21. *Fort Zumwalt*, 896 S.W.2d at 921.

The logical leap in *Fort Zumwalt* makes no sense. While a local government entity has no standing to raise a claim that affects taxpayers directly and the local government entity only indirectly (as in *Clay County* and *Bartlett*), the local government entity must be allowed to assert a violation that falls on it directly and on taxpayers only indirectly (as in *Zych* and *Boone County*). To hold that a local government entity cannot assert a Hancock violation that falls directly on the local government entity, while taxpayers who are affected indirectly if at all are the only ones who can raise the issue, makes no sense. Such a holding would ignore the fundamental differences between the sections of the Hancock Amendment that protect taxpayers directly (sections 18 and 22) and the section that expressly protects “counties and other political subdivisions” (section 21). Subsequent cases that parrot the erroneous conclusion in *Fort Zumwalt* without analysis do nothing to bolster the FRS’s claims. *See, e.g., Missouri Ass’n of Counties v. Wilson*, 3 S.W.3d 772, 776 (Mo. banc 1999).

This case illustrates the absurdity of the FRS’s argument. The FRS, a governmental entity, sued the City, a governmental entity, and its officials. As the plaintiff, the FRS got to choose whom to sue. It did not sue any taxpayer, and indeed, it could not file an action that would state a claim against a City taxpayer because the FRS has no right to any relief from any City taxpayer. It sought relief from the City, the entity whose money it seeks to obtain. Holding that the City and its officials, the only

defendants in the case, lack standing to raise a defense implicated by the claims the plaintiffs have chosen to advance would be an absurd result.

The courts of this state routinely clarify the law as set forth in previous opinions. For many years, this Court held that the Court of Appeals lacked jurisdiction to entertain appeals from judgments involving the validity of local taxes imposed under the authority of state statutes. *See, e.g., David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 190 (Mo. banc 1991). In 1997, however, the Court reversed these cases, holding that they misinterpreted the Missouri Constitution: “We are, of course, aware of those cases and, by our opinion in this case, believe that they are not consistent with the plain language of the constitution. To remove any doubt about our holding, the listed cases are overruled to the extent that they silently acquiesce to this Court’s jurisdiction or directly interpret the constitution to permit this Court to assume exclusive appellate jurisdiction where construction of a municipal revenue ordinance is at issue.” *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. banc 1997).

Similarly, the Western District recently recognized a longstanding error in a line of cases. In *Marion v. Marcus*, 199 S.W.3d 887 (Mo. App. 2006), both parties stated that the standard of review for the trial court’s refusal to give a proffered jury instruction was abuse of discretion. The parties supported this contention by citation to numerous cases, but the Court of Appeals recognized that the those cases erroneously declared the law: “The cases cited by the parties indeed stand for this proposition. However, those cases conflict with Rule 70.02(a) The refusal to give a verdict director supported by the law and the evidence is not a matter for the trial court’s discretion. . . . Our research

indicates that many of the cases stating that the trial court has discretion to give or refuse an instruction constitute an unsupported and unreasoned expansion of the narrow circumstances in which the exercise of trial court discretion is justified.” *Id.* at 892-93.

As in *Alumax* and *Marion*, the Court should recognize the confusion caused by *Fort Zumwalt* and cases following it. Local government entities have standing to raise section 21 of the Hancock Amendment in opposition to unconstitutional state actions. *See Zych; Boone County*. The Court should reverse the trial court’s judgment to the contrary.

In addition to the foregoing, *Fort Zumwalt* is distinguishable. In that case, the claim was that the state had failed to maintain its proportion of funding to local school districts for special education so that the additional, unfunded burden would fall on the districts’ taxpayers. In this case, by contrast, the issue is not maintaining the state’s proportion of an activity, but rather an unfunded increase in an existing activity. The plaintiffs claim that the City should fund this increase by taking money from other City services, not by increased taxes.

