IN THE SUPREME COURT OF MISSOURI

THE FIREMEN'S RETIREMENT SYSTEM OF ST. LOUIS, et al.,	)	
	)	
Plaintiffs/Respondents,	)	
	)	**No. SC87977**
vs.	)	
	)	
CITY OF ST. LOUIS, ET AL.,	)	
	)	
Defendants/Appellants.	)	

Substitute Brief of Respondents
The Firemen's Retirement System of St. Louis, and Lenny Wiesehan, Larry Reinecke, Bruce Williams, Chief Sherman George, Bill Hill, Gayle Malone, Darlene Green, George Hairston, in Their Capacity as All of the Members of the Board of Trustees for The Firemen's Retirement System of St. Louis,

---

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

DANNA McKITRICK, P.C.

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JURISDICTIONAL STATEMENT

Respondents agree that this Court has jurisdiction of this Appeal. The Court of Appeals, Eastern District, transferred this matter to the Supreme Court because of the general interest and importance of the issues involved in this case. This transfer was pursuant to Rule 83.02.

STATEMENT OF FACTS

Appellants' Statement of Facts is misleading, incomplete and possibly argumentative, in violation of Mo. S.Ct. Rule 84.04(c). Rather than filing a Motion to Strike Appellants' Brief, Respondent Firemen's Retirement System of St. Louis and its Trustees ("FRS") present this Statement of Facts. Respondent FRS also requests that this Court pay special attention to the thorough and carefully reasoned Memorandum, Order and Judgment (hereafter "Judgment") entered by the Honorable David L. Dowd, Circuit Judge, on June 17, 2005. As it relates to the "facts", see pp. 1-26 of the Judgment; Legal File (hereafter "L.F.") 1176-1201; and Appellants' Appendix (hereafter "A") A31-54. Appellants ("City" or "City Defendants") do not contend in their argument that there are material facts in dispute.

City Defendants portray FRS as operating under "a statutory scheme." However, FRS was created and is governed by Chapter 4.18 of the Revised Code of the City of St. Louis ("RCC") (Respondents' Appendix, (hereafter "R.A.") pp. 1-21) and is, therefore, an ordinance-based system. Sections 87.120 through 87.370 R.S.Mo. contain the enabling legislation that authorizes the City of St. Louis to adopt the ordinances creating and governing the operation of FRS. The underlying Judgment notes that "...'establishment of a firemen's pension plan is permissive, the statute merely enabling St. Louis to establish such a plan.' ***Trantina v. Board of Trustees of The Firemen's Retirement System of St. Louis***, 503 S.W.2d 148, 151 (Mo. App. 1973)." Judgment, p. 7; L.F. 1182; A37. "...[A]ny subsequent changes that the City makes or attempts to make by ordinance to the FRS system **must**, in substance, conform to the provisions of the FRS State Statute in

effect at the time of such attempted change; or otherwise 'the ordinance will be in conflict with the provisions of the statute and thereby void.' ***Trantina***, 503 S.W.2d at 152." (Judge Dowd's emphasis.) Judgment, p. 7, L.F. 1182, A37.

Chapter 4.18 RCC (R.A. 1-21) creates and sets forth in great detail the terms for the operation and funding of FRS and for the payment of retirement and other benefits to its beneficiaries. Certified copies of Chapter 4.18 RCC appear several times in the Legal File, including as Exhibit 1 to Plaintiffs' Second Amended Petition (L.F. 28-49). It is pled in paragraph 1 of the pleading (L.F. 17) and admitted by the City Defendants (L.F. 255). The terms of Chapter 4.18 were, therefore, before the Court and are not in dispute.

The trial court found that the City's failure to budget, appropriate and pay to FRS the amount certified violates the provisions of Chapter 4.18 RCC,

> ...most particularly, Section 4.18.320 of the Revised City Code, which was enacted pursuant to § 87.355 R.S.Mo. and provides as follows:
>
> > On or before the first of March of each year, the Board of Trustees shall certify to the proper City authorities the amount which will become due and payable during the year next following to the general reserve fund. The amount so certified shall be included by the City authorities in their annual budget estimate. The amount so certified shall be appropriated by the City and transferred to the Firemen's Retirement System for the ensuing year.

Judgment, p. 2; L.F. 1177; A32.

The trial court noted, in the section of the Judgment labeled "FRS Structural Overview", that:

> ... as is apparent from even a cursory glance at Chapter 4.18, it is a complex and carefully integrated set of ordinances, not merely creating the FRS but comprehensively specifying and governing virtually every aspect of it—from how it should be operated, to how it should be funded, to how its benefits are to be paid to beneficiaries.

Judgment, p. 6; L.F. 1181; A36.

As noted by the trial court in the Judgment, there is a close relationship between § 4.18.320 RCC and the following sections: 4.18.285 (General reserve fund – City contributions); 4.18.290 (General reserve fund – Contributions and payments); 4.18.295 (General reserve fund – Normal contribution rate); 4.18.300 (General reserve fund – Accrued liability contribution rate); 4.18.310 (General reserve fund – Discontinuing liability contributions); § 4.18.095 (Actuary); 4.18.100 (Actuarial Investigation and tables); 4.18.105 (Annual valuation of funds); 4.18.110 (Contribution rates); and 4.18.060 (providing that review of decisions of FRS's Board shall be pursuant to Chapter 536, R.S.Mo.). Judgment, pp. 8-13; L.F. 1183-86; A38-43.

For over forty years prior to this litigation and apparently since the inception of FRS, the actuary employed by the FRS Board of Trustees has conducted a valuation of assets and liabilities from which the annual contribution is calculated pursuant to the provisions of Chapter 4.18 RCC. During that time, the City and its responsible officials "have always budgeted, appropriated and transferred to FRS the amount that FRS has certified to the City

as the amount calculated by the actuary to be due and payable the following year." Judgment, p. 20; L.F. 1195; A49. Pursuant to pertinent sections of Chapter 4.18, the actuary calculates the amount of contribution which the City is required to pay for the upcoming fiscal year.

Over recent years FRS has paid out an average of approximately $27,000,000.00 annually in benefits to retired firefighters, their widows and children. Judgment, p 24; L.F. 1199; A52.

The FRS is and was underfunded. As of September 30, 2003, there was an unfunded accrued liability of $38,952,017. Judgment, pp. 25, 38; L.F. 1200, 1213; A53, 65.

On February 20, 2003, the FRS Board of Trustees certified to the City's Board of Estimate and Apportionment ("E&A") that the amount due and payable from the City for the fiscal year 2003-2004 (FY 2004) was $8,913,102.00. L.F. at 528. On February 24, 2004, the FRS Board of Trustees certified to E&A that the amount due and payable by the City for fiscal year 2004-2005 (FY 2005) was $13,765,477.00. L.F. at 728.

For FY 2004 the members of E&A recommended, and the City's Board of Aldermen adopted, a budget ordinance which provided funding in an amount less than the amount certified by the FRS Board of Trustees, contrary to the provisions of Chapter 4.18 and contrary to the enabling legislation at § 87.120, *et seq.*, R.S.Mo. The budget ordinance for FY 2004 authorized contributions to FRS of $1,884.356.00 as the City's direct contribution and $193,799.00 as the City's contribution on behalf of the City Airport Commission, for a total of $2,078,155.00. These amounts were paid by the City in

FY 2004 to FRS. For FY 2005, E&A submitted, and the Board of Aldermen adopted, a budget which included a payment to FRS of only $1,862,061.00. This amount was paid by the City to FRS in FY 2005 through June 17, 2005, the date of Judgment. Undersigned counsel represents to this Court that no additional monies were paid to FRS by the City for FY 2005 since the date of Judgment.

The City's contribution was based upon an arbitrarily chosen amount of up to a maximum of six percent (6%) of covered payroll basis. Judgment, p. 18; L.F. 1193; A47. The budget ordinance specifically and "expressly provides that the relevant provision of Chapter 4.18 of the Revised Code of the City of St. Louis 'notwithstanding', the City's maximum contribution to FRS would be no more than 6% of the 'covered payroll' for firefighters...." Judgment, p. 18; L.F. 1193; A47. The City's overall budget for FY 2004 was $411,000,000.00; and for FY 2005 it was $403,000,000.00. Judgment, p. 91; L.F. 1226; A114.

City Defendants never raised a Hancock Amendment issue in any answer filed in this case, including their answer to the Second Amended Petition (L.F. 255-262). City Defendants correctly note that the trial court consolidated ***Thomas Neske, et al. v. City of St. Louis*** with this case for purposes of discovery, briefing and argument (Appellant's Brief, p. 10). The City Defendants did raise the Hancock Amendment defense in the initial answer filed by them in the ***Neske*** case on September 25, 2003 (a copy of which is at R.A. pp. 22-26), which involved the Police Retirement System (hereafter "PRS"), a statute-based system. The City Defendants continued to assert the Hancock Amendment defense throughout the ***Neske*** (PRS) case, including the discovery phase of the ***Neske*** case.

The ***Neske*** case was affirmed by the Court of Appeals, Eastern District, but was also transferred to this Honorable Court. ***Neske et al.*** (SC 87976). In the case at bar, Hancock issues were never developed through hearings, motions or discovery, because they were not part of this case until raised by the City in its briefing on the summary judgment motions.

City Defendants never sought leave to file an amended answer asserting the Hancock Amendment until after the Judgment entered by Judge Dowd. Their Motion for Leave to Amend by Interlineation was filed July 18, 2005 (L.F. 13232-6). *See* Court's Order Denying Post Trial Motions (L.F. 1354-60, especially 1357).

The "CONCLUSION, ORDER AND JUDGMENT" section, wherein Judge Dowd rules and enters judgment, appears at Judgment, pp. 123-130; L.F. 1298-1305; and A145-152. The trial court entered a money judgment for FRS for $6,834,947.00 for FY 2004 (i.e., $8,913,102.00 certified, less $2,078,155.00 paid). The court also entered declaratory relief for FY 2005, requiring the City to pay the balance of the certified amount of $13,765,477.00 by the end of FY 2005. Regarding the alleged Hancock Amendment defense, the court held that: (a) Defendants/Appellants waived the defense by failing to plead and raise it as such; and (b) Appellants lacked standing to raise the issue. Judgment, p. 128; L.F. 1303; and A150. Analysis of these Hancock Amendment-related issues is contained in the following sections of the Judgment: Judgment, pp. 96-116; L.F. 1271-91; A119-138. Because of these rulings the trial court did not reach the merits of the claim, but the court expressed skepticism regarding Appellant City's position on the Hancock

Amendment in view of the fact that the City voluntarily chose to create FRS by ordinance. (Judgment, p. 116; L.F. 1291; A138.)

Chapter 4.18 and most ordinance sections in it predate the Hancock Amendment by many years. All ordinances in Chapter 4.18 were passed and enacted by the City, including all ordinances enacted since passage of the Hancock Amendment.

The Court of Appeals correctly ruled *per curiam* for FRS, but transferred the case to this Honorable Court. Both the Court of Appeals Opinion (Appendix to Substitute Brief of Appellants A154-175) and Judge Dowd's Memorandum, Order and Judgment (same Appendix A31-153) contain clear and non-argumentative statements of the facts in this case and Respondent FRS respectfully refers them to this Court.

POINTS RELIED ON

I. This Court Should Not Address the City Defendants' Argument that the Trial Court Erred in Holding that City Defendants Do Not Have Standing to Raise the Hancock Amendment as an Affirmative Defense Because City Defendants Failed to Properly Raise and Preserve the Issue for this Court's Review, in that None of Their Points Relied On Assert that the Trial Court Erred in Holding that the City Defendants Do Not Have Standing to Raise the Hancock Amendment as an Affirmative Defense, as Required by Missouri Supreme Court Rule 84.04(d), and in that City Defendants Improperly Argued the Standing Issue Without Asserting it in Their Points Relied On, in Violation of Missouri Supreme Court Rule 84.04(e).

Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978)

Schmidt v. Warner, 955 S.W.2d 577 (Mo. App. S.D. 1997)

In re Adoption of T.J.D., 186 S.W.3d 488 (Mo. App. S.D. 2006)

V.M.B. v. Missouri Dental Board, 74 S.W.3d 836 (Mo. App. W.D. 2002)

II. **The Trial Court Did Not Err in Holding that the City Defendants Could Not Rely Upon the Hancock Amendment as an Affirmative Defense to Defeat the City's Obligation to Pay the Amount Certified by the Board of Trustees of the FRS as the City's Contribution to the FRS Because: (a) the City Defendants Lacked Standing to Assert the Hancock Amendment as a Defense, in that Only Taxpayers Have Standing to Assert Rights Under the Hancock Amendment; (b) the City Defendants Waived the Hancock Amendment as an Affirmative Defense, in that They Failed to Assert it in Their Answer or at Any Time Until the Parties' Cross-Motions for Summary Judgment; and (c) the Hancock Amendment Does Not Apply to the City's Obligation to Pay the Amount Certified by the Trustees of the FRS, in that FRS is not a State Agency, and in that the Obligation to Pay the Certified Amount is Imposed Upon the City by City Ordinance, Not by Statute.**

State ex rel. Bd. of Health Center Trustees of Clay County v. County Commission of Clay County, 896 S.W.2d 627 (Mo. banc 1995)

Trantina v. Board of Trustees of The Firemen's Retirement System of St. Louis, 503 S.W.2d 148 (Mo. App. 1973)

State ex rel. Sayad v. Zych, 642 S.W.2d 907 (Mo. banc 1982)

Firemen's Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d 484, (Mo. banc 1990)

MO. CONST., Art. X, §§ 21, 23

Chapter 4.18 Revised Code of the City of St. Louis

§ 87.120, *et seq.*, R.S.Mo.

§ 86.200-86.363 R.S.Mo.

III. <u>The Trial Court Did Not Err in Denying the City Defendants' Post-Judgment Motion for Leave to Amend their Answer By Interlineation to Plead the Hancock Amendment as an Affirmative Defense Because it was Not an Abuse of Discretion for the Trial Court to Deny the Motion in that (a) Denial of the Motion Caused the City Defendants No Hardship, Because the Hancock Issue Lacked Substantive Merit; (b) the City Defendants Knew of the Hancock Issue Early in the Proceedings and Easily Could Have Amended at a Time in the Case Prior to the Entry of Judgment; (c) the City Defendants' Post-Judgment Motion was Untimely, Especially in Light of the Constitutional Nature of the Purported Defense, Which the City Defendants Should Have Raised at the Earliest Possible Opportunity; (d) the City Defendants' Proposed Amendment Would Not Have Cured its Pleading Defects Because They Failed to Identify the Specific Provisions of the Hancock Amendment Upon Which They Relied as their Defense, Causing Severe Prejudice to FRS; and (e) FRS Would Have Suffered Great Injustice had the Trial Court Granted the City Defendants Leave to Amend After the Entry of Judgment, Without Proper Notice and Briefing of the Specific Hancock Issues the City Defendants Sought to Assert as a Defense.</u>

George v. Lemay Bank and Trust Co., 618 S.W.2d 671 (Mo. App. E.D. 1980)

United C.O.D. v. State of Missouri, 150 S.W.3d 311 (Mo. banc 2004)

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 (Mo. App. W.D. 1995)

Estate of Anderson v. Day, 921 S.W.2d 35 (Mo. App. W.D. 1996)

IV. <u>The Trial Court Properly Ruled in Favor of FRS, and Against the City Defendants, with Respect to Their Argument Based on Article VI, Section 26(a) of the Missouri Constitution, Because Budgeting, Appropriating and Paying FRS the Amounts Certified by the FRS Actuary Does Not Require the City to Violate Article VI, Section 26(a), and Does Not Constitute an Improper Delegation of Legislative Power in that: (A) the City Can Balance its Budget Through Other Means So as to Avoid Any Violation of Article VI, Section 26(a); (B) the Actuarial Calculations Were Made Pursuant to the Detailed Provisions of Chapter 4.18 and According to Actuarial Principles and the Amounts Calculated Are Not in Dispute; (C) Article VI, Section 25, the Constitutional Basis for Chapter 4.18, Requires Actuarial Soundness in Pension Plans, Such as FRS, and (D) the City Cannot Prevail Through a Strategy of "Running out the Clock."</u>

Firemen's Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d 484 (Mo. banc 1990)

Missouri State Employees Retirement System v. Jackson County, 738 S.W.2d 118 (Mo. banc 1987)

Trantina v. Board of Trustees of Firemen's Retirement System, 503 S.W.2d 148 (Mo. App. 1973)

MO. CONST. Art. VI, §25

Chapter 4.18 Revised Code of the City of St. Louis

§ 87.120, *et seq.* R.S.Mo.

