IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC 92159

CITY OF ST. LOUIS, et al.

Respondents/Cross-Appellant/Plaintiffs

vs.

STATE OF MISSOURI

Appellant/Cross Respondent/ Defendant

APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT COURT
DIVISION NO. 1, CIRCUIT COURT NO. 10AC-CC00434

HONORABLE JON BEETEM

PLAINTIFFS'/RESPONDENTS'/CROSS-APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

In this declaratory judgment action, the trial court held that SB 739 (RSMo. § 320.097) is unconstitutional because it contravenes Art. VI, Section 22 (laws affecting officers and employees of charter cities) of the Missouri Constitution and the equal protection clauses of the Missouri and United States Constitutions. The trial court held that SB 739 did not violate Article III, § 40 of the Missouri Constitution and the City of St. Louis filed a cross-appeal of this determination. Therefore, this cross-appeal involves the validity of a Missouri statute and jurisdiction is proper pursuant to the Missouri Constitution Article V § 3.[1]

STATEMENT OF FACTS

Plaintiffs challenged the constitutionality of 2010 Senate Bill 739 ("the State Law"), which exempts eligible City of St. Louis fire department employees from the residency requirement contained in the City of St. Louis Charter. (L.F. Vol. I, 20-32).

The trial court entered summary judgment on Counts I and III of plaintiffs' petition and held SB 739 invalid. (Vol. VII, 651-656, 662-667, 668-673; Vol. X, 988-989) (Appx. A13, A19, A25-26). Those decisions are not the basis of the present cross-appeal. Rather, the present cross-appeal involves the trial court's ruling on Count II of plaintiffs' petition, that the State Law does not violate Article

[1] Pursuant to Rule 84.04(j) of the Missouri Rules of Civil Procedure, the City, as cross-appellant, files the first brief.

III § 40 of the Missouri Constitution. (Supp. L.F. Vol. VI, 1, 5-6).[2]

Plaintiff City of St. Louis ("City") is a constitutional charter city. (L.F. Vol. I, 20; Vol. IV, 317, 320). Plaintiff Francis Slay is the mayor of the City of St. Louis, Missouri. (L.F. Vol. I, 21; Vol. IV, 320). Plaintiff Gadell is a City of St. Louis Civil Service employee subject to the residency requirements of the Charter of the City of St. Louis, Art. VIII, Section 2. (L.F. Vol. I, 21; Vol. IV, 322). Plaintiff John Clark is a duly appointed and acting member of the Civil Service Commission of the City of St. Louis. (L.F. Vol. I, 21; Vol. IV, 322). Defendant State of Missouri is a governmental entity organized pursuant to the terms and conditions of the Missouri Constitution. (L.F. Vol. I, 20; Vol. IV, 320). Plaintiffs Slay, Gadell, and Clark are not included in the classification of City employees established in the State Law. (L.F. Vol. I, 41-42; Vol. IV, 322) (Appx. A3-A4).

In Count II of plaintiffs' first amended petition, they sought to have the State Law declared invalid under three separate provisions of Article III § 40. (L.F. Vol. I, 25-29) (Appx. A32-A36). First, plaintiffs contended that the State Law was an unconstitutional local law under Article III § 40(21) because the State

[2] While a respondent generally cannot complain of an adverse ruling by the trial court in a direct appeal, this matter involves a cross-appeal. *See Building Owners and Managers Ass'n of Metropolitan St. Louis, Inc. v. City of St. Louis, MO*, 341 S.W.3d 143, 148 n. 4 (Mo. App. E.D. 2011). Should this Court affirm the trial court's ruling that the State Law is invalid, this cross-appeal may be moot.

Law regulates the affairs of the City by changing and circumventing its voter-approved charter requirements for municipal employment. (L.F. Vol. I, 26) (Appx. A33). Second, plaintiffs asserted the State Law was invalid under Article III § 40(28) on the basis that the State Law creates a special class of municipal employees who are accorded rights and privileges that are denied to all other City employees. (L.F. Vol. I, 26) (Appx. A33). Third, the plaintiffs challenged the constitutionality of the State Law under Article III § 40(30) because the State Law creates a special subclass of municipal employees of the City who are afforded rights and privileges that no other City employees enjoy and because the terms of the State Law are tailored to specifically apply to the City and employees assigned to its fire department. (L.F. Vol. I, 27-28) (Appx. A34-35).

In 1976, the citizens of the City of St. Louis adopted a requirement that all officers and permanent full time employees of the City of St. Louis must reside in the City of St. Louis. (L.F. Vol. I, 34) (Appx. A2). The Charter of the City of St. Louis ("Charter") has embodied this requirement since then. (L.F. Vol. I, 34) (Appx. A2).

The current Charter provides that only the Civil Service Commission of the City of St. Louis ("Civil Service Commission") may grant an exception to the residency requirement when an employee "occupies a position requiring a very high degree of specialized education or skill and when qualified candidates who are willing to fill said position and reside within the City of St. Louis are not reasonably available." (L.F. Vol. I, 34) (Appx. A2).