The FRS attempts to distinguish some of the cases cited by the City by pointing to the presence of a taxpayer; however the presence of a taxpayer does not change the holding in each of those cases. In *City of Jefferson v. Missouri Dep’t of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996), the Court held that the Hancock Amendment limited a new statute that increased costs with respect to required solid waste management plans from the municipalities. The FRS says that a taxpayer from Jefferson City was a plaintiff, and therefore the standing requirement was met. However, the cities

of St. Joseph and Eldon and Buchanan County were also plaintiffs, and no taxpayers from those cities were named, yet the Court held in *City of Jefferson v. Missouri Dep't of Natural Resources*, 863 S.W.2d 844 (Mo. banc 1993), that remand was appropriate for all of the appellants (including St. Joseph, Eldon, and Buchanan County) to put on evidence of increased costs associated with the new statute.

Fort Zumwalt does not purport to overrule *Zych* or *Boone County*. Other cases following *Fort Zumwalt* allow municipalities or other political subdivisions to assert the Hancock Amendment, including *Kelly v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997), and *In re Tri-County Levee Dist.*, 42 S.W.3d 779 (Mo. App. E.D. 2001). In *Tri-County*, the levee district filed a petition for readjustment of benefits for property owned by the state highway commission. The MHTC argued in response that the levee district's assessment violated Section 22 of the Hancock Amendment. Although the Court of Appeals rejected MHTC's argument (finding that the assessment was not a tax under the Hancock Amendment), it is notable that the court considered the merits of the MHTC's Hancock Amendment argument, which was raised as a defense to the levee district's petition. *Tri-County Levee Dist.*, 42 S.W.3d at 786.

B. The City did not waive the Hancock issue.

FRS declares that the City waived the Hancock issue by failing to raise it in its answer and claims to have been "unfairly surprised." These arguments are disingenuous, as shown by FRS' response to the City's motion for summary judgment, which said "[I]t is clear from [the City's] argument and from the cases cited by [the City] that the City's argument is based on Article X, § 21." L.F. at 958 (Appendix A-153). In another

memorandum, FRS claimed that its argument “distinguishes and explains the cases cited by the Defendants, and sets forth additional reasons why the Hancock Amendment is not applicable to this case.” L.F. at 1091 (Appendix A-155). The claim that FRS was surprised or prejudiced by the City’s argument is belied by the record.

As FRS notes, the City asserted Hancock in the companion case, *Neske v. City of St. Louis*. In addition, as noted by the trial court, at no point did FRS raise any objection or point out that the City had not pleaded the Hancock issue. L.F. at 1241. It is apparent that none of the parties realized until *after* judgment was entered that Hancock had not been asserted in the City’s answer (Although the trial court decided *sua sponte* that the City waived the Hancock defense, it did not similarly decide to take notice of the FRS’s waiver of that waiver by failing to make any objection).

Yet, FRS argues that it would suffer “tremendous prejudice” if the Hancock issue were addressed on the merits because FRS conducted no discovery relating to this issue. However, FRS has not asserted what additional discovery is necessary beyond the uncontroverted facts that are already part of the record. This is not surprising given the City’s clear position that any amount sought above and beyond the appropriation made in 1981 constitutes an increase in activity and thus a violation of Article X, § 21 of the Hancock Amendment. Other than the appropriation made to the FRS in 1981 and that sought by the FRS in the relevant fiscal year (which are already part of the record), no further discovery is required. FRS did not and will not suffer “tremendous prejudice” if the Hancock issue is addressed on the merits.

None of the cases cited by FRS are remotely similar to this case. *See City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 377-78 (Mo. banc 1991) (constitutional issues raised for the first time on appeal); *United C.O.D. v. State of Missouri*, 150 S.W.3d 311, 312 (Mo. banc 2004) (waiver of constitutional issues not at issue); *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996) (constitutional issue raised for the first time in motion for new trial). In *Choteau Auto Mart, Inc. v. First Bank*, 148 S.W.3d 17 (Mo. App. 2004), and *Green v. City of St. Louis*, 870 S.W.2d 794 (Mo. banc 1994), the plaintiffs objected to affirmative defenses raised on summary judgment, and the defendants never sought leave to amend. Here, FRS made no objection, and the City did seek leave to amend after the trial court *sua sponte* found waiver in its judgment.