V. <u>The Trial Court Properly Entered Judgment in Favor of FRS and Against the City, Because the City's Payment Was Inadequate, as a Matter of Law, in that Chapter 4.18, as a Whole, and Especially § 4.18.320, Require that the City Must Pay the Certified Amount; and § 4.18.305 Does Not Alter that Result When Properly Construed, in that § 4.18.305 Does Not Authorize a "Pay as You Go" Retirement System for FRS, Which Concept is Contrary to Chapter 4.18 and to the Enabling Legislation</u>.

Firemen's Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d 484 (Mo. banc 1990)

Trantina v. Board of Trustees of Firemen's Retirement System, 503 S.W.2d 148 (Mo. App. 1973)

***State ex rel. Dreer v. Public School Retirement System of the City of St. Louis*,** 519 S.W.2d 290 (Mo. 1975)

U.S. Central Underwriters Agency v. Hutchings, 952 S.W.2d 723 (Mo. App. E.D. 1997)

Chapter 4.18 Revised Code of the City of St. Louis, especially §§4.18.320 and 4.18.290

ARGUMENT

I. This Court Should Not Address the City Defendants' Argument that the Trial Court Erred in Holding that City Defendants Do Not Have Standing to Raise the Hancock Amendment as an Affirmative Defense Because City Defendants Failed to Properly Raise and Preserve the Issue for this Court's Review, in that None of Their Points Relied On Assert that the Trial Court Erred in Holding that the City Defendants Do Not Have Standing to Raise the Hancock Amendment as an Affirmative Defense, as Required by Missouri Supreme Court Rule 84.04(d), and in that City Defendants Improperly Argued the Standing Issue Without Asserting it in Their Points Relied On, in Violation of Missouri Supreme Court Rule 84.04(e).

As an initial matter, the Court should refuse to address the City Defendants' argument that the trial court erred in holding that they do not have standing to raise the Hancock Amendment as an affirmative defense (Substitute Brief of Appellants "Sub. Brf. Ap.", p. 18 *et seq.*), because this issue was not raised by City Defendants in any point relied on submitted to this Court and is, therefore, not preserved for appellate review. Rules 84.04(d) and (e).

Rule 84.04(d) requires that parties present issues on appeal to Missouri appellate courts through the use of points relied on. This Court has discussed the importance of this well-established requirement:

> The requirement that the point relied on clearly state the contention on appeal is not simply a judicial word game or a matter of hypertechnicality on the

> part of appellate courts. It is rooted in sound policy. Perhaps the most important objective of the requirement relative to the points relied on is the threshold function of giving notice to the party opponent of the precise matters which must be contended with and answered.… In addition, such notice is essential to inform the court of the issues presented for resolution.… If the appellate court is left to search the argument portion of the brief … to determine and clarify the nature of the contentions asserted, much more is at stake than a waste of judicial time.… The more invidious problem is that the court may interpret the thrust of the contention differently than does the opponent or differently than was intended by the party asserting the contention. If that happens, the appellate process has failed in its primary objective of resolving issues raised and relied on in an appeal.

Thummel v. King, 570 S.W.2d 679, 686 (Mo. banc 1978). Only those issues presented in a party's points relied on are preserved for appellate review. Issues not presented in the points relied on are considered abandoned. ***Schmidt v. Warner***, 955 S.W.2d 577, 583-84 (Mo. App. S.D. 1997) (citing ***Pruellage v. De Seaton Corp***., 380 S.W.2d 403, 405 (Mo. 1964)).

The appellate practice rules prohibit argument of issues that are not specifically identified in the points relied on. ("The argument shall be limited to those errors included in the 'Points Relied On.'" Rule 84.04(e).) Parties arguing issues not stated in their points relied on violate this Rule. ***In re Adoption of T.J.D.***, 186 S.W.3d 488, 494 (Mo. App. S.D. 2006). "Issues to which an appellant alludes only in the argument portion of his brief are

not presented for review." ***Schmidt***, *supra* at 584 (citing ***Berger v. Huser***, 498 S.W.2d 536, 539 (Mo. 1973)). Missouri appellate courts have consistently denied review of issues first raised in the argument section of a party's brief, and not stated in their points relied on. *See*, ***V.M.B. v. Missouri Dental Board***, 74 S.W.3d 836, 839-40 (Mo. App. W.D. 2002); ***City of Riverside v. Progressive Investment Club of Kansas City***, 45 S.W.3d 905, 913 n.1 (Mo. App. W.D. 2001); ***Baker v. Empire District Electric Co.***, 24 S.W.3d 255, 257 (Mo. App. S.D. 2000); and ***Berger v. Huser***, 498 S.W.2d 536, 539 (Mo. 1973).[1]

In the argument section of their Point I, City Defendants dispute the trial court's holding that they do not have standing to assert the Hancock Amendment as an affirmative defense. (*See*, "A" on p.18 of Substitute Brief of Appellants.) Appellants' first point claims error solely on the basis of their allegation that requiring their payment of the

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1 FRS acknowledges that Missouri appellate courts have, on occasion, reviewed an allegation of error not identified in a party's points relied on. However, such review is subject to the Court's discretion and any review of a claim of error not included in the points relied on is reviewed only for "plain error that causes manifest injustice or miscarriage of justice." ***Great Southern Savings & Loan Assoc. v. Wilburn***, 887 S.W.2d 581, 583 (Mo. banc 1994) (internal quotations omitted) (citing Rule 84.13(c)). Given City Defendants' waiver of the Hancock Amendment defense in the trial court, its failure to preserve the issue of its standing under Hancock, and the substantive deficiencies of the defense, no "manifest injustice" will result if the Court does not review the City Defendants' standing argument.

certified amounts to FRS violates the Hancock Amendment, because they claim the certified amounts exceed 1981 funding levels. This substantive claim of a Hancock violation is the extent of their point relied on. Neither the standing issue, nor the City Defendants' specific allegations of error with regard to the trial court decision on standing, are set forth or asserted in their first point relied on, nor in any subsequent points relied on.

The trial court made specific findings as to City Defendants' lack of standing to raise this constitutional issue relating to the Hancock Amendment. The trial court devoted more than 7 pages of the Judgment to its analysis and conclusion that City Defendants lack standing to assert the Hancock Amendment as an affirmative defense to FRS's suit. (A130-138; L.F. 1283-1291). Nonetheless, City Defendants fail to identify this issue at all in their point relied on. They further fail to specifically identify which of the trial court's rulings or actions they claim are erroneous, the legal reasons for their claim of error, or an explanation why those legal reasons support the claim of error in the context of this case. Rule 84.04(d). None of this appears in a point relied on, as mandated by Rule 84.04(d).

This Court should not review City Defendants' standing argument because they failed to identify the standing issue in any of their points relied on. ***Schmidt***, *supra* at 583-84. City Defendants' failure to squarely present the standing issue in their points relied on leaves FRS and this Court with the burden of trying to decipher the precise basis for City Defendants' claim of error from that argument alone. This omission defeats the "most important objective" of the point relied on, which is the threshold function of giving notice of the precise argument that must be countered by FRS and answered by the Court. ***Thummel,*** *supra* at 686. The result is great prejudice not only to FRS, but also to the Court,

and an unnecessary waste of the Court's time. The Court should deem the standing issue abandoned. ***Schmidt***, *supra* at 583-84.

The standing issue City Defendants improperly raised in their argument section is consequently not preserved for review. ***Schmidt***, *supra* at 584; Rule 84.04(e). Therefore, City Defendants violated Rule 84.04(e) by arguing an error of the trial court not set forth in their points relied on. Rule 84.04(e).

Where the Appellants fail to properly raise the standing issue in the points relied on regarding a constitutional issue that they did not plead, and which they raised belatedly and in an unclear manner, the Court should not address the issue. On this basis alone, the Judgment should be affirmed as to any issues relating to the Hancock Amendment.

II. The Trial Court Did Not Err in Holding that the City Defendants Could Not Rely Upon the Hancock Amendment as an Affirmative Defense to Defeat the City's Obligation to Pay the Amount Certified by the Board of Trustees of the FRS as the City's Contribution to the FRS Because: (a) the City Defendants Lacked Standing to Assert the Hancock Amendment as a Defense, in that Only Taxpayers Have Standing to Assert Rights Under the Hancock Amendment; (b) the City Defendants Waived the Hancock Amendment as an Affirmative Defense, in that They Failed to Assert it in Their Answer or at Any Time Until the Parties' Cross-Motions for Summary Judgment; and (c) the Hancock Amendment Does Not Apply to the City's Obligation to Pay the Amount Certified by the Trustees of the FRS, in that FRS is not a State Agency, and in that the Obligation to Pay the Certified Amount is Imposed Upon the City by City Ordinance, Not by Statute.

The weakness of the City Defendants' position in this case is readily apparent from the fact that the opening point of their brief, wherein they claim violation of the Hancock Amendment, attempts to advance an argument which was merely an afterthought before the trial court. The Hancock issue was not pled by Defendants or otherwise raised by them

until the parties filed cross motions for summary judgment in the trial court.[2] Had the City truly relied on the provisions of the Hancock Amendment in limiting its contributions to FRS, it would have paid over to FRS the amount of at least $8,713,700.00 in each of the years 2003 and 2004 as and for its contribution to the system (the amount it claims to have paid as its contribution to FRS in 1981, the year that Hancock was adopted) (Sub. Brf. App., p. 9), instead of limiting its contributions to the much lower amounts it paid to FRS in those two years.

The trial court ultimately refused to address the merits of the City Defendants' Hancock argument, correctly holding that: (a) they were without standing to raise the

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[2] In fact, while City Defendants argue in their memoranda in support of their motion for summary judgment and in response to FRS's summary judgment motion that requiring the City to pay the amount certified by the Board of Trustees of FRS as the City's contribution to FRS would violate the Hancock Amendment, they did not identify any specific section of the Hancock Amendment (MO. CONST., Art. X, §§ 16-24) which they claimed would be violated by such requirement. City Defendants did not identify the specific section of the Hancock Amendment which they claimed would be violated by this requirement (MO. CONST., Art. X, § 21) until they filed their reply memorandum to FRS's response to City Defendants' summary judgment motion. It was not until after the trial court granted summary judgment in favor of FRS that City Defendants sought leave to amend their answer to raise the Hancock Amendment as an affirmative defense (see point III of this brief).

defense, and (b) by failing to plead the Hancock Amendment as an affirmative defense or to otherwise raise it at any time prior to summary judgment in this case, the City Defendants waived the defense. Although the trial court did not address the merits of City Defendants' Hancock argument, it intimated that it had serious reservations about the viability of those arguments. As explained in sub-point (C) below, even if it is assumed, *arguendo*, that the trial court erred in holding both that the City Defendants were without standing to raise the Hancock Amendment as an affirmative defense and that they had waived any such defense, this Court must nevertheless affirm the trial court's decision because the requirement that the City appropriate and pay over to FRS the amount certified by FRS's Trustees as the City's contribution does not violate the Hancock Amendment.[3]

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[3] Although the trial court did not rule on the viability of the City Defendants' assertion that requiring it to pay the certified amount violates the Hancock Amendment, this does not preclude this Court from affirming the trial court's grant of summary judgment on the basis that the requirement that the City pay the certified amount does not violate Hancock. An appellate court reviews a grant of summary judgment de novo, and may affirm on an entirely different ground than that posited by the trial court. ***ITT Commercial Finance Corp. v. Mid-America Marine Supply, Inc.***, 854 S.W.2d 371, 387-88 (Mo. banc 1993).

A. The City Defendants Lack Standing to Raise the Hancock Amendment as an Affirmative Defense.

FRS respectfully refers this Court to pages 108 through 116 of the Judgment, where the trial court correctly and properly explained why Defendants lack standing to raise the Hancock Amendment as an affirmative defense. L.F. 1283-91; A130-38.

This Court, in ***Fort Zumwalt School District v. State***, 896 S.W.2d 918 (Mo. banc 1995), held that only a taxpayer may bring a suit to enforce the Hancock Amendment. The plaintiffs in that lawsuit included a number of school districts, including the Fort Zumwalt district, and several individual taxpayers. They sued the state for its failure to maintain state funding for special education students at the same proportion as the state had provided for such services prior to passage of the Hancock Amendment in November, 1982. Specifically, plaintiffs in ***Zumwalt*** sought a declaration that:

> "the state is obligated to maintain the same proportion of categorical aid to Missouri school districts for providing special education services to school-aged residents as it did in 1980-81," and also a declaration that the state violated the provisions of Section 21 by failing to maintain that proportion in 1989-90, 1990-91 and 1991-92.

Id. at 920. In its decision, this Court first addressed the state's argument that the school district plaintiffs lacked standing to enforce MO. CONST., Art. X, § 21 (the same section of the Hancock Amendment relied upon by the City Defendants, here) and based its decision on MO. CONST., Art. X, § 23, which provides:

> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit.

The Court ultimately held that:

> The Hancock Amendment makes no pretense of protecting one level of government from another. By its clear language, Section 23 limits the class of persons who can bring suit to enforce the Hancock Amendment to "any taxpayer." In so doing Section 23 recognizes that any apparent injury to the school district is merely derivative of the taxpayers' injury. ***Bartlett v. Ross***, 891 S.W.2d 114, 116 (Mo. banc 1995) (school districts not considered real parties in interest in tax protests before State Tax Commission). The school district plaintiffs do not, because they cannot, claim status as taxpayers. We hold, therefore, as did the trial court, that the school district plaintiffs in this case are without standing to bring an action to enforce Article X, Section 21.

Fort Zumwalt, *supra* at 920.

Essentially, this Court held in ***Fort Zumwalt*** that MO. CONST., Art. X, § 23, which grants standing only to taxpayers, provides the sole basis for standing under the Hancock

Amendment and that, therefore, governmental entities are precluded from asserting claims or defenses based upon Hancock. That a governmental entity is without any standing to raise Hancock, even as a defense to a claim against it, was made clear by this Court in ***State ex rel. Bd. of Health Center Trustees of Clay County v. County Commission of Clay County***, 896 S.W.2d 627 (Mo. banc 1995) (decided the same day as ***Fort Zumwalt***).