Defendant admits that under the Charter, residency within the City limits is a qualification for employment. (L.F. Vol. I, 34; Vol. II, 178) (Appx. A2, A42). In other words, a job qualification and requirement for City employment is that employees reside in the City of St. Louis within 120 days of their initial working test period. (L.F. Vol. I, 34; Vol. II, 178; Vol. IV, 378) (Appx. A2, A42). All of the City's permanent full-time Civil Service employees are subject to the Charter's residency requirement. (L.F. Vol. I, 34) (Appx. A2). Employees must remain City residents during the entire tenure of their employment. (L.F. Vol. I, 34) (Appx. A2).

In 2010, Defendant, through the Missouri General Assembly, approved and enacted the State Law. (L.F. Vol. I, 41-42; Vol. II, 177) (Appx. A3-A4, A41). (hereinafter referenced as the "State Law").

Senate Bill 739 provides:

> 1. As used in this section, "fire department" means any agency or organization that provides fire suppression and related activities, including but not limited to fire prevention, rescue, emergency medical services, hazardous material response, dispatching, or special operations to a population within a fixed and legally recorded geographical area.
>
> 2. No employee of a fire department who has worked for seven years for such department shall, as a condition of employment, be required to reside within a fixed and legally recorded geographical

> area of the fire department if the only public school district available to the employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five years of such employee's employment. Employees who have satisfied the seven-year requirement in this subsection and who choose to reside outside the geographical boundaries of the department shall reside within a one-hour response time. No charter school shall be deemed a public school for purposes of this section.
>
> 3. No employee of a fire department who has not resided in such fire department's fixed and legally recorded geographical area, or who has changed such employee's residency because of conditions described in subsection 2 of this section, shall as a condition of employment be required to reside within the fixed and legally recorded geographical area of the fire department if such school district subsequently becomes fully accredited.

(L.F. Vol. I, 41-42) (Appx. A3-A4).

The State Law took effect on August 28, 2010. (L.F. Vol. II, 177) (Appx. A5, A41).

Defendant admits that the intended effect of the State Law is to supersede the residency employment qualifications contained in the St. Louis Charter, as applied to fire department employees with seven or more years of experience.

(L.F. Vol. IV, 300). Defendant admits that the State Law creates an exception to the Charter's residency requirement that applies to certain employees, but not to others. (L.F. Vol. II, 178) (Appx. A42).

Defendant admits that the State Law creates a subclass of certain fire department employees of the City of St. Louis who are afforded rights and privileges that no other City employees enjoy. (L.F. Vol. II, 181) (Appx. A45). The State Law applies to all City fire department employees with seven or more years of service, regardless of whether they have school-aged children. (L.F. Vol. I, 41-42; Vol. IV, 302) (Appx. A3-A4).

Defendant admits that the State Law's terms and conditions have no current application to any fire department employees other than those employed by the City. (L.F Vol. II, 180) (Appx. A44). Defendant admits that the City of St. Louis School District's boundaries are identical to that of the City of St. Louis Fire Department. (L.F. Vol. II, 181) (Appx. A45). Of all local government entities in Missouri, defendant admits that only the City of St. Louis has the combination of a public school district that has been unaccredited or provisionally accredited in the last five years and a residency requirement for municipal employment. (L.F. Vol. II, 181) (Appx. A45).

Defendant admits that, with respect to employees who have worked at the City's fire department for seven years or more, the State Law eliminates the power and duty of the Civil Service Commission to determine whether waivers of the residency requirement may be granted to said employees. (L.F. Vol. II, 179)

(Appx. A43). Defendant admits that the Charter's residency requirement is a qualification of employment, that employment qualifications for municipal jobs are a matter of local concern, and that the State Law regulates some of the terms and conditions of employment for the City's fire department employees. (L.F. Vol. II, 178-180) (Appx. A42-A44).

Defendant admits that students residing in the City of St. Louis have the option of attending schools in other accredited public school districts in St. Louis County with tuition and transportation costs paid by the St. Louis Public School District, pursuant to RSMo. § 161.131. (L.F. Vol. II, 178) (Appx. A42).

The parties agree that as of November 20, 2010, the City employed a total of 3,901 full-time employees, all of whom are subject to the Charter's residency requirement as a condition of employment. (L.F. Vol. IV, 323). Included in this number are 817 full-time City employees assigned to the fire department who are all subject to the residency requirement, 643 of whom have seven or more years of service. (L.F. Vol. IV, 323).

First responders in local emergencies are firefighters, ambulance, and police personnel. (L.F. Vol. II, 305-306). Firefighters and ambulance service personnel, including paramedics and emergency medical technicians, are among City employees assigned to the Fire Department. (L.F. Vol. II, 303, 306).

Off duty firefighters understand that they may be called to duty in the event an emergency response is required. (L.F. Vol. II, 305-306). In most emergency situations, response time is an essential component of effective control and

management and the Fire Department consistently works to shorten emergency response times. (L.F. Vol. II, 306). Management and leadership are also essential to an effective emergency response. (L.F. Vol. II, 306). Response times will be lengthened and delayed if ranking, experienced firefighters require more time to respond. (L.F. Vol. II, 306). If all City firefighters with seven or more years of experience are permitted to live up to an hour away from the City, it will include all supervisory positions and will severely undermine the Fire Department's ability to assemble effective emergency response teams on short notice. (L.F. Vol. II, 306). Recently, the turnover rate for firefighters with six or more years of service has been less than one-half of one percent. (L.F. Vol. IV, 303-304).