FRS also attempts to distinguish *Heritage Roofing, L.L.C. v. Fischer*, 164 S.W.3d 128, 132 (Mo. App. 2005) by arguing that it is the introduction of evidence rather than the introduction of a new argument which may result in amendment of the pleadings by implied consent. Here, the City introduced such evidence by asserting the City's 1981 normal and accrued liability contribution appropriated to the FRS as a statement of uncontroverted fact, which is solely relevant to the Hancock Amendment issue. FRS made no objection to this statement of uncontroverted fact as unduly prejudicial or surprising, and then addressed the Hancock Amendment issue on the merits in its summary judgment briefing.

The trial court erred in declaring that the Hancock issue was waived. The issue was extensively briefed and argued without objection, and thus tried by consent. Rule 55.33(b); *see Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869

(Mo. banc 1995); *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355, 358 (Mo. banc 1991). And to the extent there would otherwise have been a waiver, the FRS waived the waiver by failing to object, and indeed by addressing the Hancock argument on its merits.

C. Requiring the City to pay the certified amount would violate Hancock.

The Hancock Amendment, Article X § 21, forbids FRS from requiring the City to increase its level of funding beyond the 1981 level. Hancock prohibits mandating increased levels of financial activity by a political subdivision without a corresponding appropriation from the state. *See State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982); *Boone County v. State*, 631 S.W.2d 321 (Mo. banc 1982). Requiring increased costs to fund existing activities is an explicit violation of the Hancock Amendment. *Id.*; *see also Missouri State Employees' Retirement Sys. v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987) (*MOSERS*).

The City does not ignore the more recent cases applying the Hancock Amendment test. Rather, the City relies on cases applying that test that are more squarely on point. In order to show a violation of Article X, section 21, there must be (1) a new or increased activity or service required of a political subdivision by the State and (2) increased costs in performing that activity or service. *Miller v. Director of Revenue*, 719 S.W.2d 787, 788-89 (Mo. banc 1986).

Whether there has been an increased activity or service and a resulting increased cost is answered by *Zych*. In *Zych*, this Court held that the City could not be compelled to appropriate to the Police Board an amount above that appropriated in 1981, the

effective date of the Hancock Amendment. As in *Zych*, there has clearly been an increased activity that results in increased costs to the City with respect to FRS's certified amount. In 1981, the City paid \$8,713,700, exclusive of administrative expenses. Absent additional state funding, \$8,713,700 provides the maximum that may be sought by FRS in conformity with the Hancock Amendment. L.F. at 908. The amounts certified by FRS for 2003-2004 totaled \$8,913,102, L.F. at 528, and for 2004-2005 totaled \$13,765,477. L.F. at 728

FRS contends that because it was enabled by ordinance, it is not a state agency. It is undisputed, however, that the City was bound to abide by the statutory scheme. *See* Section 87.125 (city may provide for pension system "subject to the provisions of sections 87.120 to 87.370"). *Trantina v. Board of Trustees of Firemen's Retirement System of St. Louis*, 503 S.W.2d 148, 151-52 (Mo. App. 1973), recognized that the City, in adopting a pension system for its firemen, "must comply with the provisions of the enabling statute which is in effect at the time the ordinance is adopted." The City could not decide which statutory provisions it would adopt.