The plaintiff in ***Clay County*** was the Board of Trustees of the Clay County Health Center, which was established by the County's voters in the 1950s. Pursuant to the enabling legislation and the referendum by which the Health Center was established, the Board of Trustees was given the authority, within certain parameters, to annually set the property tax rate which County landowners are required to pay to support the Health Center. The Board of Trustees proposed to increase the tax rate from $.07 to $.09 per hundred dollars of assessed valuation. This amount was within the discretion granted to the Board of Trustees by the applicable ordinances and statutes. Pursuant to the state statutes applicable to Clay County, before a levy established by a local taxing authority (such as the Health Center's Board of Trustees) can be placed on property tax bills by the collector of revenue, the County Commission must certify the amount. After receiving the Board's $.09 levy, along with its proposed budget, the Commission held a hearing on the increase, after which it determined that it would not grant an increase and would only approve a rate of $.07 per hundred dollars assessed valuation. In response to the Commission's actions, the Board of Trustees filed a petition in mandamus. *Id*. at 629.

For its defense, the Commission asserted that the Board's decision to increase the tax levy for the Health Center violated the Hancock Amendment.[4] In response to this argument, this Court held that:

> We do not reach a decision on whether the Hancock provisions were violated because the Commission has no standing to bring such a challenge. The Commission's role for independent taxing authorities such as the Board is the ministerial duty of accumulating the levies assessed by such political subdivisions and certifying them to the collector for inclusion on the tax bills. Its role is not to act as a judge of the constitutionality of the tax. Moreover, **the class of persons who can bring suit to enforce the Hancock Amendment is limited to taxpayers**. Art. X, § 23; § 137.073.8 [R.S.Mo.]; ***Fort Zumwalt School District v. State***, 896 S.W.2d 918, 921 (Mo. banc 1995). The **Commission has no standing in such a matter**.

Id. at 631 (emphasis added).

In other words, this Court held in ***Clay County*** that a governmental entity is without standing to assert the Hancock Amendment, even as an affirmative defense, when it is sued, because only taxpayers have standing under the Hancock Amendment.

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[4] Specifically, the County Commission in ***Clay County*** argued that imposing the increased tax levy on county taxpayers violated MO. CONST., Art. X, § 22, which prohibits a governmental entity from increasing any tax rate without a vote by citizens within the affected county or other political subdivision. *Id*. at 630.

The City Defendants argue that ***Fort Zumwalt*** and ***Clay County*** held only that governmental entities are without standing to seek a refund under the Hancock Amendment. However, neither the school districts in ***Fort Zumwalt***, nor the Clay County Commission, sought a refund. Instead, the school districts in ***Fort Zumwalt*** sought a declaration that the State had a duty to maintain the same proportion of categorical aid to Missouri school districts for providing special education services to school-aged residents as it did in the year immediately preceding the passage of the Hancock Amendment, and also a declaration that the state violated the provisions of MO. CONST., Art. X, § 21 by failing to maintain that proportion. The County Commission in ***Clay County*** raised Hancock as an affirmative defense to the mandamus action brought by the Health Center's Board of Trustees, wherein the Board of Trustees sought to force the County Commission to certify the tax rate established by the Board.

City Defendants further argue that ***Boone County Court v. State***, 631 S.W.2d 321 (Mo. banc 1982) and ***State ex rel. Sayad v. Zych***, 642 S.W.2d 907 (Mo. banc 1982), support their contention that governmental entities have standing to challenge the imposition of increased financial obligations on political subdivisions by the general assembly or state agencies. First, as argued extensively below, FRS is not a state agency and the City's duty to pay over to FRS the amount certified as the City's contribution by FRS's Board of Trustees is imposed by city ordinance, not state statute. Second, it should be noted that neither of these two cases addressed the standing issue. Third, to the extent that ***Boone County*** and ***Zych*** are inconsistent with ***Fort Zumwalt*** and ***Clay County***, they must be considered to have been overruled by this Court's explicit holdings regarding

standing in the latter two cases, which were decided substantially after the decisions in ***Boone County*** and ***Zych***.

City Defendants also argue in their brief that the holdings in ***City of Jefferson v. Missouri Dep't. of Natural Resources***, 916 S.W.2d 794 (Mo. banc 1996); ***Missouri Mun. League v. State***, 932 S.W.2d 400 (Mo. banc 1996); and ***In re Tri-County Levee Dist.***, 42 S.W.3d 779 (Mo. App. E.D. 2001) support their contention that ***Fort Zumwalt*** and ***Clay County*** do not conclusively hold that governmental entities may never have standing to assert claims under the Hancock Amendment. However, none of these cases addressed the issue of whether the governmental entities involved therein had standing to raise a claim or defense under Hancock.

Further, taxpayers were joined as plaintiffs with the governmental entities in both ***City of Jefferson*** and ***Missouri Mun. League,*** so that parties with proper standing were present as plaintiffs in each of those cases. Records obtained from the Missouri State Archives, L.F. 1347-1351, show that David E. Johnson, a Jefferson City resident and taxpayer, was a plaintiff in ***City of Jefferson***.[5] In fact, the decision in ***City of Jefferson***, at 796, specifically noted the presence of a taxpayer as a plaintiff. Three individual taxpayers, Gary Markenson, James Link and Robert Irvin, were named as plaintiffs in ***Missouri Mun.***

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[5] These records, and the records from the archives concerning the individual taxpayers as defendants in ***Missouri Mun. League***, were filed by FRS in the trial court with Plaintiffs' Memorandum in Opposition to the City Defendants' Motion for New Trial (L.F. 1339-1353).

League. Clearly, the individual taxpayers named as plaintiffs in these cases had standing under ***Fort Zumwalt*** and ***Clay County***, which likely explains why the Court did not address the issue of standing of the governmental plaintiffs in those cases.

In the case of ***In re Tri-County Levee District***, the district maintained a levee in Warren, Montgomery, and Gasconade Counties on the north bank of the Missouri River. It filed a petition for readjustment of benefits, which was granted by the Circuit Court, which then appointed Commissioners to reassess the benefits conferred upon the owners of the property within the levee district. The Commissioners filed their report assessing benefits to the Missouri Highway and Transportation Commission ("MHTC") of $2,101,716.00, resulting in a levy of $24,000.00 to $26,000.00 against the MHTC, which MHTC challenged. The trial court found the Commissioners' determination and assessment of benefits was reasonable, appropriate, and supported by the evidence. *Id*. at 782.

On appeal, MHTC argued, in part, that the trial court erred in approving Tri-County's assessment against MHTC because the assessment constituted a tax which had not been approved by referendum, so that the assessment violated § 22 of the Hancock Amendment. *Id*. at 785. Ultimately, the Court found that the levy did not constitute a tax, but was instead a fee for service not subject to Hancock's requirement that any tax increase first be approved by the voters (the court also rejected several additional defenses asserted by MHTC). *Id*. at 786. As noted above, the court did not address MHTC's standing to raise Hancock as a defense. Because the court's decision was silent as to the standing issue, ***In re Tri-County*** does not support the City Defendants' contention that they have standing

to raise Hancock as a defense in this case.[6] Further, there is a substantial difference between the position of MHTC in ***In re Tri-County*** and the position of the City Defendants here. In that case, the Tri-County Levee District was imposing a levy directly against MHTC. In other words, had the Court found in ***In re Tri-County*** that the levy constituted a tax, MHTC would have stood in the shoes of a taxpayer (i.e., MHTC was required to pay the levy directly to the levee district). Thus, the question of MHTC's standing would, in any event, be substantially different from the standing of City Defendants in this case.

City Defendants also allege that there is little difference between this case and ***Kelly v. Hanson***, 959 S.W.2d 107 (Mo. banc 1997), and argue that the holding there requires this Court to find that they have standing in this case. However, the facts of that case are completely different from those present here, as they involve interpretation of Article IV, Section 13, of the Missouri Constitution, which relates to the duties of the State Auditor ("Auditor"). That provision, which was the basis for the Court to find that the Auditor had standing, is completely separate from the Hancock Amendment.

The Hancock Amendment establishes a formula for calculating a revenue limit, and requires a refund to taxpayers if the state collects revenues in any given year that exceed that revenue limit by more than one percent. MO. CONST., Art. X, § 18. In ***Kelly***, Margaret Kelly, then the Auditor, filed a petition for a declaratory judgment in the Cole County

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[6] It cannot be presumed that the Court of Appeals in ***In re Tri-County*** *subsilentio* either overruled this Court's decisions in ***Fort Zumwalt*** and ***Clay County***, which it is without authority to do, or found those cases distinguishable.

Circuit Court, seeking a declaration that she had authority to devise a system for calculating total state revenues and the revenue limit under the Hancock Amendment, and that the system she devised complied with Hancock Amendment requirements. *Id*. at 109.

Defendant Richard Hanson, the Commissioner of Administration for the State of Missouri, filed a motion to dismiss on the grounds that the Auditor lacked standing to bring her claim. The circuit court granted the motion. However, the Court of Appeals, Western District, reversed and remanded, holding that the Auditor did have standing to seek a declaration regarding the extent of her constitutional duties. On remand, the circuit court determined that the Auditor had a constitutional duty under Article IV, Section 13, of the Missouri Constitution to establish a system of accounting, and that this duty encompassed an obligation to calculate the amounts included in the aforementioned formula in order to allow compliance with the Hancock Amendment. Because of the importance of the issues presented by ***Kelly***, this Court granted transfer of the appeal prior to the issuance of a second opinion by the Court of Appeals Western District.

To resolve the issue of whether the Auditor has a legally protectable interest that entitled her to the relief sought in her petition, the Court reviewed the duties and authority of the Auditor in relation to the Hancock Amendment. The Court initially looked to Article IV, Section 13, of the Missouri Constitution and determined that the Auditor has a duty to establish appropriate systems of accounting for all public officials of the state. *Id*. at 110. The Court also looked at Section 29.180 R.S.Mo., which provides that accounting systems established by the Auditor shall conform to recognized principles of governmental accounting. The court then held that the Hancock Amendment was a finance-related legal

provision and, as such, the Auditor had a duty to establish an appropriate accounting system to determine compliance with the Hancock Amendment. *Id*. The Court also held that the Auditor has a legal right to enforce her system for calculating the formula established by Hancock. *Id*. This legal right to enforce her system is a legally protectable interest, so that Auditor had standing under Article IV, Section 13, to bring her action for declaratory judgment. (*Id*. at 110-11) Because the ***Kelly*** court's recognition of standing was premised on an entirely different constitutional provision, the case does not support a finding that the City Defendants have standing to raise Hancock as a defense in this case.

Finally, City Defendants argue that their position "is similar to that of the city in ***City of Hazelwood v. Peterson***, 48 S.W.3d 36 (Mo. banc 2001)." With regard to the question of standing under Hancock, FRS agrees. This Court specifically held in that case that the City of Hazelwood was "without standing to sue under the Hancock Amendment." *Id*. at 40.

Although the Court held in ***City of Hazelwood*** that the city there was without standing to assert a claim under the Hancock Amendment, it nevertheless upheld the portion of the trial court's summary judgment which required the Florissant Valley Fire Protection District ("District") to refund the increased amount paid to it by the city under a "Fire Service Agreement" entered into between them. However, the circumstances in that case were unique, and the holding that Hazelwood was entitled to a refund in that case in no way supports a holding that City Defendants have standing to raise the Hancock Amendment as a defense in this case.

To understand why ***City of Hazelwood*** does not support the City Defendants' claim of standing here requires an understanding of the facts of that case, which had its genesis in the annexation by Hazelwood of an area known as the "Northwest Area". After the annexation, the St. Louis County Circuit Court ordered the District to continue to provide fire and ambulance services in the Northwest Area in return for certain fees which were to be paid by Hazelwood, pursuant to a statutorily prescribed formula set forth in § 321.675 R.S.Mo. 1986. These payments were to be equal to the assessed valuation of all taxable property within the Northwest Area multiplied by the District's tax rate. *Id*. at 38.

Thereafter, the District sought voter approval for a tax increase. After the St. Louis County Election Board certified that the increase passed by a margin of 13 votes, some of the District's voters filed an election contest. While it was pending, the District levied the tax increase. Pursuant to the Fire Service Agreement, the City of Hazelwood made payments to the District which were calculated based upon the increased levy amount. The increased portion of the payment was paid under protest by the city. Eventually, the trial court set aside the election due to an irregularity in the ballot, and when the tax increase was resubmitted, it was voted down. The city and several of the District's individual taxpayers then filed suit seeking refund of the increased amount paid by them to the District based upon the failed tax increase proposal, and the trial court granted summary judgment in favor of all of the plaintiffs.

On appeal, this Court first found that the individual taxpayers were entitled to a refund, pursuant to Article X, § 22(a) of the Hancock Amendment, which requires voter approval in advance of any local tax increase. *Id*. at 40. It then held that the City of

Hazelwood had no standing to seek a refund under Hancock. It nevertheless affirmed the portion of the judgment requiring the District to refund the increased amount paid by the city, "for the simple reason that the amount the District is allowed to charge Hazelwood is controlled by section 321.675, RSMo. 1986. The amount to be paid annually by the municipality to the fire district...shall be the annual assessed value of all property subject to tax in the excluded area...multiplied by the annual tax rate...." *Id*. at 40. Because the tax rate had not lawfully been increased, "the District collected fees in excess of the statutory amount and the Fire Service Agreement." *Id*. Thus, the city, which this Court found to have timely filed for a refund, was entitled to recover.

Here, there is no separate statute or contract on which the City Defendants rely to claim standing. Instead, they claim standing to directly assert the Hancock Amendment as a defense in this case, a position contrary to this Court's decision in ***City of Hazelwood***. Not only did this Court explicitly find in that case that the City of Hazelwood did not have standing under Hancock, it then reinforced this holding by reversing that portion of the trial court judgment awarding attorneys' fees to Hazelwood, stating that because Hazelwood lacked standing to assert a claim under Hancock, it was not entitled to fees under Article X, § 23 of the Hancock Amendment. *Id*. at 41.

Judge Dowd correctly concluded that the City Defendants lack standing to raise the Hancock Amendment as an affirmative defense in this case, based on this Court's holdings in ***Fort Zumwalt*** and ***Clay County***. None of the cases cited by Defendants in their brief support a contrary conclusion.

B. The City Waived the Hancock Issue.

In its Judgment, the trial court provided a detailed analysis concerning the City Defendants' waiver of their Hancock claim, due to their failure to plead it as an affirmative defense. *See*, Judgment, pp. 98-108, L.F., pp. 1273-83; A121-30. FRS adopts the analysis and reasoning of the Judgment, as if it were set out in full in this Brief.

The alleged Hancock defense was not raised by the City Defendants in either their answer to FRS's original Petition or their answer to the First Amended Petition. Nor was it raised in the Joint Answer of Defendants to the Second Amended Petition, filed on or about July 15, 2004, after the litigation had been pending approximately 11 months, although they pled a number of other affirmative defenses in their Answer (*see*, paragraphs 41 through 48 of said Answer, L.F. 260-1).