Defendant moved for summary judgment on Count II of the plaintiffs' petition. (L.F. Vol. IV, 324-325) (Appx. A47-A48). In its suggestions in support of the motion for summary judgment, defendant only addressed one of the three constitutional provisions raised in plaintiffs' petition regarding Article III §40. (L.F. Vol. IV, 313-314) (Appx. A55-A56). Defendant asserted that the State Law was not a special law under Article III § 40(30) because it uses open-ended criteria and because the State Law could apply to other fire departments in the future. (L.F. Vol. IV, 313-314) (Appx. A55-A56).

Plaintiffs argued in their memorandum in opposition to the defendant's motion for summary judgment that defendant did not establish entitlement to judgment as a matter of law as to plaintiffs' "closed-end" claims and did not address the other claims raised in Count II of plaintiffs' petition, including

whether the State Law was an unconstitutional local law under a) Article III § 40(21) because the State Law regulates the affairs of the City by changing and circumventing its voter-approved charter requirements for municipal employment; or b) Article III § 40(28) because the State Law creates a special class of municipal employees who are accorded rights and privileges that are denied to all other City employees. (L.F. Vol. I, 25-29; Vol. IV, 370-373) (Appx. A32-A36).

On May 24, 2011 and in amended orders on August 17, 2011 and September 1, 2011, the trial court entered summary judgment in favor of defendant on Count II of plaintiffs' petition regarding Article III §40. (L.F. Vol. VII, 655, 666, 672-673). The trial court held that, "[w]hile it was clear that the City of St. Louis was the intended target of this legislation, there were others who were potentially affected by the same. Accordingly, it cannot be said that this is a special law." (L.F. Vol. VII, 655, 666, 672-673) (Appx. A13, A19, A25-26).

On November 10, 2011, the trial court entered final judgment in this case and noted that all issues had been disposed. (L.F. Vol. X, 989-989).

In none of its rulings did the trial court address the concerns raised in plaintiffs' opposition to defendant's motion for summary judgment regarding defendant's failure to address the remaining constitutional violations alleged in Count II of their second amended petition. (L.F. Vol. I, 25-29; Vol. VII 651-656, 662-667, 668-673; Vol. X, 988-989) (Appx. A13, A19, A25-26, A32-36).

On November 18, 2011, Defendant filed the instant appeal. (L.F. Vol. X, 1005). On December 16, 2011, the City filed a cross appeal. (Supp. L.F. Vol. I,1).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON COUNT II OF PLAINTIFFS' PETITION WITH REGARD TO ARTICLE III § 40(30) OF THE MISSOURI CONSTITUTION BECAUSE THE DEFENDANT FAILED TO PROVE, ON THE BASIS OF FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT:

A. THE STATE LAW IS A SPECIAL LAW WHERE A GENERAL LAW COULD BE MADE APPLICABLE BECAUSE THE STATE LAW IS TAILORED TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT;

B. DEFENDANT FAILED TO MEET ITS BURDEN OF DEMONSTRATING A SUBSTANTIAL JUSTIFICATION FOR THE SPECIAL LAW WITH RESPECT TO TAILORING THE STATE LAW TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT.

ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Harris v. Mo. Gaming Com'n, 869 S.W.2d 58 (Mo. banc 1994)

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. 2006)

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. banc 1997)

Missouri Constitution, Article III § 40(30)

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON COUNT II OF PLAINTIFFS' PETITION BECAUSE THE DEFENDANT FAILED TO PROVE, ON THE BASIS OF FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE DEFENDANT DID NOT PROPERLY MOVE FOR SUMMARY JUDGMENT ON ALL ISSUES ALLEGED IN COUNT II OF PLAINTIFFS' PETITION, INCLUDING:

A. WHETHER THE STATE LAW IS AN UNCONSTITUTIONAL LOCAL LAW THAT REGULATES THE AFFAIRS OF THE CITY BY CHANGING AND CIRCUMVENTING ITS VOTER-APPROVED CHARTER REQUIREMENTS FOR MUNICIPAL EMPLOYMENT IN VIOLATION OF ARTICLE III § 40(21) OF THE MISSOURI CONSTITUTION; AND

B. WHETHER THE STATE LAW IS AN UNCONSTITUTIONAL LOCAL AND SPECIAL LAW THAT CREATES A SPECIAL CLASS OF MUNICIPAL EMPLOYEES OF THE CITY WHO ARE ACCORDED RIGHTS AND PRIVILEGES THAT NO

OTHER CITY EMPLOYEES ENJOY AND THAT ARE DENIED TO ALL OTHER CITY EMPLOYEES IN VIOLATION OF ARTICLE III § 40(28) AND (30) OF THE MISSOURI CONSTITUTION.

ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Harris v. Mo. Gaming Com'n, 869 S.W.2d 58 (Mo. banc 1994)

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S.Ct. 1154 (1976)

Building Owners and Managers Association of Metropolitan St. Louis, Inc., v. City of St. Louis, 341 S.W. 3d 143 (Mo. App. E.D. 2011)

Missouri Constitution, Article III § 40(21)

Missouri Constitution, Article III § 40(28)

Missouri Constitution, Article III § 40(30)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON COUNT II OF PLAINTIFFS' PETITION WITH REGARD TO ARTICLE III § 40(30) OF THE MISSOURI CONSTITUTION BECAUSE THE DEFENDANT FAILED TO PROVE, ON THE BASIS OF FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT:

A. THE STATE LAW IS A SPECIAL LAW WHERE A GENERAL LAW COULD BE MADE APPLICABLE BECAUSE THE STATE LAW IS TAILORED TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT;

B. DEFENDANT FAILED TO MEET ITS BURDEN OF DEMONSTRATING A SUBSTANTIAL JUSTIFICATION FOR THE SPECIAL LAW WITH RESPECT TO TAILORING THE STATE LAW TO SPECIFICALLY APPLY TO THE CITY OF ST. LOUIS AND ITS FIRE DEPARTMENT.

Whether a statute is unconstitutional is a question of law requiring de novo review. *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. 2006).

Likewise, appellate review of summary judgment is *de novo. ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 376

(Mo. banc 1993). To be entitled to summary judgment, the moving party must prove, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.;* Mo.R.Civ.P. 74.04(c)(3). A "genuine issue" that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the "genuine issue" is real, not merely argumentative, imaginary, or frivolous. *ITT Commercial Fin. Corp.,* 854 S.W.2d at 382. This Court reviews the record in the light most favorable to the party against whom judgment was entered. *Id*. The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id*.

A. The state law is a special law that is tailored to specifically apply to the City of St. Louis and its fire department.

The Missouri Constitution has prohibited special legislation since 1875. *Jefferson County Fire Protection Districts Ass'n v. Blunt,* 205 S.W.3d 866, 869 (Mo. 2006). During the Missouri Constitutional Convention of 1875, there was "a unanimous desire to provide against special legislation." *Id.* citing 5 Debates of the Missouri Constitutional Convention.

The Missouri Constitution currently provides that "[t]he general assembly shall not pass any local or special law ... where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." Mo. Const. Art. III § 40(30) (Appx. A7).

A general law is a statute that relates to persons or things as a class. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006). Unlike a general law, a special law relates to particular persons or things of a class. *Id.* "A law may not include less than all who are similarly situated." *Wilson v. City of Waynesville,* 615 S.W.2d 640, 644 (Mo. App. S.D. 1981). "Thus, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply." *City of Springfield,* 203 S.W.3d at 184.

"Special legislation refers to statutes that apply to localities rather than to the state as a whole and statutes that benefit individuals rather than the general public." *Jefferson County Fire Protection Districts Ass'n,* 205 S.W.3d at 868. Facially special laws are those that are "based on close-ended characteristics, such as historical facts, geography, or constitutional status." *Id*. at 870. Such closed-ended legislation "typically singles out one or a few political subdivisions by permanent characteristics." *City of Springfield*, 203 S.W.3d at 184.

A facially special law is presumed to be unconstitutional. *Tillis v. City of Branson,* 945 S.W.2d 447, 448 (Mo. banc 1997). To overcome this presumption, the party defending a facially special law must demonstrate a substantial justification for the special treatment. *Harris v. Mo. Gaming Com'n,* 869 S.W.2d 58, 65 (Mo. banc 1994).

The State Law is limited to fire departments that require employees to "reside within a fixed and legally recorded geographical area of the fire

department if the only public school district available to the employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five years of such employee's employment." (L.F. Vol. I, 41) (Appx. A3). The State Law further narrows the applicability by removing charter schools from the definition of a public school. (L.F. Vol. I, 41) (Appx. A3). Thus, the State Law applies to only those limited localities that come within the purview of the statute rather than to the state as a whole.

There is no question that the State Law specifically targets the City of St. Louis and its Charter. Defendant admits that the intended effect of the State Law is to supersede the residency employment qualifications contained in the St. Louis Charter, as applied to fire department employees with seven or more years of experience. (L.F. Vol. IV, 300). The boundaries of the St. Louis Public School District are identical to the City's municipal boundaries. (L.F. Vol. I, 27; Vol. II, 181) (Appx. A34, A45). Although Charter schools operate in the city of St. Louis, the State Law excludes charter schools from consideration as to whether public schools have been "unaccredited or provisionally accredited" in the last five years. (L.F. Vol. I, 41; Vol. II, 178, 181) (Appx. A3, A42, A45).

Defendant admits that the State Law's terms and conditions have no current application to any fire department employees other than those employed by the City or to any other charter city in Missouri other than the City of St. Louis. (L.F Vol. II, 180-181) (Appx. A44-A45). Among all local government entities in

Missouri, only the City has the combination of a public school district that has been unaccredited or provisionally accredited in the last five years and a residency requirement for municipal employment. (L.F. Vol. II, 181) (Appx. A45). While plaintiffs admit that school accreditation decisions may change over time, the State acknowledges that the State Law targets the St. Louis charter. (L.F. Vol. IV, 300).