FRS relies on *City of Jefferson I* for the proposition that any requirement that the City appropriate the certified amount is not an activity or service mandated by the State. In *City of Jefferson I*, cities and counties challenged a statute that allowed counties to form or join solid waste management districts. Counties that chose not to join a solid waste management district were required merely to submit a solid waste plan. *City of Jefferson I*, 863 S.W.2d at 847. Several municipalities argued that an amendment to the statute required them to finance the waste management district if they chose to form a

district, which constituted a violation of the Hancock Amendment. *Id.* This Court held that counties were not forced to join the solid waste management district; therefore the Hancock claim failed. *Id.* In this case, the City was required to adhere to the enabling legislation without change when it created FRS. *Trantina*, 503 S.W.2d at 151-52. Unlike *City of Jefferson*, the City has no other statutory option. As set forth in *Zych*, if the City is required to pay the certified amount, the increase since the enactment of Hancock establishes the necessary increase in activity or service.

In *Zych*, this Court analyzed whether the Police Board was a state agency for purposes of Hancock, considering the membership on the Police Board, the statutory powers and duties of the Board, the Board's responsibilities, the City's prohibition from interfering with exercise of the Board's powers, and the City's requirement to appropriate the Board's funds. *Zych*, 642 S.W.2d at 909. Similar to the Police Board, the FRS legislation prescribes the powers and duties of the FRS Board of Trustees, the Trustees were responsible for establishment and control of FRS, the City has been prohibited from interfering with exercise of FRS' powers, and the City is required under certain circumstances to appropriate FRS funds. As *Zych* recognized, the "protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division and subdivision of the State, is a governmental duty, which devolves upon the State, and not upon its municipalities." 642 S.W.2d at 910. By requiring the City to adhere to the enabling legislation, FRS is carrying out the state's duty. There is no sound reason to make a distinction between the police and firemen. FRS is a state agency for purposes of Hancock.

II. IN THE ALTERNATIVE, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION FOR LEAVE TO AMEND ITS ANSWER BY INTERLINEATION TO RAISE THE ISSUE THAT THE HANCOCK AMENDMENT BARS THE FRS' CLAIMS BECAUSE JUSTICE REQUIRED THE COURT TO GRANT LEAVE TO AMEND IN THAT THE PARTIES FULLY BRIEFED, ARGUED, AND SUBMITTED THE HANCOCK ISSUE WITHOUT ANY CLAIMS OF WAIVER, THE CITY AND ITS PEOPLE STAND TO SUFFER GREAT HARDSHIP ON ACCOUNT OF THE DENIAL OF LEAVE TO AMEND TO RAISE A VALID CONSTITUTIONAL ISSUE, THE FRS WOULD SUFFER NO INJUSTICE ON ACCOUNT OF THE AMENDMENT BECAUSE IT HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS THE ISSUE ON THE MERITS IN THE SUMMARY JUDGMENT PROCEEDINGS AND ACTUALLY WAS HEARD ON THE MERITS, AND THE AMENDMENT WOULD CURE THE DEFICIENCY PERCEIVED BY THE TRIAL COURT.

In the alternative, the judgment should be reversed because the trial court abused its discretion in denying the City's motion for leave to amend its answer. Rule 55.33(a) permits a party to amend its pleading by leave of court and states that leave shall be freely given when justice so requires. The factors considered in deciding whether to grant leave to amend a petition include hardship to the moving party if leave is not granted, reasons for failure to include any new matter in earlier pleadings, timeliness of the application, whether an amendment could cure any inadequacy of the moving party's

pleading, and injustice resulting to the party opposing the motion, should it be granted. *Walton v. City of Berkeley*, 158 S.W.3d 260, 263 (Mo. App. 2005).

As previously addressed in Point I, the parties extensively briefed the Hancock issue. L.F. at 263, 925-27, 957-63, 1059-60, 1071-75, 1091-92. Prior to entry of judgment, FRS did not object, nor did the court raise any issue as to any deficiencies in the City's answer. L.F. at 1241. The entry of judgment was the first indication from the Court or the parties, after two years of litigation, of any potential difficulty with addressing the Hancock Amendment on the merits. Upon entry of judgment, the City moved for leave to amend its answer. L.F. at 1323.