Instead, the Hancock issue was raised for the first time in City Defendants' Motion for Summary Judgment. Even at that time, City Defendants did not specifically identify the section of Hancock upon which they relied, leaving FRS to guess as to the exact basis for the assertion that requiring the City to contribute the amount certified by FRS's Board of Trustees violated the Hancock Amendment. As noted in the Judgment, at pp. 107-08 (L.F. 1282-83; A129-30), City Defendants did not finally identify the specific section of the Hancock Amendment upon which their argument was based until they filed their memorandum in reply to FRS's response to Defendants' Summary Judgment Motion.

The manner in which City Defendants raised the Hancock defense in this case is in marked contrast to the parallel ***Neske*** case involving the Police Retirement System, with which this case was consolidated in the Circuit Court for purposes of discovery and

briefing. In that case, defendants (who are identical to the City Defendants in this case) raised the Hancock Amendment in their initial answer (R.A. 22-26).

Nor did City Defendants seek leave to amend their Answer in this case to state an affirmative defense under Hancock until after the trial court entered summary judgment in favor of FRS. Instead, their Motion for Leave to Amend was filed on July 18, 2005, thirty-one days after entry of the trial court's Judgment (July 17, 2005 was a Sunday), the last date for filing of post-trial motions. As explained in the third point of this Brief, a motion for leave to amend filed after judgment is entered is untimely.

The Hancock argument was clearly an afterthought by the City Defendants in this litigation. It was not pled as an affirmative defense. Nor was any effort made to add, as additional party defendants, one or more taxpayers who might have standing to raise the Hancock issue. FRS and its Trustees never believed that there was any Hancock issue in this case, both because the City had voluntarily chosen to create FRS by ordinance, ***Trantina***, *supra* at 151-52, and because it was never pled by City Defendants as an affirmative defense. As a result, FRS conducted no discovery relating to the Hancock issue.[7] Thus, FRS was unfairly surprised by the City Defendants raising Hancock in their summary judgment motion.

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[7] This stands in marked contrast to the subsequent case brought by FRS, which is currently pending in the St. Louis City Circuit Court, challenging the City's failure to pay the certified amount for Fiscal Years 2006 and 2007. The City Defendants did assert Hancock as an affirmative defense in that case. Though FRS believes the Hancock

Under these circumstances, the trial court correctly held that the City Defendants had either waived any defense under Hancock, or that they had not properly raised Hancock as an affirmative defense in this case.

This Court has repeatedly held that constitutional issues must be raised at the earliest possible opportunity by the party relying on such issues. "The general rule is that constitutional questions are deemed waived that are not raised at the first opportunity consistent with good pleading and orderly procedure." ***City of Chesterfield v. Director of Revenue***, 811 S.W.2d 375, 377 (Mo. banc 1991); ***accord United C.O.D. v. State of Missouri***, 150 S.W.3d 311, 313 (Mo. banc 2004) ("To properly raise a constitutional question, one must...raise the constitutional question at the first available opportunity..."). *See*, *also*, ***Hollis v. Blevins***, 926 S.W.2d 683, 684 (Mo. banc 1996), wherein the Court held that:

> The appropriate time to raise the constitutional issue would have been in the answer to the tort petition ... See ***Bauldin v. Barton County Mutual Insurance Co.***, 666 S.W.2d 948, 951 (Mo. App. 1984) (Failure to raise constitutional challenge by reply to amended answer or motion to strike defense from amended answer held to be waiver).

By not raising the Hancock issue in any of the Answers filed by them in this case, City Defendants thereby waived any claim based upon the Hancock Amendment.

Amendment is not applicable, FRS has engaged, and will continue to engage, in extensive discovery relating to the "Hancock issues" in that case.

City Defendants argue, however, that their Answer should be deemed to have been amended by implication, pursuant to Mo.S.Ct. Rule 55.33(b), because they raised the Hancock defense in their summary judgment motion. In support of this contention, City Defendants principally rely upon ***Heritage Roofing, L.L.C. v. Fischer***, 164 S.W.3d 128, 132 (Mo. App. E.D. 2005). However, neither the language of Rule 55.33(b), nor the decision in ***Heritage Roofing***, support their contention that pleadings are deemed amended to include an affirmative defense merely because that defense is <u>argued</u> in a motion for summary judgment. First, Rule 55.33 is entitled "Amendments to Conform to the Evidence", not "Amendments to Conform to Argument".

> The implied consent rule only applies when the **evidence** introduced at trial bears on a new issue and is not pertinent to issues already in the case. In other words, if evidence that raises issues beyond the scope of the pleadings is relevant to another issue already before the trial court, then failure to object to its admission does not constitute implied consent to amend the pleadings to conform to the new issue.

Heritage Roofing at 132-33 (internal quotations and citation omitted) (emphasis added).

Thus, it is the introduction of evidence which does not relate to a previously pled issue, without objection, which requires that pleadings be considered to have been amended to assert such issue, not the mere argument of the issue. Because plaintiff in ***Heritage Roofing*** had introduced evidence relating to an unsigned written contract, which was irrelevant to the pleaded cause of action, suit on account, the court held that the parties had tried the issue of breach of contract by implied consent. *Id*. at 133-34.

Here, City Defendants do not point to a single shred of evidence to support their allegation that requiring the City to pay the amount certified by the FRS as the City's annual contribution violates the Hancock Amendment, much less explain how this evidence relates only to that issue, as opposed to other issues in the case. In other words, there is simply no basis to support the City's contention that their Answer must be considered to have been implicitly amended to assert the Hancock Amendment as an affirmative defense.

In ***Choteau Auto Mart, Inc. v. First Bank of Missouri***, 148 S.W.3d 17 (Mo. App. W.D. 2004), Choteau argued that the Bank had waived the affirmative defense of apparent authority by failing to assert it in its answer. *Id*. at 26. In response, the Bank argued that it had raised the defense several times in response to numerous motions for summary judgment made by plaintiff during the trial court proceedings, so that its answer should be deemed to have been amended to assert this defense. *Id*. The court in ***Choteau*** held that, "Raising an affirmative defense for the first time in a response to a motion for summary judgment is, however, not sufficient" to preserve the issue. *Id*. (citing ***State ex rel. Nixon v. Consumer Automotive Resources, Inc.***, 882 S.W.2d 717, 721 (Mo. App. 1994)). The Court further noted that Rule 55.33(a) allows a defendant to move for leave to amend its answer to assert additional affirmative defenses, and that while leave is not required, it is to be freely granted as justice requires. It then held that, "The Bank did not include the affirmative defense of apparent authority in responsive pleadings, and it did not seek leave of the court to amend the pleadings. This court will not, therefore, reach the merits of the affirmative defense of apparent authority." *Id*. at 25. Similarly, in the case at bar, merely

asserting the Hancock Amendment as a defense in a summary judgment motion was insufficient to raise it as an affirmative defense. Because it was not asserted by City Defendants in their Answer, and because they did not seek leave to amend their Answer to assert an affirmative defense under Hancock until after Judgment was entered by the trial court, Defendants waived the defense and, therefore, this Court should refuse to address the City Defendants' argument based on Hancock.

Even assuming that City Defendants did not waive their asserted Hancock defense by failure to plead it prior to asserting it in their summary judgment motion, the trial court did not err when it refused to address the merits of the Hancock defense. In ***Green v. City of St. Louis***, 870 S.W.2d 794 (Mo. banc 1994), the City of St. Louis first raised the defense of collateral estoppel in its motion for summary judgment. *Id*. at 796. Even after the plaintiff objected, the City did not move to amend its answer to assert collateral estoppel as a defense. *Id*. at 797. On appeal, the City argued that it had sufficiently asserted collateral estoppel as an affirmative defense by raising it in its summary judgment motion (i.e., that its answer had effectively been amended by the assertion of the defense of collateral estoppel in its motion). This Court held that the trial court had the discretion to allow an affirmative defense to be raised for the first time in a summary judgment motion. It then stated:

> The factors for the trial court to consider are precisely those used in determining whether to permit amendment of an answer. A court should not grant summary judgment based upon affirmative defenses that are raised for

> the first time in the summary judgment motion if the court would not have permitted the defendant to amend the answer to include the defenses.

Id. at 797. The Court identified the factors to be considered by a trial court in determining whether to permit amendment of an answer to include: "(1) the hardship to the moving party if the request is denied; (2) the reasons for failure to include the matter in a designated pleading; and (3) the injustice or prejudice caused the opposing party if the request is granted." *Id*. (citing ***Stewart v. Sturms***, 784 S.W.2d 257, 262 (Mo. App. 1989)). The Court in ***Green*** then remanded to the trial court to apply these factors to determine whether it should have considered the collateral estoppel defense.[8]

As fully argued by FRS in Point III of this Brief, it was not an abuse of discretion for the trial court to refuse to allow City Defendants to amend their answer, after the entry of judgment, to assert the Hancock Amendment as an affirmative defense. For the same reasons, it would not have been an abuse of discretion for the trial court to refuse a motion to amend at the time the City Defendants filed their summary judgment motion. In particular, City Defendants were not prejudiced by the trial court's failure to address their

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[8] The Court in ***Green*** stated that, in considering the second factor on remand, "the trial court should be mindful that collateral estoppel is a defense almost always known to a defendant from the inception of a lawsuit." ***Id.*** at 798 n. 4. Similarly, to the extent that Hancock is even arguably applicable as a defense in this case, the City Defendants were well aware of it from the time of their initial answer in this case, as evidenced by their raising the same defense, based on Hancock, in their initial answer in ***Neske***.

Hancock argument because: (1) as argued above, the City Defendants do not have standing to raise Hancock as an affirmative defense and, as argued below, the defense has no merit; (2) City Defendants have no good excuse for failing to plead Hancock as an affirmative defense; and (3) FRS would have suffered tremendous prejudice had the trial court allowed Defendants to raise the defense for the first time in their summary judgment motion (and to identify the specific section of the Hancock Amendment on which they relied for the first time in their reply to FRS's response to that Motion). Thus, it was not an abuse of discretion for the trial court to refuse to address the merits of City Defendants' Hancock argument.

C. Requiring the City to Pay the Certified Amount Does Not Violate Hancock Because FRS is Not a State Agency and Because the Requirement to Pay the Certified Amount is Mandated by City Ordinance, Not by State Statute.

In their brief, the City Defendants argue that if the City is required to pay any amount as its contribution to FRS in excess of $8,713,700.00 (the amount it paid as its contribution to FRS in 1981 exclusive of administrative expenses),[9] such requirement

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9 The City Defendants argue that the City cannot be required to pay more as its contribution to FRS than the amount the City paid in 1981, minus the amount the City paid for FRS's administrative expenses in 1981, apparently on the basis that since FRS is now paying administrative expenses from interest and earnings on assets held by it, the administrative expenses should be subtracted from the total amount that the City paid as its

would violate the Hancock Amendment's prohibition against the state imposing additional obligations on political subdivisions (including municipalities) without providing the funding necessary to pay for such obligations. Specifically, City Defendants argue that requiring the City to pay as the City's contribution to FRS an amount in excess of the amount paid by the City to FRS as its contribution in 1981 violates MO. CONST., Art. X, § 21. That section provides, in relevant part:

> 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.

City Defendants apparently argue two alternative points in support of that position that requiring it to pay an amount in excess of the amount it paid in 1981 as its contribution to FRS would violate the Hancock Amendment. First, it argues that the obligation to pay

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contribution to FRS in 1981. Even assuming, arguendo, that Hancock does limit the maximum amount that the City can be required to pay as its contribution to FRS to the amount paid by it to FRS in 1981, there is no basis to subtract out that amount which it paid for administrative expenses at that time. As the Court is surely aware, money is fungible. To the extent that FRS pays its administrative expenses from interest and earnings, this is money that is not available to FRS for use in paying benefits or generating earnings to pay future benefits.

the amount certified by the Trustees as the City's contribution to FRS arises from state statute. However, while state statutes (§ 87.120, *et seq*.) both authorize the City to create the Firemen's Retirement System and establish various requirements that must be followed by the City if it chooses to establish the system, FRS was created, and is governed, by ordinances adopted by the City of St. Louis. FRS would not exist but for the adoption of Chapter 4.18 RCC by the City. Thus, the requirement that the City appropriate and pay as its contribution to FRS the amount certified by its Board of Trustees derives from City ordinance and not state statute. Second, City Defendants also argue that FRS is a state agency, so that certification by its Trustees of a specific amount as the City's contribution to FRS constitutes the actions of a state agency for purposes of the Hancock Amendment. However, FRS is a City agency which was established by City ordinance. When the City decided to create FRS, the City was required to enact ordinances mirroring the enabling statute. This is just one of many examples of how state legislation constrains municipal governments, including the City of St. Louis. This does not make FRS a state agency.

In evaluating City Defendants' Hancock argument, it should first be remembered that there is a presumption that both state statutes and local government ordinances are constitutional. *See*, ***Missouri State Employees Retirement System v. Jackson County***, 738 S.W.2d 118, 120 (Mo. banc 1987) (statutes); and ***City of Pagedale v. Murphy***, 142 S.W.3d 775, 778 (Mo. App. E.D. 2004) (ordinances). Thus, it must be presumed that the enabling statutes and adopting ordinances allow for FRS to be fully and adequately funded in a manner which complies with constitutional mandates, including both the Hancock Amendment and MO. CONST., Art. VI, § 26 (*see*, Point IV, *infra*). If the enabling statutes

and adopting ordinances can be construed in a manner which would render them constitutional, the Court must construe them in such manner.

In support of its argument that requiring it to pay more than the amount it contributed to FRS in 1981 violates the Hancock Amendment, the City cites ***Boone County Court v. State***, 631 S.W.2d 321 (Mo. banc 1982) and ***State ex rel. Sayad v. Zych***, 642 S.W.2d 907 (Mo. banc 1982). These are both early Supreme Court cases interpreting MO. CONST., Art. X, § 21, and are easily distinguishable on their facts from this case, as will be discussed below. City Defendants completely ignore more recent cases which are not only more factually similar to this case, but which also articulate the test to determine whether a particular enactment violates § 21 of the Hancock Amendment. Specifically, a number of more recent cases have held that:

> A legislative act violates Article X, Section 21, "if both (1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service."

City of Jefferson v. Missouri Dept. of Natural Resources, 863 S.W.2d 844, 847 (Mo. banc 1993) (hereinafter "***City of Jefferson I***") (citing ***Miller v. Director of Revenue***, 719 S.W.2d 787, 788-89 (Mo. banc 1986)).

> Article X, Section 21 prevents the State from requiring **local governments** to begin a new mandated activity, or to increase the level of a previously mandated activity beyond its 1980-81 level, without appropriation of sufficient state monies to finance the costs of the new or increased activity.

Purler-Cannon-Schulte, Inc. v. City of St. Charles, 146 S.W.3d 31, 37 (Mo. App. E.D. 2004) (citing ***Fort Zumwalt Sch. Dist. v. State***, 896 S.W.2d 918, 921 (Mo. banc 1995)) (emphasis in original). Application of this test to the facts of this case makes clear that the requirement that the City pay the amount certified by the Board of Trustees of FRS does not violate the Hancock Amendment, in that this requirement is not established by a mandate of the state but, instead, by the City's own ordinances.