The State Law is a facially special law because it is based on close-ended characteristics. It is based on historical facts to the extent it only applies to public school districts that is or has been unaccredited or provisionally accredited in the last five years of the employee's employment. (L.F. Vol. I, 41) (Appx. A3).

It is also based on geography because it removes the requirement for fire department employees to reside "within a fixed and legally recorded geographical area of the fire department if the only public school district is a public school district that is or has been unaccredited or provisionally accredited…" (L.F. Vol. I, 41) (Appx. A3). In other words, the Special Law only applies to fire districts where there is only one school district and that school district is either unaccredited or provisionally accredited. The combination of only one public school district that operates within the jurisdiction of the St. Louis Fire Department is a permanent characteristic.

The State Law clearly benefits only fire department employees employed more than seven years. Defendant has not alleged that the State Law benefits the state as a whole or the general public as *Jefferson County Fire Protection Districts Ass'n* suggests. Defendant has not even alleged that the State Law benefits the

citizens of the City of St. Louis, the people who passed the requirement that all permanent employees reside in the City limits.

The trial court's determination that that State Law is not a special law on the basis that "there were others who were potentially affected by the same" is not outcome determinative because legislation may still be considered a special law if it singles out a few political subdivisions based on permanent characteristics. *City of Springfield*, 203 S.W.3d at 184. (L.F. Vol. VII, 655, 666, 672-673).

Therefore, the trial court erred when it determined that the State Law was not a special law under Article III, § 40 of the Missouri Constitution.

B. Defendant failed to meet its burden of demonstrating a substantial justification for the closed-ended classification with respect to tailoring the state law to specifically apply to the City of St. Louis and employees assigned to its fire department.

Attempts at changing the Charter of the City of St. Louis through legislation that violates of the Missouri Constitution are not new. In 1893, the State of Missouri clearly intended to change the Charter of the City of St. Louis as it pertained to the improvement of streets, a matter of local concern, through state legislation. *Murnane v. City of St. Louis*, 27 S.W. 711, 712 (Mo. 1894). This Court remarked that the state legislation appeared to be a general law at first glance. *Id.* at 713. However, "to make such a law general there must be some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class." *Id.* "A mere classification for the purpose of legislation,

without regard to such necessity, is simply special legislation of the most pernicious character, and is condemned by the constitution." *Id.* In other words, "there must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded." *Id.*

This Court held that the state's thinly veiled attempt at changing the Charter of the City of St. Louis was an impermissible special law both in operation and in its effect. *Id.* at 314. The state's intent to change the City's Charter deemed it a special law. *Id.* "Such legislation has been quite generally denounced as vicious, because special, both by our own court and others of last resort. *Id.* at 714.

Nearly 120 years later, the analysis remains largely the same. For the reasons discussed above, the State Law is "special on its face" and is therefore presumed unconstitutional for exceeding all of the limitations stated in Article III, Section 40(30). *Tillis*, 945 S.W.2d at 448.

Therefore, the State must demonstrate a substantial justification for the closed-ended classification if a state law is found to be "special on its face." *Id.* "[T]he mere existence of a rational or reasonable basis for the classification is insufficient." *Building Owners and Managers Association of Metropolitan St. Louis, Inc. v. City of St. Louis*, 341 S.W. 3d 143, 152 (Mo. App. E.D. 2011).

In defendant's reply in support of its motion for summary judgment, defendant proceeded on the basis that the State Law was not a special law, and therefore applied the rational basis test. (L.F. Vol. VII, 598-615). However,

because the State Law was a special law, defendant was required to prove a substantial justification for the law and not a rational basis.

No substantial justification exists for limiting the State Law only to fire department employees where "the only public school district available is a public school district available to the employee within such fire department's geographical area is a public school district that is or has been unaccredited or provisionally accredited…." (L.F. 41) (Appx. A3). If quality of public education is the goal, then the legislature should have taken into account charter schools and the provisions RSMo. § 161.131, which gives City of St. Louis students the option to attend accredited public school districts in St. Louis County with tuition and transportation costs paid by the St. Louis Public School District. (L.F. Vol. II, 178; Vol. IV, 359; Vol. VII, 602-603) (Appx. A42). Furthermore, although the State Law purports to deal with quality public education, it applies equally to all fire department employees that fall within the statute regardless of whether they have school-aged children. (L.F. Vol. IV, 302; Vol. VII, 606).

Finally, there is no substantial justification to permit fire department employees to live up to an hour away from the City limits. Fire department employees, by the nature of their occupation, must be available in emergencies and for disaster response. (L.F. Vol. IV, 305-306).

Based on the composition of the City's fire department personnel existing at the time the trial court proceedings were held, the State Law would permit more than seventy eight percent of the City's fire department employees to move an

hour away from the City limits. (L.F. Vol. IV, 379) (817 full-time employees assigned to the City's fire department, of whom 643 have seven or more years of service as of November 20, 2010).