FRS claims a trial court commits no error in denying leave to amend where the claim has no merit, citing *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184 (Mo. App. 1995). In *Curnutt*, the appellate court observed that a key factor is whether the proposed amendment could cure the inadequacy of the pleading in light of a motion for summary judgment. The Western District found that the appellant listed affirmative defenses in his answer without factual support and did not articulate any facts indicating the difference the proposed affirmative defense would make in the case. *Curnutt*, 903 S.W.2d at 194.

Here, the City articulated all facts necessary to support an amendment adding the Hancock issue and demonstrated the extreme hardship it would suffer if the amendment was denied. To imply that the City intentionally waited to file its motion for leave to amend after entry of the judgment is ridiculous. It was not until the judgment that the City or the FRS realized Hancock had not been pleaded, and the City properly sought

leave to amend within the timeframe to file post-trial motions. FRS raised no objections to the City's argument prior to the judgment.

In Point I, the City distinguished cases cited by FRS and demonstrated the extent to which FRS contradicts itself regarding its ability to analyze the Hancock Amendment issue. FRS suffered no injustice, and the trial court should have allowed the City's proposed amendment. *See Rose v. City of Riverside*, 827 S.W.2d 737, 738 (Mo. App. 1992); *Dwyer v. Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291 (Mo. App. 2002).

At the least, the City is entitled to a remand for the trial court's determination on the merits of the Hancock Amendment.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE FRS VIOLATES ARTICLE VI, SECTION 26(A), OF THE MISSOURI CONSTITUTION AND CONSTITUTES AN IMPROPER DELEGATION OF LEGISLATIVE POWER IN THAT ARTICLE VI, SECTION 26(A), PROVIDES THAT NO CITY MAY BECOME INDEBTED BEYOND ITS INCOME AND THE UNDISPUTED FACTS SHOW THAT THE CITY'S REVENUE FOR 2003-2004 AND 2004-2005 HAS ALREADY BEEN APPROPRIATED AND TRANSFERRED TO VARIOUS RECIPIENTS SO THAT IF THE CITY WERE REQUIRED TO PAY THE CERTIFIED AMOUNT FOR FISCAL YEARS 2003-2004 AND 2004-2005, THE CITY WOULD BE OBLIGATED IN EXCESS OF ITS REVENUES.

FRS criticizes the City's citation to Judge Dierker's opinion in *State ex rel. Employees of Retirement System v. Board of Estimate and Apportionment*, Cause No. 004-01181, ("ERS"), which this Court affirmed on appeal at 43 S.W.3d 887 (Mo. App. 2001). The City does not claim that *ERS* constitutes precedent. However, given the similar posture, *ERS* and Judge Dierker's rationale provide persuasive authority on a highly analogous set of facts.

If the City is required to appropriate the certified amount to FRS, this requirement would violate Article VI, section 26(a), of the Missouri Constitution, which provides that no city may become indebted beyond its income. In *ERS*, Judge Dierker reasoned that the City's budget is adopted on an annual basis, and, as a municipality, it cannot obligate

itself in excess of its anticipated revenues in any given fiscal year except through proper bond issues. *See ERS, L.F. at 1171.*

The City is not arguing that it should be allowed to forego payment of member benefits; indeed, the City has repeatedly recognized this obligation. FRS' emphasis on the City's lack of dispute with the actuary's calculations and the City's agreement that it is responsible for the unfunded accrued liability is misleading. The City's position is based on how much the City is required to *pay* in a given year under the plain language of the statute and ordinance, which give the City discretion in balancing the needs of the community when deciding how much to allocate to FRS in a given year. As the FRS recognized, the City has made substantial payments to the FRS in the past. The City's position in this matter is not part of long-term pattern or strategy to refuse payment of the certified amount, nor is the City suggesting that it would "retroactively deprive" members and beneficiaries, as the FRS insinuates. Rather, the City is attempting to balance the various needs of and services for its citizens.