As made clear in various decisions of this Court and of the Court of Appeals, Eastern District, the State did not mandate that the City create a Firemen's Retirement System. "*The City created FRS* under authority of § 87.120, *et seq*., by enacting Chapter 4.18 of the City code." ***Firemen's Retirement System of St. Louis v. City of St. Louis***, 789 S.W.2d 484, 486 (Mo. banc 1990) (emphasis added) (hereafter ***Mo. 1990 FRS***). "The establishment of a firemen's pension plan is permissive; the statute is directory, not mandatory." *Id*. at 487, (citing ***Trantina*** *supra* at 151-52). Further, once the City enacted the initial provisions of what is now Chapter 4.18 of the Revised Code of the City of St. Louis, creating FRS, in compliance with the then extant provisions of § 87.120 R.S.Mo., *et seq.*, it was not required to adopt any provisions later authorized by state statute. In other words, no portion of the current Chapter 4.18, including the provisions requiring that the City appropriate and pay the amount certified by the Board of Trustees, was legislated by the general assembly. The enabling legislation has no effect unless the City chooses to enact a corresponding ordinance. ***Trantina***, *supra* at 151-52.

In ***Trantina***, the plaintiff, Trantina, was a retired firefighter who argued that the City was required to calculate his benefits upon his retirement in accordance with the

provisions of § 87.175 R.S.Mo., as amended in 1969, rather than in accordance with the provisions of the City's ordinance, which had last been amended so as to incorporate the provisions adopted by the 1967 amendments to § 87.175. Trantina argued that the provisions of the City's ordinance had been superseded by the most recent act of the legislature. In refuting this argument, the Court first looked to the enabling statute, § 87.125 R.S.Mo., which provides:

> Any city in this state that now has or may hereafter have seven hundred thousand inhabitants or more and that has an organized fire department is hereby authorized, subject to the provisions of sections 87.120 to 87.380, to provide by ordinance for the pensioning of members of any such organized fire department and of the dependents of deceased members thereof and to take from its municipal revenue a fund for such purpose. The fund shall be under the management of a board of trustees herein described and shall be known as "The Firemen's Retirement System of ...."

Id. at 151. The Court stated that, "Clearly, the words 'is hereby authorized' are words of permission to the City allowing it to establish a firemen's pension system." *Id*. The Court then stated that:

> The distinction between a mandatory requirement for a pension system and one which is permissive in nature is readily apparent when comparison is made between the enabling legislation for a firemen's pension system and the St. Louis Police Pension System established by §§ 86.200 through 86.363 R.S.Mo. 1969. V.A.M.S. § 86.203 provides:

> "In all cities of this state that now have or may hereafter attain a population of seven hundred thousand inhabitants or more, there are hereby created and established retirement systems as alternative systems to those which have been established under the provisions of sections 86.010 to 86.193...."

The mandate to establish a police pension plan is unequivocal. Equally explicit is that under § 87.125 the establishment of a firemen's pension plan is permissive, the statute merely enabling St. Louis to establish such a plan.... The statute grants St. Louis authority to establish a pension plan, but in order to finally achieve such a plan, it is essential for the City to enact a supporting ordinance. The City may or may not elect to enact such an ordinance. If it does, it must comply with the provisions of the enabling statute which is in effect at the time the ordinance is adopted. Otherwise, the ordinance will be in conflict with the provisions of the statute and thereby void. ***State ex rel. Burnau v. Valley Park Fire Protection District of St. Louis County***, 477 S.W.2d 734 (Mo. App. 1972). But it is not incumbent upon the City under § 87.120 *et seq.*, to enact any supportive ordinance, and if it does not do so, there is no pension plan. It is axiomatic that where enabling legislation is permissive, as we have determined in this case, the City need not take any action. The statute is the authority; but equally important is the adoption by the City of an ordinance as the rule for implementing and accomplishing the purpose of the statute. The ordinance is the mechanism by which the

> enabling statute takes effect.... *Enabling legislation, standing alone, is inoperative.*

Id. at 151-52 (emphasis added).

The Court in ***Trantina*** then went on to explain that the City did not have to adopt amendments to the enabling legislation adopted by the legislature, "(h)owever, if St. Louis were to amend [the FRS ordinance] to change the pension benefits, it must do so in accordance with the provisions of the statute then in effect at the time of such ordinance amendment." *Id*. at 153. *Accord* ***Mo. 1990 FRS*** at 487; and ***Firemen's Retirement System of St. Louis v. City of St. Louis***, 754 S.W.2d 21, 24 (Mo. App. E.D. 1988).

In summary, the provisions of § 87.120 R.S.Mo., *et seq.*, merely authorized the City to create the FRS; it was entirely the City's choice as to whether to actually create such a retirement system. Under such circumstances, it is obvious that the requirement that the City appropriate and pay the amount certified by the Board of Trustees of FRS fails the first prong of the test enunciated in ***City of Jefferson I***, in that it is not an "activity or service... required of a political subdivision by the State...". *Id*. at 847.

The facts in ***City of Jefferson I*** are instructive. In that case, the plaintiffs–various cities, Buchanan County, and at least three taxpayers–claimed that the plaintiff political subdivisions were required to join Solid Waste Districts. *Id*. at 847. The court determined that the statute did not require municipalities or counties to join a solid waste district, so there was not a Hancock violation in that regard (the Court did remand for determination of whether the requirement for submission of a solid waste plan violated the Hancock

Amendment). *Id*. at 848-49. Similarly, here, there is no statutory requirement that the City of St. Louis establish FRS.

It is the lack of a mandate or requirement imposed on the City by the general assembly or a state agency which clearly differentiates this case from ***Boone County Court*** and ***Sayad*** *supra*. In the former case, § 52.420 R.S.Mo. was amended, shortly after passage of the Hancock Amendment, to increase the salary of collectors in second class counties by $100.00. *Id*. at 232. In passing this increase, the legislature acted pursuant to the provisions of Article VI, § 11 of the Missouri Constitution which provides that, except with regard to charter counties, "the compensation of all officers shall be prescribed by law uniform in operation in each class of counties." *Id*. at 326. The members of the Boone County Court sued for a declaration that the State of Missouri was required to disburse $100.00 to Boone County to pay the increased salary. *Id*. at 323. This Court held in ***Boone County Court*** that, "To the extent that the county court is **mandated** to pay the collector more, an increase in the level of governmental operation results and therefore the salary increase is 'an increase in the level of any activity,'" so that any such increase is to be paid from the state treasury. *Id*. at 325-26 (citing MO. CONST., Art. X, § 21) (emphasis added).

The fallacy of the City's argument that it is mandated to fund FRS by state statute becomes readily apparent when one considers the City's adoption, subsequent to passage of the Hancock Amendment, of ordinance provisions increasing benefits for members and/or beneficiaries of FRS, as authorized by amendments to the enabling statute (e.g. "DROP" benefits, § 4.18.131 RCC; § 87.182 R.S.Mo.; and cost of living adjustments, § 4.18.165 RCC; § 87.207 R.S.Mo.). Upon passage of the enabling legislation, the City

had the choice whether or not to adopt these new or enhanced benefits by passage of an ordinance authorizing or directing the Board of Trustees to make such benefits available through FRS. It was not required to do so by the enabling statutes.

Even if it is assumed, *arguendo*, that the City's contributions to FRS are subject to the limitations of the Hancock Amendment (specifically MO. CONST., Art. X, § 21), it seems clear that, since the City has voluntarily chosen to make various new benefits, such as DROP and cost of living increases, available through FRS subsequent to adoption of Hancock, although there was no requirement that it do so, the cost of providing these benefits should not count against the cap on the amount the City can be required to pay as its contribution to FRS. However, the same logic that requires the cost of providing such benefits to be excluded from the Hancock cap leads to the inescapable conclusion that the City's contribution to FRS is not subject to limitation under Hancock at all. There was no more of a requirement that the City enact Chapter 4.18, creating FRS, than there was that it adopt provisions establishing DROP benefits or cost of living increases. Thus, there is no difference, for purposes of Hancock analysis, between those benefits which FRS was authorized to pay prior to 1981 and the additional benefits which it was authorized to pay thereafter. In all such cases, the City (not the General Assembly) made the choice to make the benefits available through FRS.

In ***Sayad*** *supra*, the issue was whether the City of St. Louis could be required to appropriate the full amount of the estimated police department budget as certified to the City by the St. Louis Board of Police Commissioners. *Id*. at 908. In the fiscal year 1982-83, the Police Board certified a budget of over $76,000,000.00 to the City. *Id*. at 909. In the

fiscal year prior to adoption of the Hancock Amendment, 1980-81, the Police Board certified an amount of over $66,600,000.00. The City argued that, after the passage of the Hancock Amendment (specifically MO. CONST., Art. X, § 21), it could not be compelled to appropriate any more than it had paid to the Police Board in the fiscal year prior to passage of the Hancock Amendment. This Court stated that the question before it was "whether the St. Louis Board of Police Commissioners is a 'state agency' subject to the limitations of article X, section 21 ..." *Id*. at 908. This Court ultimately held that:

> The Police Board is a state agency subject to this prohibition. Therefore, the Police Board may not require the City to fund an increase in its budget above the amount certified in fiscal year 1980-81 but must look to the general assembly to fund the increase.

Id. at 911.[10]

In determining that the Police Board was a state agency, this Court in ***Sayad*** relied upon a number of factors that are not applicable to FRS. First, the Court noted that the Governor appoints four of the five members of the Police Board (with the Mayor of the City of St. Louis being designated as the fifth member). *Id*. at 909. In contrast, the FRS

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[10] The decision in ***Sayad*** was by a vote of 4-3. In his dissent, Judge Gunn argued that the Police Board was *sui generis*, and was not a state agency for purposes of the Hancock Amendment. (*Id*. at 911-16.) He would have, therefore, held that the Hancock Amendment did not relieve the City of its obligation to appropriate the amount certified by the Police Board. *Id*. at 916.

Board of Trustees consists of the chief of the City Fire Department (a Mayoral appointee), *ex officio*; the Comptroller or Deputy Comptroller; two members appointed by the Mayor; three members elected by members of the system; and one retired fireman elected by retired firemen. § 4.18.055 RCC. Thus, four City officials or appointees of City officials serve on the FRS Board, with the remaining four members elected by members or beneficiaries of the system. Unlike the Police Board, the Governor has no authority to make appointments to the FRS Board. This, in itself, is such an important distinction that ***Sayad*** simply cannot be read to support the conclusion that FRS is a state agency.

The Court in ***Sayad*** also relied on other factors not applicable to FRS in finding the Police Board to be a state agency. The state statutes establishing the Police Board explicitly prohibit City officials from interfering with its operation. *Id*. at 909. By way of contrast, as discussed *supra*, whether or not to establish FRS was a decision left entirely to the discretion of the Board of Aldermen and the Mayor. Further, it is these same officials who make the decision as to whether or not changes to the benefits payable by FRS, permitted by amendments to the enabling legislation, will be adopted by the City and made applicable to FRS. ***Trantina***, *supra*, at 151-52.

Additionally, the Supreme Court in ***Sayad*** cited a long history of cases which held that the Police Board is a state agency. *Id*. at 909-10. These cases relied, in no small part, upon the conclusion that, "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..." so that the state has authority "to impose upon municipalities... a police force of its own

creation...." ***State ex rel. Hawes v. Mason***, 54 S.W. 524, 529 (Mo. 1899), quoted with approval in ***Sayad***, *supra* at 910. There are no cases which hold that FRS is a state agency or that the pensioning of municipal firefighters is a state governmental responsibility.[11]

Unlike the situation in ***Boone County Court***, the appropriation and payment of the amount certified by the Board of Trustees of FRS is not mandated by state statute, but instead, is required by City ordinance. Further, unlike the Police Board, FRS is not a state

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[11] In ***Mo. 1990 FRS***, the City argued that FRS's employees were in the City's service (which would have required FRS to be a City agency), so that they were subject to City ordinances, rules and regulations governing the City's civil service. In support of its argument, the City cited a number of factors, including that, "the positions [secretary and clerk-typists working for FRS] are created pursuant to city ordinance; the City retains the ability to repeal the ordinance; the jurisdiction of the Trustees is limited to matters pertaining to present and former City employees; seven of the eight Trustees are City employees or appointees of the Mayor; and funds managed by the system are supplied either by the City or through mandatory contributions from employees." ***Id.*** at 487. While noting that the City's argument was not unpersuasive, the Court ultimately held that the City's arguments did not overcome the independent status of FRS pursuant to Chapter 4.18. This independence from control by the City does not, however, make FRS a state agency for purposes of the Hancock Amendment. The argument made by the City Defendants in this case, that FRS is a state agency, is not only incompatible with the argument made by the City in ***Mo. 1990 FRS***, but is effectively undercut by its earlier argument.

agency; it was created by City ordinance. Thus, neither ***Boone County Court*** nor ***Sayad*** constitutes controlling precedent here. Instead, because it was within the sole discretion of the City to decide whether (1) to create FRS, and (2) to adopt provisions, as authorized by amendments to the enabling statute, § 87.120 R.S.Mo., *et seq.*, which increased the cost of the FRS to the City, the requirement that the City appropriate and pay the amount certified by the Board of Trustees in no way violates the Hancock Amendment.

This Court should affirm the trial court's judgment because: (a) the City Defendants are without standing to raise the Hancock Amendment as an affirmative defense; (b) in any event, they waived the defense by not raising it in a timely fashion; and (c) the requirement that the City pay FRS the amount certified as the City's contribution by FRS's Board of Trustees is neither mandated by state statute or imposed by a state agency as required for a violation of the Hancock Amendment.

III. <u>The Trial Court Did Not Err in Denying the City Defendants' Post-Judgment Motion for Leave to Amend their Answer By Interlineation to Plead the Hancock Amendment as an Affirmative Defense Because it was Not an Abuse of Discretion for the Trial Court to Deny the Motion in that (a) Denial of the Motion Caused the City Defendants No Hardship, Because the Hancock Issue Lacked Substantive Merit; (b) the City Defendants Knew of the Hancock Issue Early in the Proceedings and Easily Could Have Amended at a Time in the Case Prior to the Entry of Judgment; (c) the City Defendants' Post-Judgment Motion was Untimely, Especially in Light of the Constitutional Nature of the Purported Defense, Which the City Defendants Should Have Raised at the Earliest Possible Opportunity; (d) the City Defendants' Proposed Amendment Would Not Have Cured its Pleading Defects Because They Failed to Identify the Specific Provisions of the Hancock Amendment Upon Which They Relied as their Defense, Causing Severe Prejudice to FRS; and (e) FRS Would Have Suffered Great Injustice had the Trial Court Granted the City Defendants Leave to Amend After the Entry of Judgment, Without Proper Notice and Briefing of the Specific Hancock Issues the City Defendants Sought to Assert as a Defense.</u>

In Point II of their brief, the City Defendants argue that the trial court erred in denying them leave to amend their Answer in order to plead the Hancock Amendment as an affirmative defense. The City Defendants sought leave to amend only after the trial court entered judgment against them.

Whether a court should grant leave to amend pleadings is a matter within the court's discretion and is reviewed only for abuse of discretion. ***Sheehan v. Northwestern Mut. Life Ins. Co.***, 44 S.W.3d 389, 394 (Mo. App. E.D. 2000), (citing ***Rhodes v. Westoak Realty & Inv., Inc***., 983 S.W.2d 565, 568 (Mo. App. E.D. 1998)). In their post-judgment motion for leave, the City Defendants sought leave to amend pursuant to Missouri Rule of Civil Procedure 55.33(a), which provides, in pertinent part:

> A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

A number of factors are considered in deciding whether to grant leave to amend a pleading, including: 1) hardship to the moving party if leave to amend is not granted; 2) reasons for failure to include any new matter in previous pleadings; 3) timeliness of the application; 4) whether an amendment could cure any defects of the moving party's pleading; and 5) injustice to the party opposing the motion. ***Eltiste v. Ford Motor Co.***, 167 S.W.3d 742, 751 (Mo. App. E.D. 2005) (citing ***Sheehan***, *supra*). None of these factors weigh in favor of allowing City Defendants to amend their Answer post-judgment.