Therefore, because defendant failed to meet its burden of demonstrating a substantial justification, the trial court erred in granting summary judgment in defendant's favor.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON COUNT II OF PLAINTIFFS' PETITION BECAUSE THE DEFENDANT FAILED TO PROVE, ON THE BASIS OF FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE, A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE DEFENDANT DID NOT PROPERLY MOVE FOR SUMMARY JUDGMENT ON ALL ISSUES ALLEGED IN COUNT II OF PLAINTIFFS' PETITION, INCLUDING:

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B. WHETHER THE STATE LAW IS AN UNCONSTITUTIONAL LOCAL AND SPECIAL LAW THAT CREATES A SPECIAL CLASS OF MUNICIPAL EMPLOYEES OF THE CITY WHO ARE ACCORDED RIGHTS AND PRIVILEGES THAT NO OTHER CITY EMPLOYEES ENJOY AND THAT ARE DENIED TO ALL OTHER CITY EMPLOYEES IN VIOLATION OF ARTICLE III § 40(28) AND (30) OF THE

MISSOURI CONSTITUTION.

As detailed above, whether a statute is unconstitutional and appellate review of summary judgment are questions of law requiring de novo review. *Weinschenk*, 203 S.W.3d at 210; *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. To be entitled to summary judgment, the moving party must prove, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

Rule 74.04 of the Missouri Rules of Civil Procedure allows parties to move for summary judgment as to "all or any part of the pending issues." *See Hutto By and Through Hutto v. Rogers*, 920 S.W.2d 112, 116 (Mo. App. E.D. 1996); Rule 74.04(b).

In *Hutto By and Through Hutto v. Rogers*, the defendants' motion for summary judgment made a general request for summary judgment without specifying that the motion applied to one or both counts of plaintiff's petition. *Hutto By and Through Hutto*, 920 S.W.2d at 116. Although the defendants' motion appeared to move for summary judgment on all pending issues, the allegations at issue only related to Count I of plaintiff's petition. *Id.* Citing *Williams v. Mercantile Bank of St. Louis*, 845 S.W.2d 78, 82 (Mo. App. 1993), the court of appeals noted that "[i]n order for a trial court to grant summary judgment, it must normally have a motion for summary judgment before it." *Id.* Because the defendants did not state the requisite material facts relevant to Count II, defendants did not properly raise Count II in their motion for summary judgment.

Id. Therefore, the court of appeals held that the trial court erred in granting summary judgment on Count II of plaintiff's petition. *Id.*

Here, the trial court erred in granting summary judgment on Count II of plaintiffs' petition because defendant failed to establish that they were entitled to judgment as a matter of law on all issues raised in Count II of plaintiffs' first amended petition. Rule 74.04(c)(3); *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. Although defendant's motion for summary judgment purports to seek summary judgment on each count of plaintiffs' petition, defendant's suggestions in support of its motion for summary judgment only addressed one of the four grounds for relief asserted in Count II of plaintiffs' petition involving Article III §40. (L.F. Vol. I, 25-29; Vol. IV, 313-314, 324-325) (Appx. A32-A36, A47-A48, A55-A56).

To be exact, the defendant only asserted that the State Law was not a special law because it uses open-ended criteria and because the State Law could apply to other fire departments in the future. (Vol. IV, 313-314) (A55-A56). In other words, the defendant's argument and cases cited only dealt with Article III § 40(30) and special laws but not local laws or Article III §§ 40(21) or (28) or plaintiffs' other Article III § 40(30) claim regarding the creation of an impermissible subclass based on closed-ended criteria.

Therefore, defendant's motion for summary judgment was only a partial motion for summary judgment under Rule 74.04(a) of the Missouri Rules of Civil Procedure.

The plaintiffs brought up the issue that defendant did not address all of the issues raised in Count II of their petition in their memorandum in opposition to defendant's cross motion for summary judgment and set forth the reasons why the prohibitions contained in Article III §§ 40(21), (28), and (30) prohibit the State Law. (L.F. Vol. IV, 370-373).

Similar to *Hutto By and Through Hutto*, the trial court did not have a motion for summary judgment on all of the pending issues related to Count II of plaintiffs' petition before it. The only issue defendant presented to the trial court involved the plaintiffs' claim that the State Law violated Article III § 40(30) because the State Law was tailored to specifically apply to the City and employees assigned to its fire department. (L.F. Vol. IV, 324-325; 307-316) (Appx. A47-A48, A49-A58).

As in *Hutto By and Through Hutto*, the trial court here erred in granting summary judgment on all of Count II of plaintiffs' petition when only part of Count II was addressed in defendant's motion for summary judgment. Because defendant did not establish that it was entitled to judgment as a matter of law on all of the issues raised in Count II of plaintiffs' petition, the trial court should not have entered summary judgment in favor of defendant on all of Count II.

Even if the defendant's motion for summary judgment could be construed as a motion for summary judgment on all of the issues raised in Count II of plaintiffs' petition, defendant failed to properly move for summary judgment because it failed to address the requirement that defendant must show it is entitled

to judgment as a matter of law on all of these issues.

A. Defendant failed to address the requirement that it was entitled to judgment as a matter of law on plaintiffs' Count II allegation that the state law is an unconstitutional local law that regulates the affairs of the city by changing and circumventing its voter-approved charter requirements for municipal employment in violation of Article III § 40(21) of the Missouri constitution.