FRS claims that Article VI, section 26, does not mean what it says. FRS argues that section 26 does not prohibit the City from being obligated in excess of its revenues because the last clause of section 26 (a) allows an exception for other provisions of the constitution. FRS asserts that Article VI, section 25, is applicable and mandates that FRS remain actuarially sound. Article VI, section 25, provides, in part, that no political subdivision may lend credit or grant public money to private individuals except in providing pensions for its employees.

Section 25 does not address whether a municipality must always pay the entire certified amount such that the system remains actuarially sound. Nor does section 25 provide that a City may obligate itself in excess of anticipated revenues to pay the certified amount. The last exception to the general prohibition on granting public money to private individuals provides that a city *may* grant *periodic* cost of living increases in benefits, provided that pension and retirement systems remain actuarially sound. Thus, section 25 reinforces the City's argument that it has discretion in making an appropriation to FRS.

Requiring the City to appropriate the certified amount would also constitute an improper delegation of legislative power of appropriation. Despite FRS' efforts to distinguish *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo. 1932), by asserting that the trustees do not have unfettered discretion because of the actuarial computation, it is undisputed that, under their interpretation of the statute, "the entire revenue of the city is subject to appropriation," which could leave the city's municipal functions "greatly impaired, if not wholly destroyed." *Id.* at 78-79.

Contrary to FRS' assertion, the City is not asking this Court to disregard the law or engage in judicial activism. This Court should not be intimidated by such mischaracterizations.

IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE THE CITY'S PAYMENT WAS ADEQUATE AS A MATTER OF LAW IN THAT SECTION 87.340, RSMO, AND CITY CODE SECTION 4.18.305, PROVIDE THAT, NOTWITHSTANDING THE CERTIFIED AMOUNT, A PAYMENT BY THE CITY IS SUFFICIENT AS A MATTER OF LAW IF, WHEN COMBINED WITH THE AMOUNT IN THE GENERAL RESERVE FUND, THERE IS ENOUGH MONEY TO PROVIDE THE BENEFITS PAYABLE DURING THE CURRENT YEAR AND THE UNDISPUTED FACTS SHOW THAT THE AMOUNT IN THE GENERAL RESERVE FUND EXCEEDS THE AMOUNT NECESSARY TO SATISFY BENEFITS PAYABLE DURING THE CURRENT YEAR.

FRS emphasizes section 87.355, RSMo, and Code section 4.18.320, providing that the City "shall" appropriate and transfer FRS' certified amount to the general reserve fund.

FRS ignores the provisions that show the City's discretion.

FRS extensively discusses the actuarial calculations, but the dispute in this case lies in the interpretation of provisions explaining how much the City is required to *pay* in a given year. Notwithstanding the certified amount, a payment by the City is sufficient as a matter of law if, when combined with the amount already in the general reserve fund, there is enough money to provide the benefits payable during the current year. City Code § 4.18.305; § 87.340, RSMo. When reading the funding provisions together and within the context of the entire chapter, the City is simply required to appropriate and transfer an

amount sufficient to satisfy the benefits payable during the current year, less the assets in the general reserve fund.

FRS cites *Farmers & Merchants Bank v. Director of Revenue*, 896 S.W.2d 30 (Mo. banc 1995), to support its claim that “shall” is always mandatory except “where the legislation involves a procedural requirement that does not affect substantive rights.” *Farmers* makes no distinction between substantive and procedural rights, but emphasizes that whether “shall” is mandatory or directory is a function of context: “Where the legislature fails to include a sanction for failure to do that which “shall” be done, courts have said that “shall” is directory, not mandatory. Moreover, courts have concluded that statutes directing the performance of an act by a public official within a specified time are directory, not mandatory.” 896 S.W.2d at 32-33 (citations omitted). *Farmers* supports the City in confirming that the lack of a sanction suggests the use of “shall” is directory.