A. City Defendants Suffered No Hardship Because Hancock Was Not a Meritorious Defense.

As discussed in Point II, the trial court's decision poses no hardship for City Defendants because they did not have standing to assert Hancock as a defense and because their purported Hancock defense is, in any event, without merit. A trial court does not commit error when it denies a motion for leave to amend a pleading in order to assert a claim that has no merit. ***Curnutt v. Scott Melvin Transport, Inc***., 903 S.W.2d 184, 194 (Mo. App. W.D. 1995) (citing ***Birt v. Consolidated School Dist. No. 4***, 829 S.W.2d 538, 543 (Mo. App. W.D. 1992) and ***Chapman v. St. Louis County Bank***, 649 S.W.2d 920 (Mo. App. E.D. 1983)).

The trial court agreed that there is no support for the Hancock claim, noting that not only did City Defendants fail to properly plead the issue, but finding further shortcomings of the purported defense. Judgment, p 98-116; L.F. 1273-91; A121-38. In particular, Judge Dowd identified the City's lack of standing to raise the defense, which may only be brought by a taxpayer. Judgment, pp. 108-116; L.F. 1283-91; A130-38. He further expressed doubts as to the substantive merits of the City Defendants' Hancock defense, noting that FRS is an ordinance-based system. Judgment, p. 116; L.F. 1291; A138. For all of the reasons articulated in Point II of this Brief, the limitations of the Hancock Amendment do not apply to payment by the City of the amounts certified by the FRS Trustees.

Given these circumstances, the City suffers no hardship from the denial of its Motion for Leave to Amend by Interlineation. Aside from procedural problems caused by

requesting leave after the entry of judgment, the trial court correctly denied leave because the Hancock issue was not a meritorious defense to FRS's claims. ***Curnutt***, *supra*. The City suffers no hardship from not being able to assert an affirmative defense that would ultimately fail.

B. The City Defendants' Failure to Plead the Hancock Amendment was Without Cause.

City Defendants offer no explanation for their failure to plead Hancock as an affirmative defense, for their failure to raise the issue prior to summary judgment, or for their failure to seek leave to amend until after the trial court entered judgment against them. The City Defendants had pleaded the Hancock defense in their initial answer filed in the companion ***Neske*** case. R.A. at 22-26.

In ***Estate of Anderson v. Day,*** 921 S.W.2d 35 (Mo. App. W.D. 1996), the plaintiff defended a summary judgment motion by arguing undue influence, which she had pleaded, and mental incapacity, which she did not plead as a separate theory of recovery. *Id*. at 36-37. The trial court entered summary judgment against her, finding that she could not rely on evidence of a claim she had not pleaded to support a claim she had pleaded. *Id*. at 37, 39. After the entry of judgment against her, the plaintiff sought leave to amend her petition to add a count for mental incapacity, which the trial court denied, citing Rule 55. *Id*. On appeal, the court concluded that the trial court did not abuse its discretion in denying the request for leave to amend. *Id*. The petitioner could have, and based on the facts, should have included the mental incapacity count earlier in the case, but did not. *Id*.

Just as in ***Anderson***, the City Defendants could have, and should have, pleaded the Hancock issue earlier if they deemed it meritorious. Only they are to blame for raising this defense so late in the case, when it is clear that they knew of the Hancock issue from the beginning, as evidenced by the fact that they had pleaded the Hancock Amendment as an affirmative defense in their initial answer in ***Neske***. It was not an abuse of discretion for the trial court to deny City Defendants leave to raise a defense they easily could have, and should have, raised much earlier. ***Anderson***, *supra*.

C. The City Defendants' Post-Judgment Efforts to Amend their Pleadings Were Untimely.

The City Defendants' request for leave to amend subsequent to the entry of judgment was so untimely as to be, on its own, fatal to their effort to assert Hancock as an affirmative defense.

A request to amend pleadings after the entry of judgment is too late. ***George v. Lemay Bank and Trust Co.***, 618 S.W.2d 671 (Mo. App. E.D. 1980), *declined to follow by* ***Dye v. Division of Child Support Enforcement, Dept. of Social Services, State of Mo.***, 811 S.W. 2d 355 (Mo. banc 1991); *see*, *also*, ***Estate of Anderson***, *supra*; ***Mid-Continent News Co., Inc. v. Ford Motor Co.,*** 671 S.W.2d 796, 800-01 (Mo. App. W.D. 1984); ***Pine Lawn Bank and Trust Co. v. Schnebelen***, 579 S.W.2d 640, 644-45 (Mo. App. E.D. 1979).

The plaintiffs in ***George*** sought leave to file an amended petition seven days after the court entered summary judgment against them. *Id*. at 675. The trial court denied the motion. *Id*. On appeal, the trial court's decision was affirmed, the appellate court agreeing that the amendment sought after judgment was too late. *Id*. The court also noted that the

amendment was not one allowed so that the pleadings might conform to the evidence.[12] *Id*. *See*, *also*, ***Pine Lawn Bank***, *supra* at 644-45.

Similarly, the parties seeking relief in ***Estate of Anderson, Mid-Continent News*** and ***Pine Lawn Bank*** all sought to amend their claims after the entry of summary judgment against them. The trial court in each of these cases denied these post-judgment requests, and the denials were affirmed on appeal, with the court in ***Pine Lawn Bank*** specifically noting "[t]he attempt at amendment came too late." ***Pine Lawn***, *supra* at 645. *See*, *also*, ***Estate of Anderson***, *supra* at 39; and ***Mid-Continent News***, *supra* at 801. Just as in these cases, the City Defendants' request for leave was too late and was properly denied.

City Defendants rely upon a footnote in ***Dwyer v. Meramec Venture Assoc., LLC***, 75 S.W.3d 291 (Mo. App. E.D. 2002), as precedent for amending its answer post-judgment. The dispositive motion in ***Dwyer*** was actually a motion to dismiss that the appellate court considered as one converted to summary judgment pursuant to Rule 55.27(a). *Id*. at 293, n.1. The trial court dismissed the action on the grounds of a discharge in bankruptcy,

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[12] FRS notes that ***Dye v. Division of Child Support Enforcement***, which declined to follow the holding of ***George***, was in a wholly different procedural posture than that present in this case and ***George***. In ***Dye***, the amendment was sought after a hearing, but before the entry of a judgment. Thus, FRS submits that ***Dye*** does not in any way affect the holding of ***George*** to the extent a proposed amendment is sought after a judgment, as here. In fact, the ***Dye*** opinion merely "compares" ***George*** and declines to follow that holding, only on a clearly distinguishable procedural posture. ***Dye,*** *supra* at 358.

although the defendants did not assert this defense in their answer. On appeal, the court noted that it would treat the dismissal as a summary judgment because the bankruptcy was a matter outside of the pleadings. *Id*. The appellate court ultimately reversed the trial court decision on the substantive merits of the defense and not the procedural posture with which the defendants asserted their defenses. *Id*. at 295.

Unlike the instant appeal, the ***Dwyer*** trial court did not decide the merits of any motion for leave to amend, and certainly not one post-judgment, since the case was simply dismissed. There was no opportunity for that trial court to exercise discretion in granting or denying a motion for leave to amend and, thus, no opportunity for the appellate court to review such discretion. The appellate court simply concluded in a footnote that it *would* have been abuse of discretion to deny leave to amend in that case. *Id*. at 293, n.1. This is not a substantive holding of the ***Dwyer*** opinion, but merely a footnote in a case that is dissimilar to the appeal before this Court, in a situation where that appellate court offered no analysis of the factors considered in determining whether or not to grant leave to amend.

The City Defendants' reliance upon both ***Dwyer*** and ***Rose v. City of Riverside***, 827 S.W.2d 737 (Mo. App. W.D. 1992) is further misplaced because the defenses asserted in those cases were not constitutional issues. A party raising a constitutional issue in a case must do so at the first available opportunity. ***United C.O.D. v. State of Missouri***, 150 S.W.3d 311, 313 (Mo. banc 2004). As Judge Dowd noted, "it is clear that as a general matter, Missouri courts take 'the earliest opportunity' rule very seriously...." Judgment, p. 101; L.F. at 1276; A127, citing this Court's decision in ***City of Chesterfield v. Director of Revenue***, 811 S.W.2d 375, 378 (Mo. banc 1991). The timing of the City Defendants'

motion for leave to amend is still more egregious because Hancock is a constitutional issue that they must raise at the first opportunity. *Id*. Rather than raising it in a responsive pleading, or even seeking leave to amend during discovery or during the summary judgment briefing, City Defendants waited until a post-judgment motion, literally the absolute final opportunity to raise the issue while the trial court retained jurisdiction over the judgment against them and FRS's cause of action.

D. The City Defendants' Proposed Amendment Would Not Cure the Defects in their Pleadings.

City Defendants argue that the trial court should have granted them leave to amend because both they and FRS addressed the Hancock issue during the summary judgment briefing below. This, of course, was the first time the City Defendants raised the Hancock issue in this case. Not only was the timing of the assertion of this defense improper, but the manner in which it was done was also flawed.

To properly raise a constitutional issue, the party raising it must specifically designate the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself. ***United C.O.D.***, *supra* at 313, citing ***Callier v. Director of Revenue, State of Mo.***, 780 S.W.2d 639, 641 (Mo. banc 1989). Even in arguing Hancock in their own summary judgment motion, City Defendants failed to specifically identify the part of Hancock upon which they relied. In fact, as noted by Judge Dowd, City Defendants did not identify the specific section of Hancock on which they were relying until their reply memorandum in support of their

summary judgment motion, leaving FRS to guess as to which section they were relying upon. *See*, Judgment, pp. 107-108; L.F. 1282-83; A129-130, including n.65.

Despite City Defendants' assertion in Point II of their brief that the Hancock issue was "fully briefed, argued and submitted" by the parties, City Defendants argued the issue in such as way as to preclude FRS from fully briefing, arguing and submitting the issue to the trial court. FRS was also denied the opportunity to conduct discovery on the issue, because it was not pled. FRS's only option was to address an unpled constitutional issue by making an educated guess as to its precise basis. This left the trial court without a proper footing to address Hancock. As the trial court found, the City Defendants did not plead nor raise Hancock in an adequate manner (Judgment, p. 108; L.F. 1283; A130) and permitting them leave to amend in the manner in which they haphazardly brought the issue before the trial court would not effectively cure the deficiencies in their pleadings.

Nor does the proposed amendment which the City Defendants offered following entry of judgment by the trial court (the new paragraph 49 which they sought to add by interlineation) properly comply with the requirements for the assertion of an affirmative defense.

First, in order to raise a constitutional issue, the party relying upon it must "designate specifically the constitutional provision claimed to have been violated." ***United C.O.D. v. State***, *supra* at 313, 150 S.W.3d at 312. In their proposed paragraph 49, City Defendants allege that "the additional appropriations demanded by plaintiffs are barred by Article X, §§ 16-24, of the Missouri Constitution." L.F. 1323-6, especially 1325. Rather than designating a specific constitutional provision that is allegedly violated by the

"demands" of FRS, even after the Court noted in its decision that they had not identified the appropriate section of Hancock until filing their reply to FRS's response to their summary judgment motion, City Defendants simply designated all eight sections added to the Constitution by the Hancock Amendment. This "shotgun approach" is insufficient to meet the requirement that a party identify a constitutional provision with specificity.

Second, a party asserting an affirmative defense must state facts sufficient to support the defense. "The factual basis for defenses must be set out in the same manner that is required for pleading claims." ***Leiser v. City of Wildwood***, 59 S.W.3d 597, 605 (Mo. App. E.D. 2001) (citing ***Trotters Coop. v. Ringleader Restaurants, Inc.***, 929 S.W.2d 935, 938 (Mo. App. 1996)). Bare legal conclusions, such as stated in City Defendants' proffered paragraph 49, are insufficient to state an affirmative defense. *See*, ***ITT Commercial Finance Corp. v. Mid-America Marine Supply, Inc.***, 854 S.W.2d 371, 383 (Mo. banc 1993). Paragraph 49 does not identify what "additional appropriations" allegedly violate Hancock. (e.g., does this include appropriations to pay for additional benefits adopted by City ordinance passed subsequent to the date on which the Hancock Amendment became effective?) Requiring FRS to "negate such conclusory allegations as a prerequisite to summary judgment would require [them] to first make the [City Defendants'] case and then defeat it. Such is often the case under 'notice pleading,' but has been purposely avoided by Missouri's historical adherence to 'fact pleading'." *Id* at 384. The proposed paragraph 49 is insufficient to allow FRS to formulate an appropriate defense, as was also true of City Defendants' summary judgment motion and memorandum in support thereof. Thus, the City Defendants' proposed amendment is

insufficient to state an affirmative defense, and was, therefore, properly denied by the trial court.

E. Granting City Defendants Leave to Amend Would Cause Severe Injustice to FRS.

For many of the reasons discussed above, the trial court properly denied the City Defendants' post-judgment motion for leave to amend, because granting it would have caused great injustice to FRS. The timing of their request for leave was procedurally improper, and granting leave after judgment would have posed a significant injustice to FRS in terms of its ability to discover facts relevant to the Hancock issue. Perhaps most importantly, granting City Defendants leave would have severely prejudiced FRS, given the City Defendants' failure to properly identify the sections of Hancock upon which they relied, forcing FRS to argue its position blindly.

Under these circumstances, the trial court's denial of the City Defendants' post-judgment motion for leave to amend was clearly not an abuse of discretion and should be affirmed for each and every reason set forth in the Judgment and in this point.

IV. <u>The Trial Court Properly Ruled in Favor of FRS, and Against the City Defendants, with Respect to Their Argument Based on Article VI, Section 26(a) of the Missouri Constitution, Because Budgeting, Appropriating and Paying FRS the Amounts Certified by the FRS Actuary Does Not Require the City to Violate Article VI, Section 26(a), and Does Not Constitute an Improper Delegation of Legislative Power in that: (A) the City Can Balance its Budget Through Other Means So as to Avoid Any Violation of Article VI, Section 26(a); (B) the Actuarial Calculations Were Made Pursuant to the Detailed Provisions of Chapter 4.18 and According to Actuarial Principles and the Amounts Calculated Are Not in Dispute; (C) Article VI, Section 25, the Constitutional Basis for Chapter 4.18, Requires Actuarial Soundness in Pension Plans, Such as FRS, and (D) the City Cannot Prevail Through a Strategy of "Running out the Clock."</u>

The precedent initially, and perhaps primarily, relied upon by City Defendants in this section is ***State ex rel. Employees of the Retirement System v. Board of Estimate and Apportionment***, Cause No. 004-01181, affirmed by *per curiam* opinion at 43 S.W.3d 887 (Mo. App. E.D. 2001) (hereafter "***ERS***"). Since it is *per curiam*, the appellate decision contains disclamatory language; including the following: "It shall not be reported, cited, or otherwise used in unrelated cases before this court or any other court." L.F. 1159; A14. In essence, Appellants cite a circuit court decision to this Court as one of their primary authorities. (Note that the cites by Appellant are to the Circuit Court Judgment.) ***ERS*** is distinguishable on numerous grounds.