The Missouri Constitution prohibits the General Assembly from passing any local law that prescribes "the powers and duties of officers in, or regulating the affairs of…cities…" Article III § 40 (21) (Appx. A7).

Residency requirements such as that contained in the Charter have long been upheld. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S.Ct. 1154 (1976).

For more than thirty five years, City voters have required City employees to live within the limits of their city. (L.F. Vol. I, 34) (Appx. A2). This requirement applies equally to all permanent city employees. (L.F. Vol. I, 34) (Appx. A2).

Defendant admits that the Charter establishes a residency requirement as a qualification of employment, that employment qualifications for municipal jobs are a matter of local concern, and that the State Law regulates some of the terms and conditions of employment for the City's fire department employees. (L.F. Vol. II, 178-180) (Appx. A42-A44). Defendant also admits that the State Law creates an exception to the Charter's residency requirement that applies to certain

employees, but not to others. (L.F. Vol. II, 178) (Appx. A42).

There is no question that the State Law is an unconstitutional attempt to regulate the affairs of the City contrary to Article III § 40(21) of the Missouri Constitution by eliminating the Charter's residency requirement for fire department employees employed by the City for more than seven years. In fact, there is no dispute that the State enacted the State Law for the intended effect of superseding the voter-approved residency requirement set forth in the City's Charter. (L.F. Vol. IV, 300).

Plaintiffs alleged in Count II of petition that the State Law was an unconstitutional local law under Article III § 40(21) because the State Law regulates the affairs of the City by changing and circumventing its voter-approved charter requirements for municipal employment. (L.F. Vol. I, 26) (Appx. A33). Despite this contention, defendant failed to prove that it is entitled to judgment as a matter of law on this issue in its motion for summary judgment. Likewise, the trial court failed to address Article III § 40(21). Therefore, summary judgment was not proper.

In addition, the State Law unconstitutionally prescribes the powers and duties of City officers under Article III § 40(21) because the State Law seeks to limit the powers and duties of the Civil Service Commission by changing the Charter. The Charter vests the Civil Service Commission with authority to grant waivers in extremely narrow and limited circumstances: only if an employee occupies a very high degree of specialized education or skill and when candidates

who are willing to reside in the City are not reasonably available. (L.F. Vol. I, 34) (Appx. A2). However, as defendant admits, the State Law eliminates the powers and duties of the Civil Service Commission to determine whether waivers of the residency requirement may be granted to employees who have worked at the City's fire department for seven years or more. (L.F. Vol. II, 179) (Appx. A43).

The State Law is nothing more than an unconstitutional attempt to subvert the will of City voters. By changing the Charter's residency requirement, the State Law interferes with the City's power to require its employees to reside within the City. Thus, the State Law is a clear attempt by the state to regulate the affairs of the City and to limit the powers and duties of the Civil Service Commission. Therefore, it is unconstitutional under Article III § 40(21).

For these reasons, not only did defendant fail to establish it was entitled to judgment as a matter of law, it is also clear that defendant was not entitled to judgment as a matter of law based on the undisputed material facts. Therefore, the trial court erred in entering summary in its favor. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

B. Defendant failed to prove that it was entitled to judgment as a matter of law on plaintiffs' allegation in Count II of their petition that the state law is an unconstitutional local and special law that creates a special class of municipal employees of the city who are accorded rights and privileges that no other city employees enjoy and that are denied to all other city employees

in violation of Article III § 40(28) and (30) of the Missouri constitution.

The General Assembly is forbidden from passing a local or special law "where a general law can be made applicable." Article III § 40(30). The General Assembly is also prohibited from passing any local or special law "granting to any corporation, association or individual any special or exclusive right, privilege, or immunity…" Article III § 40(28) (Appx. A7).

A general law is a statute that relates to persons or things as a class, whereas a special law relates to particular persons or things of a class. *City of Springfield*, 203 S.W.3d 177 at 184. "A law may not include less than all who are similarly situated." *Wilson*, 615 S.W.2d at 644. "Thus, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply." *City of Springfield*, 203 S.W.3d at 184.

A facially special law is presumed to be unconstitutional. *Tillis*, 945 S.W.2d at 448. A law is facially special if it is based on close-ended characteristics. *Building Owners and Managers Association of Metropolitan St. Louis, Inc.*, 341 S.W. 3d at 151. To overcome the presumption of unconstitutionality, the party defending a facially special law must demonstrate a "substantial justification" for the special treatment. *Harris*, 869 S.W.2d at 65.

The Missouri Court of Appeals for the Eastern District of Missouri determined that a City of St. Louis ordinance that only applied to a subgroup of building service workers was an unconstitutional special law. *Building Owners*

and Managers Association of Metropolitan St. Louis, Inc., 341 S.W. 3d at 152. The court determined that the law was facially special because the ordinance protected a certain narrow class of employees but excluded others who were similarly situated. *Id.* at 151. The court then looked at whether the defendant satisfied its burden of proving a substantial justification for the special treatment of the limited class of persons. *Id.* "In order to meet this standard, the mere existence of a rational or reasonable basis for the classification is insufficient." *Id.* at 152.