FRS governing provisions do not provide for a consequence should the City exercise its discretion not to pay the FRS certified amount, indicating that the legislature intended these provisions to be directory. As Judge Dierker noted in *ERS*, the lack of a sanction or consequence provides evidence of the legislature’s intent that the word “shall” is directory. L.F. at 1169. Section 87.340 and Code section 4.18.305 show the legislature’s intention to afford the City discretion in contributing less than the certified amount. These sections allow the City to contribute at any time from a bond issue or other available funds to pay the unfunded accrued liability, or the City may contribute a lesser amount used to proportionately reduce future accrued liability contributions. As FRS notes, a portion of the accrued liability is included in the certified amount pursuant to

sections 4.18.320 and 4.18.290. The statutory language shows that the City is not required to fund the entire contribution sought by FRS in any given year as long as the system's fund can meet its current obligations.

FRS attempts to discount this Court's decision in *Tomlinson v. Kansas City*, 391 S.W.2d 850, 853 (Mo. banc 1965). This Court held that, under predecessor statutes, Kansas City was not required to appropriate the sums certified by Kansas City's firemen's pension fund. "***Actuarial soundness is a creditable objective for a pension system, but over-all municipal financial stability is a consideration which cannot be ignored.***" *Id.* (emphasis added). This Court also emphasized the fact that the pension system had adequate funding because beneficiaries of the system were receiving their pensions.

FRS also erroneously relies on *Trantina* and *Firemen's Retirement System v. City of St. Louis*, 789 S.W.2d 484 (Mo. banc 1990) ("*Firemen's*"), in suggesting that the City has an obligation to appropriate the certified amount. *Trantina* simply recognized that the City's creation of FRS was not mandatory, but that when the City chose to create FRS, the ordinance was required to conform to the enabling statute. *Firemen's* acknowledged the FRS Board of Trustees' authority over daily operations, and, in citing to Code section 4.18.320, commented in dicta that it is the Trustees who are responsible for determining a certified amount rather than the City. *Id.* Interpretation of code section 4.18.320 in conjunction with the other FRS provisions was not at issue in either case, nor was the issue of the actual amount to be *paid* by the City in any given year. *Trantina* and *Firemen's* do not address the present questions of statutory interpretation and constitutionality and thus are not controlling on those issues.

Under FRS' theory, the City has no ability to control the amounts appropriated to the pension system and cannot exercise its discretion to balance the financial obligations and needs of the City and its residents. Under FRS' theory, if the certified amount is \$10.00 in one year and \$10,000,000 the next, the City has to appropriate that amount without any consideration of what is needed to fund current benefits or of the total assets held by FRS. The FRS certified amount tripled from \$2,836,561 in 1999 to \$8,913,102 in 2003, growing more than \$5.5 million between 2002 and 2003. While this may not be much for FRS, which maintains \$370,000,000 in assets, it is significant to the firefighters who need paychecks and other residents of the City who need essential services. The suggestion that the City may not exercise its discretion in making a contribution to FRS through the legislative decisions of the people's elected representatives is unreasonable and unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: _____

Jay A. Summerville #24824
jsummerville@armstrongteasdale.com
Jeffery T. McPherson #42825
jmcpherson@armstrongteasdale.com
Deanna M. Wendler Modde #54091
dwendler@armstrongteasdale.com
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 621-5065 (facsimile)

Attorneys for Appellants
City of St. Louis, Missouri, Francis G.
Slay, James Shrewsbury, and Darlene
Green

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of appellants and a disc containing a copy of the foregoing Reply Brief of appellants was served via U.S. mail, postage prepaid, this 14th day of December, 2006 to the following attorneys for respondents:

Daniel G. Tobben
David R. Bohm
Eric C. Mueller
Danna McKittrick, P.C.
150 North Meramec Ave.
Fourth Floor
Clayton, MO 63105-3907
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Reply Brief of Appellants 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 6,786, exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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