First, at the time ***ERS*** was litigated, the ERS plan had an actuarial surplus of $67,000,000.00 (L.F. 1162; A17); whereas here, Judge Dowd found, and it is not in dispute, that, as of September 30, 2003, FRS had an unfunded accrued liability in the amount of $38,952,017.00. Judgment, pp. 25, 38; L.F. 1200, 1213; A853, 65.

Second, Judge Dowd noted the significance in ***ERS*** of the fact that the Employees Retirement System contained a provision allowing for reduction in benefits in the event the City failed to make its "required contributions." This was important to Judge Dierker's determination that the amount certified by ERS' actuary as the City's Contribution to ERS was not mandatory. Judgment, p. 38; L.F. 1213; A65. There is no provision for reduction of benefits in the FRS plan contained in Chapter 4.18 or in the enabling legislation.

Third, ERS is purely a creature of municipal ordinance and not derived from enabling legislation, as is FRS. See, ***Trantina v. Board of Trustees of the Firemen's Retirement System of St. Louis***, 503 S.W.2d 148, 152 (Mo. App. 1973). As noted in the ***Trantina*** case, it is only when the City enacts ordinances adopting the enabling legislation the new provisions became effective. *Id*. at 151-52. The ordinances enacted by the City must comply with, and correspond with, the enabling legislation. *Id*.

Fourth, Judge Dierker noted in ***ERS*** that the City Defendants in that case could not "evade their express legal duties simply by 'running out the clock.' See, ***State ex rel. Twenty-Second Judicial Circuit v. Jones***, 823 S.W.2d 471 (Mo. banc 1992)." ***ERS*** at 6; L.F. 1169; A24. City Defendants' third Point Relied On makes a "running out the clock" argument by implication, although it is not developed in their argument. Judge Dowd also rejected a "running out the clock" argument in this case. Judgment, p. 92, n. 58; L.F. 1267;

A115. There is no legal or equitable basis for this disingenuous argument, if City Defendants are indeed making it.

In their brief, City Defendants make an admission or concession that is remarkably telling and undercuts many of their arguments, including those based on ***ERS***. "The City Defendants do not dispute the actuary's calculation of the normal contribution and the accrued liability contribution, nor do the City Defendants deny the City is responsible for any **unfunded accrued liability**." Substitute Brief of Appellants, p. 40 (emphasis added). As noted above, that is an admission by the City that it was responsible for almost $39,000,000.00 (i.e., unfunded accrued liability) in September, 2003. Since the City adopted its illegal "6% of covered payroll" method of funding FRS, contrary to Chapter 4.18 and the enabling legislation, unfunded accrued liability has increased due to the City's failure to properly fund FRS.

Before rebutting Appellant's argument concerning Article VI, § 26(a), it is important to understand the constitutional underpinnings of FRS. Article VI, § 25, provides:

> **§ 25. Limitation on use of credit and grant of public funds by local governments—pensions and retirement plans for employees of certain cities and counties.**
>
> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a), and **except that the general assembly may**

> **authorize any** county, **city** or other political corporation or subdivision **to provide for the retirement or pensioning of its officers** and employees **and the surviving spouses and children of deceased officers** and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the surviving spouses and minor children of such deceased employees; **and except also, any** county, **city** or political corporation or subdivision **may provide for the payment of periodic cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, <u>provided such pension and retirement systems will remain actuarially sound</u>**.
>
> (Readopted Nov. 2, 1948; amended at special election Jan. 14, 1966; amended at general election Nov. 6, 1984.)

Id. (emphasis added).

Article VI, Section 25, is the constitutional basis for the enabling legislation in § 87.120 *et seq.* and ultimately for Chapter 4.18 RCC, adopted pursuant to the enabling legislation. ***Firemen's Retirement System of St. Louis v. City of St. Louis***, 789 S.W.2d

484, 486 (Mo. banc 1990) (hereafter ***Mo. 1990 FRS***). Judgment, p. 5, fn 7; L.F. 1180; and A35.

Article VI, § 25, also arguably mandates retirement systems like FRS to remain actuarially sound. Judge Dowd notes that this constitutional requirement that retirement systems remain actuarially sound may be interpreted several ways. The highlighted language at the end of Article VI, § 25, was adopted by the 1984 constitutional amendment dealing with cost of living increases. Section 4.18.125 RCC, enacted pursuant to § 87.120 *et seq*. R.S.Mo., provides cost of living adjustments (COLA) based on the Consumer Price Index. Even if the "actuarially sound" requirement of Article VI, § 25, is connected to COLA provisions, it applies to FRS. (For an extended analysis, *see*, Judgment, pp. 94-96; L.F. 1269-71; A117-19.) The City also does not dispute Judge Dowd's finding "...that there is no **genuine** dispute of fact that FRS cannot remain actuarially sound if the City continually fails to contribute the amount certified by FRS on an ongoing basis...." (Court's emphasis) Judgment, p. 24; L.F. 1199; A52. This was confirmed in the record by FRS's actuaries, especially Michael R. Kivi. *See*, Affidavit of Michael R. Kivi, L.F. 1018-21, especially paragraphs 9-11 at 1020-21.

The preceding analysis of Article VI, § 25, gives context to the argument advanced by the City Defendants premised on Article VI, § 26(a); i.e., that appropriation of the amount certified by FRS's Trustees would cause the City to have an unbalanced budget. The easy and most obvious answer to this alleged issue is that the City could pay the certified amounts as a part of its budget, and then balance the rest of its budget by doing what the City officials believed was appropriate. The City's FY 2004 budget was

$411,000,000.00; for FY 2005, it was $403,000,000.00, so there was between $390,000,000.00 and $400,000,000.00 remaining in the budget to allocate to other City needs or priorities after properly paying FRS the amount certified. The City might have to make some hard choices, but that is not a constitutional problem but rather a political or administrative set of choices. On the facts presented, and given that the certified amount is to be based on a carefully circumscribed actuarial calculation (which Appellants do not dispute), the Appellants' claim in their brief that FRS seeks appropriation of the City's **entire** revenue is disingenuous. (Emphasis is from Appellants' Substitute Brief, p. 37.) This misleading argument, along with the threat of the City's possible bankruptcy, are alarmist cries designed to divert this Court's attention from the facts and legal issues presented on appeal. For over forty years, since the inception of FRS until FY 2004, and through good financial times and bad, the City contributed the full amount certified by FRS and balanced its budget. For a detailed analysis of this history and its significance, *see*, Judgment, pp. 91-92; L.F. 1266-67; A114-15.

Though City Defendants twice cite and quote Article VI, § 26(a), in their argument in Point III, there is no concrete effort by Appellants to demonstrate its applicability to the case at hand. Judge Dowd specifically noted and held that, even if he were to disregard the "actuarially sound argument" based on Article VI, Section 25, requiring the City to appropriate and pay the amount certified by FRS's Trustees does not violate Article VI, § 26(a). Judgment, pp. 89-96, at 96; L.F. 1264-71 at 71; A112-119 at 119.

City Defendants also rely on ***State ex rel. Field v. Smith***, 49 S.W.2d 74 (Mo. 1932), concerning the City's claim that Chapter 4.18 RCC fails to provide "any" restriction on the

amount of money that FRS may seek from the City. FRS's actuary is governed by Chapter 4.18 and by generally accepted actuarial principles. There is no challenge by the City Defendants to the actuaries selected by FRS nor to their methods or calculations. As noted above, Appellants concede in their brief at p. 39 that, "The City Defendants do not dispute the actuary's calculations of the normal contribution and the accrued liability contribution...." The ordinances in Chapter 4.18 provide specific guidance, the application of actuarial principles is not in dispute, and the City appellants "do not dispute the actuary's calculations." There has not been any improper delegation in violation of the state constitution.

Judge Dowd extensively analyzed ***Field***, beginning at Judgment, p. 74; L.F. 1249. This page was omitted from Appellants' Appendix. *See*, A100, 101. Judge Dowd's analysis of ***Field*** continues, ending at Judgment, p. 78; L.F. 1253; A103. In essence, Judge Dowd correctly noted that, in ***Field***, the Police Board had absolutely unfettered and unlimited discretion to set an annual amount which Kansas City had to contribute. Here, FRS and its Trustees must request the amount certified by the actuary, which amount the City concedes is not in dispute.

As the court in ***Field*** carefully explained:

> The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, **and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the**

> **complete operation and enforcement of the law within its expressed general purpose.** (citations omitted)
>
> The Legislature **may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor.** (citations omitted)

Field, 49 S.W.2d at 76 (emphasis added by Judge Dowd). Judgment, p. 76; L.F. 1251; and A102.)

"The situation here is similar to that in ***Missouri State Employees Retirement System v. Jackson County***, 738 S.W.2d 118 (Mo. banc 1987)." (*See*, Decision of Court of Appeals in this case, p. 13, Sub A166.) Jackson County argued that the statutory provision in that case was an unconstitutional delegation of legislative power because it did not provide sufficient standards for guidance and cloaked the Missouri State Employees Retirement System (MOSERS) with arbitrary discretion and authority. *Id*. at 119. In squarely rejecting that contention, this Court stated:

> Contrary to the county's argument, we believe that the requirements of the statute are clear. Counties are obliged to contribute sufficient sums to make MOSERS whole, on account of past service credits for county employees who are admitted to participation in MOSERS on becoming state employees. The amounts due depend on actuarial computation, which takes account of life expectancies and interest factors. The actuary is the person who is equipped to compute the sums required by the statute subject to review by

> the court. The statute is not vague as to what is required and it does not delegate any authority to MOSERS which is not supported by actuarial computation. It makes no difference that the actuarial computations are not exact, or that certain assumptions are made about future salaries. The requirement is simply that the best computation available be furnished. The courts are open to a claim that the actuarial computation is unsound.

Id. at 120.

Here there is no dispute about the actuarial computation. *See*, Appellants' previously quoted admission or concession regarding the correctness of the calculations of FRS' actuary. The City Respondents' argument is seriously undermined, if not destroyed, by this Court's decision in ***Missouri State Employees Retirement System.***

The City's attempt to balance its budget illegally and on the back of FRS, its members and their beneficiaries is preposterous and lacking in principle. If the City's position is accepted, it could avoid contractual obligations and tort judgments (not otherwise barred by sovereign immunity) merely by refusing to budget and appropriate amounts for them. *See*, Judgment, p. 92; L.F. 1267; A115.

The City's failure to budget and pay the amounts certified only causes the City to dig a deeper hole for itself. The City cannot be allowed to pursue this course of action, which will turn FRS into a "pay as you go" retirement system, contrary to the terms and purpose of Chapter 4.18 and the enabling legislation, and ultimately resulting in either the ruin of FRS, bankruptcy of the City, or both.

Though it is not the subject matter of this lawsuit, the City has also failed to budget and pay the amount certified by the actuary in the next two City fiscal years (i.e., last fiscal year and this year). The City's conduct in this case is not a temporary aberration, but seems to be part of a long-term pattern or strategy. There is apparently money for subsidizing a "Ballpark Village", but not for discharge of the City's obligation to pay the amount certified by the actuary, as required by law, to fund firefighters' pensions.

The City also asks this Honorable Court to disregard the law and assume the role of the legislative bodies. If the City wishes to lobby the legislature to revise the FRS enabling legislation in some manner regarding benefits or funding of benefits, the City Defendants know their way to the Capitol. Changes in enabling legislation, followed by properly enacted ordinances changing Chapter 4.18, could effect prospective changes in FRS benefits, at least as to new members, and could also affect how those benefits are funded by the City in the future. The City's present effort to ask this Court to legislate a fundamental change in the method of funding FRS, in a manner inconsistent with enabling legislation, is beyond the pale. This is an unabashed plea for judicial activism at the extreme level. Not only do the City Defendants request that this Court make determinations of a legislative nature, City Defendants seek to have this Court apply such determinations retroactively. This raises issues concerning violation of the vested contractual pension rights of members and beneficiaries of FRS. Beside these contractual rights themselves, any attempt to retroactively deprive members and beneficiaries of those rights would seem to violate their rights to due process. These issues have not been briefed previously, because it has been unnecessary for the Courts to reach them. Respondent will not engage in any extended

discussion or argument in this Brief, but will rather merely note the slippery slope that has been created by the City's arguments in this case.

The Court of Appeals in this case discussed issues relating to the status of firefighter pension rights:

> The Missouri Supreme Court in ***Tomlinson*** also implicitly based its holding on the view that the police pension funds at issue in that case were "gratuities," a view which that court subsequently declined to adopt in ***Police Retirement System of Kansas City v. Kansas City***, 529 S.W.2d 388, 391 (Mo. banc 1975). The modern trend is to view such pension rights as contractual in nature and not as gratuities. *See*, 3 MCQUILLIN MUN. CORP., section 12.1444.05 (3rd ed. 2001); 5 ANTIEAU ON LOCAL GOVERNMENT LAW, section 78.02[4] (2d. ed. 2002). We note that the ordinance in the present case makes the creation and maintenance of reserves in the general reserve fund, the maintenance of benefit reserves, and the payment of all benefits under City Code 4.18 obligations of the City. *See*, City Code 4.18.325.

P.20 A173, RCC 4.18.325.

For each and every reason set forth in this Point, the trial court's grant of summary judgment must be affirmed.

V. **The Trial Court Properly Entered Judgment in Favor of FRS and Against the City, Because the City's Payment Was Inadequate, as a Matter of Law, in that Chapter 4.18, as a Whole, and Especially § 4.18.320, Require that the City Must Pay the Certified Amount; and § 4.18.305 Does Not Alter that Result When Properly Construed, in that § 4.18.305 Does Not Authorize a "Pay as You Go" Retirement System for FRS, Which Concept is Contrary to Chapter 4.18 and to the Enabling Legislation.**

FRS again notes the City's concession and admission, "The City Defendants do not dispute the actuary's calculation of the normal contribution and accrued liability contribution...."

§ 4.18.290 RCC provides:

> Contributions to and payments from the general reserve fund **shall** be as follows: On account of each member there **shall be paid annually** into the fund by the City an amount equal to a certain percentage of the earnable compensation of the member to be known as "**the normal contribution**" and an additional amount equal to a percentage of his earnable compensation to be known as "**the accrued liability contribution**." The [percentage rates] of the contributions shall be fixed on the basis of the liability of the Retirement System as shown by actuarial valuations.

See, Judgment, p. 9; L.F. 1184; A39 (Underlining by Judge Dowd.)(Emphasis added).

Section 4.18.320 RCC, a key section upon which FRS relies, provides:

> On or before the first of March of each year the board of Trustees shall certify to the proper City authorities the amount which will become due and payable during the year next following to the general reserve fund. The amount so certified **shall** be included by the City authorities in their annual budget estimate. The amount so certified **shall** be appropriated by the City and transferred to the Retirement System for the ensuing year.

Judgment, p. 12; L.F. 1187; A42 (Judge Dowd's Emphasis).

Judge Dowd emphasized the word "shall," which underscores the mandatory nature of the contribution. That issue will be discussed later in this Brief. However, § 4.18.320 specifically ties into § 4.18.290, cited above. The admission by the City is a concession that the normal contribution rates and the accrued liability contribution rates were correctly calculated by the actuary. Section 4.18.320 makes apparent that the certified amount, which is the sum of those numbers, must be appropriated and paid to FRS by the City.