1. Defendant failed to prove entitlement to judgment as a matter of law on plaintiffs' allegation that the State Law is a special law that violates Article III § 40(28) and (30) of the Missouri constitution.

In plaintiffs' petition, they allege the state law is a special law because it creates a special subclass of municipal employees of the City who are afforded rights and privileges that no other City employees enjoy in violation of Article III § 40(30) of the Missouri Constitution. (L.F. Vol. I, 27) (Appx. 34). Similarly, the plaintiffs allege the State Law violates Article III §40(28) because it creates a special class of municipal employees who are accorded rights and privileges that are denied to all other City employees. (L.F. Vol. I, 26) (Appx. A33).

In other words, the State Law is a special law because it relates to particular persons or things of a class. Because it only applies to City of St. Louis Fire Department employees, it includes less than all who are similarly situated. The State Law further restricts the subclass because it targets only fire department

employees employed more than seven years, while excluding all other fire fighters and all other permanent civil service employees. (L.F. Vol. IV, 178) (Appx. A42).

Defendant admits that the State Law creates a subclass of municipal employees of the City of St. Louis who are afforded rights and privileges that no other City employees enjoy. (L.F. Vol. II, 181) (Appx. A45). This admission alone is sufficient to trigger the determination that the State Law is a special law.

In addition, defendant admits that the State Law creates an exception to the Charter's residency requirement that applies to certain employees, but not to others. (L.F. Vol. II, 178) (Appx. A42). Defendant also admits that the State Law grants special rights and privileges to City fire department employees that other City employees do not enjoy. (L.F. Vol. II, 180) (Appx. A44).

Like *Building Owners and Managers Association of Metropolitan St. Louis, Inc.*, the State Law is facially special because the applicable sub-class is based on close-ended characteristics; namely, fire department employees who are employed more than seven years. (L.F. Vol. I, 41; Vol. II, 178) (Appx. A3, A42).

Furthermore, although all other permanent City employees and fire department employees are subject to dismissal for violation of the Charter's residency requirement, the state law grants this special class of employees immunity from dismissal in the event they move outside of the City. (L.F. Vol. I, 41-42) (Appx. A3-A4).

Therefore, it is clear that the State Law is a special local law that violates Article III § 40(28) and (30) of the Missouri constitution. Defendant did not

address any of these contentions in its motion for summary judgment. (L.F. Vol. IV, 307-316, 324-325, L.F. Vol. VII, 611-612) (Appx. A47-A48, A49-A58). Nor did the trial court consider this issue when entering summary judgment in defendant's favor on Count II of plaintiffs' petition. (L.F. Vol. VII 655, 666, 672-673). For these reasons, the trial court erred in entering summary judgment in favor of defendant on Count II of plaintiffs' petition.

2. Defendant failed to prove entitlement to judgment as a matter of law because defendant failed to prove substantial justification for the State Law.

Because, as defendant admits, the State Law creates a subclass of municipal employees of the City of St. Louis who are afforded rights and privileges that no other City employees enjoy, it is facially special and is presumed to be unconstitutional. (L.F. Vol. II, 181) (Appx. A45). Because the law is facially special, defendant was required to demonstrate a substantial justification for the closed-ended classification in order to be entitled to judgment as a matter of law. *Harris*, 869 S.W.2d at 65.

However, defendant has failed to identify substantial justification for limiting the residency exemption to fewer than all permanent City employees or limiting the applicability of this statute only to fire department employees employed for seven years.

Therefore, the trial court erred in granting summary judgment on Count II of plaintiffs' petition. Clearly, summary judgment was not proper because

defendant did not establish that it was entitled to judgment as a matter of law. Mo.R.Civ.P. 74.04(c)(3); *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d at 376. Because defendant never addressed this requirement in their motion for summary judgment, the trial court erred in granting summary judgment in favor of defendant on Count II of plaintiffs' petition.

CONCLUSION

In conclusion, the trial court's determination that "while it is clear that the City of St. Louis is the intended target of this legislation, there are others who could potentially be affected by the same" was effectively a holding that the State Law was not a "special law" on the sole basis of Article III § 40(30). The trial court erred in determining the State Law was not a special law. Furthermore, because defendant never addressed plaintiffs' claims in Count II of their petition involving Article III §§ 40(21), (28) or plaintiffs' claims that the State Law creates a special subclass of municipal employees in violation of Article III § 40(30), it was improper for the court to enter summary judgment on all of Count II solely on the basis of Article III § 40(30). For the foregoing reasons, this cause should be reversed and remanded to the circuit court for consideration of the remaining issues in Count II of plaintiffs' petition if this Court finds in favor of the defendant on defendant's appeal.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Brief of Respondents/Cross-Appellant/Plaintiffs was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 8,631words of text. It has been scanned and found to be virus-free. The name, address, bar, and telephone number of counsel for Appellant is stated herein and the Brief has been signed by the attorney of record.

/s/ Christine Hodzic
Assistant City Counselor

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served by operation of the Court's electronic filing system, this 3rd day of April 2012, upon all attorneys of record to this proceeding:

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