A. The Judgment Is Consistent With the Plain Language of Chapter 4.18, and the Provisions of Section 4.18.305 Do Not Change That Result.

In their brief, City Defendants highlight certain modifying language in Section 4.18.305 RCC. *See*, Appellants' Brief at p. 40. They disregard language at the beginning of that Section:

> **The total amount payable in each year to the general reserve fund <u>shall not be less than</u> the sum of the rates known as the <u>normal contribution</u>**

<u>rate</u> and <u>accrued liability contribution</u> rate of the total compensation earnable by all members during the year.... (Emphasis added).

Given the City's previously cited admission, the language of § 4.18.320 and § 4.18.290, and Chapter 4.18 as a whole, it is clear that Section 4.18.305 is actually supportive of FRS's position.

FRS generally agrees with the case law regarding ordinance constructions or statutory construction provisions set forth by the City in its brief. For a more detailed and complete statement of those principles, *<u>see</u>*, Judgment, pp. 29-31; L.F. 1204-1206; A56-58. The remainder of the City's argument on this point contains no citation to authority. For a detailed analysis of these issues, see Section E of the Judgment: "Does 'Shall' as Used in RCC 4.18.320 Take on a Different Meaning When That Provision Is Construed with Reference to Chapter 4.18 as a Whole?" Judgment, pp. 41-60; L.F. 1216-35; A68-87. Judge Dowd noted that Defendants' construction of Section 4.18.305 "would require this Court to find in the statute and ordinances words that are simply not there." Judgment, p. 46; L.F. 1221; App at A73. The court also notes that the City's construction of § 4.18.305 conflicts with § 4.18.320. Judgment, pp. 47-49; L.F. 1222-24; A74-76. Judge Dowd correctly noted that "the City's proposed construction thus appears to the Court to fly in the face of the principle that one part of a statute or ordinance should not be read in isolation from the context of the whole act—as well as the principle that a court should seek, if at all reasonably possible, to harmonize all provisions of the legislation and give every word, clause, sentence and section thereof some meaning." Judgment, p. 49; L.F. 1224; A76.

Judge Dowd set forth further the preferred construction of § 4.18.305. *See*, Judgment, pp. 53-57; L.F. 1228-32; at A80-84. Judge Dowd notes the initial section of 4.18.305, and notes how it ties into § 4.18.320. The second clause of that first sentence, emphasized by the City, is actually modifying language to the first clause, which ties § 4.18.305 to § 4.18.320. One must remember that:

> ... at its inception, when pertinent ordinances were enacted in 1959 or 1960, FRS did not have significant assets. The provision cited by the City, read in conjunction with the prior part of that same sentence, in § 4.18.305 and Chapter 4.18 as a whole, means that the City could have an obligation to pay an amount in excess of the certified amount, if that certified amount, combined with the amounts in the general reserve fund, is not large enough to pay out the retirement allowances and other benefits which became due during the current year.

Judgment, p. 55; L.F. 1230; A82.

This construction of § 4.18.305 harmonizes with the other provisions in Chapter 4.18. It is also internally consistent, because it was logically possible that, in the early years, the City would have to comply with both clauses, paying the certified amount and, if that was not sufficient, paying an amount in addition thereto, to ensure that all benefits were paid during the current year.

B. The Use of "Shall" is Mandatory.

The City again primarily relies upon the decision of Circuit Court Judge Dierker in the ***ERS*** case, which FRS previously distinguished in detail. As Judge Dowd notes, FRS's

core contention in this litigation is that the words in § 4.18.320, taken in the context of Chapter 4.18 in its entirety, mean what they say. There is a history of litigation between these parties, some of which has gone to this Court. In ***Mo. 1990 FRS***, 789 S.W.2d at 486, this Court stated the following:

> It is the trustees, not the City, who certify each year the amount the City **is required to appropriate for the following year:** "The amount so certified **shall be appropriated by the City** and **transferred to the [Firemen's]Retirement System** for the ensuing year."

Id. (emphasis added) (quoting RRC 4.18.320).

In ***Mo. 1990 FRS***, the City took the position that FRS' employees had to be appointed through the Civil Service System. The City argued that FRS was a City agency, rather than an independent body fulfilling a City-related obligation (interesting in itself, since the City essentially contends in this litigation that FRS is a state agency, as part of its desperate attempt to create a Hancock issue). In analyzing the relative control or power of the Trustees versus the City concerning the FRS as a whole, this Court quoted the above language of RCC 4.18.320 with approval. Though it is not a *res judicata* determination on the issues in this case, ***Mo. 1990 FRS*** does involve the same parties, and the above-quoted language certainly provides a clear indication of how this Court understood and interpreted this crucial ordinance language in that case.

The meaning of "shall" is well understood and should be given its plain meaning. Where a provision's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction, unless there is some ambiguity. ***State ex rel.***

Baumruk v. Belt, 443, 446 (Mo. banc 1998); ***Civil Service Com'n of City of St. Louis v. Bd. of Aldermen of City of St. Louis and FRS***, 92 S.W.3d 785, 787 (Mo. banc 2003).

The term "shall" is used on numerous occasions in Chapter 4.18, and its meaning is consistently mandatory. The Missouri courts are clear that the legislative use of the word "shall" confers nothing less than a mandatory obligation. ***State ex rel. Dreer v. Public School Retirement System of the City of St. Louis***, 519 S.W.2d 290, 296 (Mo. 1975). "The definition of 'shall' states that it is 'used in laws, regulations, or directives to express what is mandatory.'" ***U.S. Central Underwriters Agency, Inc. v. Hutchings***, 952 S.W.2d 723, 725 (Mo. App. E.D. 1997), citing WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2085 (1976). The general rule is clear that a legislature's use of "shall" is mandatory and not permissive. ***Missouri Society of the American College of General Practitioners v. Roderick***, 797 S.W.2d 521, 524 (Mo. App. W.D. 1990) (citing ***Show-Me Power Corp. v. City of Mountain Grove***, 467 S.W.2d 109-111-12 (Mo. App. 1971)).

The sole, narrow exception to the interpretation of the word "shall" as mandatory is applicable only where the legislation involves a procedural requirement that does not affect substantive rights. *See*, ***Farmers & Merchants Bank & Trust Co. v. Director of Revenue***, 896 S.W.2d 30, 33 (Mo. banc 1995). The City cannot seriously contend that its failure to fund a pension plan is a procedural requirement that does not affect substantive rights.

The City next relies upon ***Tomlinson v. Kansas City***, 391 S.W.2d 850 (Mo. 1965). The ***Tomlinson*** plaintiffs' core contention was that the Kansas City Firemen's Pension Fund created a contractual relationship between the city and the fund's beneficiaries. *Id*. at 853. That was a suit about benefits, where three firefighters brought suit to seek

contractual enforcement of the city's obligation. In that case, the firemen's pension fund had not acted and was actually sued as a defendant by the firefighters. ***Tomlinson*** is distinguishable from the present case for many reasons. In those regards, see Judge Dowd's analysis of ***Tomlinson***, Judgment, pp. 82-88; L.F. 1257-63; A105-11.

The ***Tomlinson*** plaintiffs were firefighters seeking to assert contractual pension rights on their own behalf. This is different than the present case, where the FRS, as an entity, and its Trustees assert ordinance-based obligations of the City to fund FRS. The law in Missouri regarding the assertion of such contractual rights by individual beneficiaries is unclear. The ***Tomlinson*** case relied upon ***State ex rel. Phillip v. Public School Retirement System of the City of St. Louis***, 262 S.W.2d 569 (Mo. 1953), in categorizing pensions as gratuities, rather than a form of deferred compensation. This has been called into question by the Supreme Court's holding in ***Police Retirement System of Kansas City v. Kansas City***, 529 S.W.2d 388 (Mo. 1975). However, this present suit is not premised upon the beneficiaries' personal contractual rights. This case is, therefore, a significantly different type of case than ***Tomlinson***. In analyzing the City Appellants' argument regarding ***Tomlinson***, the Court of Appeals correctly observed: "Defendants make a public policy argument, which is not the same as a legal argument" (p. 20, A173).

The ***Tomlinson*** court's fleeting reference to Article VI, Section 26(a), demonstrates that the court's holding is not premised upon that constitutional provision, and the significance of that constitutional section in ***Tomlinson*** is not clear. Also, it is not clear if the ordinances in ***Tomlinson*** were based upon enabling legislation or if they were freestanding ordinances. The amendment of Article VI, Section 25, after the ***Tomlinson***

decision to provide that pension and retirement systems "will remain actuarially sound" further undermines the City's attempts to justify its failure to maintain the System in an actuarially sound manner going forward, based on ***Tomlinson***.

Though it is not necessary to reach this issue in order to decide in favor of FRS, FRS strongly contends that the "actuarially sound" requirement in Article VI, Section 25, constitutionally precludes the "pay as you go" or "pay as much as we feel like paying" approach the City Defendants have adopted in funding FRS.

As Judge Dowd makes clear, ***Tomlinson*** is distinguishable and its references to Article VI, Section 26(a), are dicta. Even assuming, *arguendo*, that there was an implicit holding by ***Tomlinson*** that a pension system had no right to sue the city to enforce its obligations, "this can no longer be presumed to be good law in light of the Supreme Court's subsequent, explicit endorsement of the ***Trantina*** decision in the ***Mo. 1990 FRS*** case. *See*, ***Firemen's Retirement System v. City of St. Louis***, 789 S.W.2d 484, 487 (Mo. banc 1990)." Judgment, p. 88; L.F. 1263; A111.

Also as discussed near the end of Argument IV, ***Tomlinson*** seems premised upon the premise that public pensions are mere gratuities, which is inconsistent with the modern view of public pensions and inconsistent with ***Police Retirement System of Kansas City***, *supra*.

C. *Trantina* and the *Firemen's Retirement System* Cases Are Extraordinarily Relevant.

The contention by the City Defendants that ***Trantina*** and ***Mo. 1990 FRS*** are irrelevant rises to the level of intellectual dishonesty for several reasons. In attempting to make the argument that FRS is a state agency, City Defendants rely initially, and perhaps primarily, upon ***Trantina***. *See*, Appellants' Brief, pp. 26-27. Though they do not do so in this Brief, in the trial court attorneys for the City argued that ***Trantina*** was incorrectly decided and should not be followed by Judge Dowd. The City Defendants understand clearly how devastating ***Trantina*** is to their position. ***Trantina*** was also cited, with approval and as authority, in ***Mo. 1990 FRS***.

The ***Mo. 1990 FRS*** case was also cited by the City regarding the issue in the prior section, dealing with the word "shall", to allegedly support its argument.

To borrow a phrase from the old western movies: the City Defendants "speak with forked tongues". When these cases devastate the City's positions, they are irrelevant; when needed to help glue together the City Defendants' arguments, they are apparently relevant.

This Court's review of § 4.18.320 in ***Mo. 1990 FRS*** was not idle or careless. The parties to that litigation are essentially the parties to this litigation:

> It is the trustees, not the City, who certify each year the amount the City **is required to appropriate for the following year**: "The amount so certified **shall be appropriated by the City** and **transferred to the [Firemen's] Retirement System** for the ensuing year." (Emphasis added).

Mo. 1990 FRS at 486.

D. The City Impermissibly Seeks to Solve Its Fiscal Problems by Violating the Law and Balancing Its Budget on the Back of the Firemen's Retirement System.

The City's position ultimately boils down to an argument that the City is allowed to fund FRS as a "pay as you go" system; i.e., where the City is only responsible for making sure that benefits are paid in the current year. Because the City has funded FRS properly in the past, by paying the amount certified by FRS for almost fifty years, FRS earnings can now pay a portion of the annual benefits obligations of over $27,000,000.00. During the last few years, the City's funding, itself, has been a very small number, compared to the benefits paid out by FRS. In another blatantly false statement, the City states "the exaggerated suggestion that FRS will be unable to pay its benefits, should the City refuse to pay the certified amount this year, ignores the fact that FRS managed very well without any contributions from the City for the past decade." This is a clear misstatement of fact. As Judge Dowd noted, contributions were made, in full, by the City, for almost 50 years prior to the time when the City quit paying the amount certified in FY 2004. Judgment, p. 20; L.F. 1195; A49. *See*, *also*, the Affidavit of Vicky Grass, Executive Director of FRS, L.F. 504 and L.F. 1029-36, also attached as R.A. 27-37. Many of the City's past payments of amounts certified by FRS exceeded the FY 2004 certified amount, and exceeded the amount used by the City Defendants in their belated Hancock Amendment argument: (a) FY1992, $9,703,000.00; (b) FY1993, $8,998,121.00; (c) FY1995, $10,709,220.00;

(d) FY1996, $10,987,432.00; (e) FY1997, $11,286,200.00; (f) FY1998, $9,262,597.00. Exhibit B1 to Affidavit of Vicky Grass, L.F. 1029-1036 at 1036; R.A. 34.[13]

FRS pointed out this error to the City Defendants in the trial court, and again in the Respondent's Brief filed in the Court of Appeals (pp. 86-7). The City's repetition of this error clearly shows a willingness on the part of City Defendants to "play fast and loose" with the facts.

Money must be set aside not only to pay current benefits, but to pay retirement or disability benefits for all active firefighters, their spouses and children. Pension plans have obligations and responsibilities to pay benefits which will become due decades in the future, not just during the City's current fiscal year.

The City Defendants may need to make some tough decisions, if the City honors its legal responsibility to properly fund the Firemen's Retirement System. The City may have assets that could be a basis for a bond issue. The City could use some of its substantial assets and reserves, as set forth in the materials accompanying the most recently published St. Louis City Audit. Raising taxes may be difficult; passing a bond issue requiring a vote of the people would not be easy; considering laying off people or cutting programs will be hard. However, we live in a country and a state that accepts, and is governed by, the rule of law, and the City cannot "make up the law as it goes." The City has chosen to fight this

[13] Note that years listed are plan years. The City contributes the following year, which is based on the City's fiscal year.

battle in the courts, rather than attempting to solve its problems through political, fiscal or proper legislative action.

The law is clear, and the City's actions show that it has understood its obligations to pay the certified amount for the last 50 years. That time frame has included prosperous times and down times. The thorough and careful analysis contained in the Judgment entered by Judge Dowd cannot be disregarded and is correct. The legal analysis of the Court of Appeals is also clear and correct.

CONCLUSION

Though this Honorable Court is the pinnacle of case law in Missouri, it is neither the Missouri General Assembly nor the St. Louis City Board of Aldermen. The law must be enforced as it has been enacted, consistent with the decisions of this Honorable Court. FRS is correct in the positions it has asserted, as found by the trial court. For all the reasons set forth in this Brief, and in the well reasoned decision of the Court of Appeals, Eastern District, this Honorable Court should affirm and must affirm the detailed and well reasoned judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that two (2) true copies of the foregoing Substitute Brief of Respondents, an original and two (2) copies of the separately bound Appendix to Substitute Brief of Respondent, and a disc containing a copy of the foregoing Substitute Brief of Respondents, in Microsoft Word format, was sent, via first class U. S. Mail, postage prepaid, this _____ day of November, 2006, to:

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_____

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Substitute Brief of Respondents 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 23,539, exclusive of the cover page, signature block, and certificates of service and compliance.

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

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