IN THE
SUPREME COURT OF MISSOURI

No. SC91454

MIKE WEBER, et al.,

Appellants,

v.

ST. LOUIS COUNTY, MISSOURI, et al.,

Respondents.

SUBSTITUE BRIEF OF APPELLANTS

SUBMITTED BY

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2. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE AMENDED PETITION CORRECTLY AND COMPLETELY PLED THAT ST. LOUIS COUNTY'S ORDINANCES AND DEFENDANTS' AGREEMENTS AND ACTIONS ESTABLISHING TRASH DISTRICTS WERE IN DIRECT VIOLATION OF §260.247 R.S.MO. AND VOID AB INITIO, IN THAT §260.247 REQUIRES A COUNTY TO GIVE TWO YEARS' CERTIFIED MAIL NOTICE BEFORE ST. LOUIS COUNTY'S TRASH DISTRICTS GO INTO OPERATION AND DISPLACE PREEXISTING TRASH HAULERS, AND ST. LOUIS COUNTY PURPORTED TO ESTABLISH TRASH DISTRICTS BUT NEVER GAVE ANY CERTIFIED MAIL NOTICE.

3. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' AMENDED PETITION BECAUSE MISSOURI TAX PAYING CITIZENS SUBJECT TO A VOID COUNTY ORDINANCE HAVE STANDING TO CHALLENGE THE LEGALITY OF THE VOID COUNTY ORDINANCE, IN THAT:

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE RESIDENTS OF AN ILLEGAL MONOPOLY TRASH DISTRICT REQUIRED BY A VOID ORDINANCE TO ACCEPT

MONOPOLY TRASH SERVICE AND PAY THE SET SERVICE CHARGE OR FACE CRIMINAL PROSECUTION;

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE COUNTY TAXPAYERS WHOSE TAXES WERE USED TO DESIGN THE ILLEGAL MONOPOLY TRASH DISTRICT SCHEME, WHOSE TAXES WERE USED TO CARRY OUT THE ILLEGAL COUNTY MONOPOLY TRASH DISTRICT SCHEME, AND WHOSE TAXES WERE USED ILLEGALLY TO ENFORCE AND PROSECUTE INNOCENT COUNTY CITIZENS FOR VIOLATING THE VOID COUNTY TRASH DISTRICT ORDINANCES; PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD A RIGHT TO VOTE ON THE ST. LOUIS COUNTY MONOPOLY TRASH DISTRICT SCHEME ACCORDING TO ARTICLE 2, SECTION 24, OF THE ST. LOUIS COUNTY CHARTER BUT WERE NEVER ALLOWED TO VOTE ON THE COUNTY MONOPOLY TRASH DISTRICT ORDINANCES AND SCHEME; AND

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD EACH PAID SUMS MANDATED BY THE ILLEGAL MONOPOLY TRASH ORDINANCE AND SCHEME TO THE COUNTY-SELECTED MONOPOLY TRASH REMOVER.

4. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE LACHES WAS NOT SHOWN TO APPLY BY THE ALLEGATIONS OF THE AMENDED PETITION AND LACHES IS ONLY A DEFENSE TO EQUITABLE CLAIMS IN THAT THE ALLEGATIONS OF AMENDED PETITION DO NOT SHOW ANY ELEMENTS OF LACHES BEING SATISFIED AND IN THAT PLAINTIFFS DID NOT BRING ANY EQUITABLE CLAIM IN THIS ACTION.

5. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE CLAIMS OF PLAINTIFFS WERE NOT MOOT IN THAT THE TRIAL COURT HAD THE POWER AND AUTHORITY TO DECLARE THE TRASH DISTRICTS AND ORDINANCES VOID AND TO ORDER THE RETURN OF MONEY PAID BY PLAINTIFFS PURSUANT TO THE VOID TRASH DISTRICTS ORDINANCES.

6. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE ILLEGAL GOVERNMENT EXACTIONS ARE RIGHTFULLY RECOVERABLE UNDER THE CAUSES OF ACTION OF MONEY HAD AND RECEIVED OR UNJUST ENRICHMENT IN THAT

PLAINTIFFS PROPERLY PLED AND WERE PREPARED TO PROVE THAT DEFENDANTS, BY OBTAINING MONOPOLY PAYMENTS PURSUANT TO VOID AB INITIO TRASH DISTRICT ORDINANCES AND SCHEME, HAD BEEN UNJURSTLY ENRICHED AND HAD RECEIVED MONEY THAT IN EQUITY AND GOOD CONSCIENCE SHOULD BE RETURNED TO PLAINTIFFS AND THEIR NEIGHBORS.

7. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE A CLAIM, THE MERCHANDISING PRACTICES ACT, IMPOSES LIABILITY FOR DECEPTIVE AND UNFAIR PRACTICES IN THAT PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT DEFENDANTS' FALSE STATEMENTS ABOUT THE LEGALITY OF THE TRASH ORDINANCES AND ABOUT NO NEED FOR A VOTE AND THE UNFAIR PRACTICE OF IMPOSING MONOPOLY TRASH SERVICE AND CRIMINALLY PROSECUTING NONPAYMENT FOR SUCH ILLEGAL MONOPOLY TRASH SERVICE ARE ALL DECEPTIVE AND UNFAIR PRACTICES ACTIONABLE UNDER THE MERCHANDISING PRACTICES ACT.

8. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY WHEN THE PAYOR PAYS UNDER DURESS, NOR DOES THE DOCTRINE APPLY TO CLAIMS UNDER THE MERCHANDISING PRACTICES ACT IN THAT PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THE THREAT, AND ACTUAL, CRIMINAL PROSECUTIONS FOR NONPAYMENT CONSTITUTED ACUTE AND LEGAL DURESS, AN EXCEPTION TO THE VOLUNTARY PAYMENT DOCTRINE.

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JURISIDICTIONAL STATEMENT

On September 11, 2009, Plaintiffs Paul Marquis and Cathy Armbruster filed their petition in the St. Louis County Circuit Court. (L.F. page 1). Marquis and Armbruster correctly contended and pled that St. Louis County's monopoly trash district ordinances and scheme were void ab initio because §260.247 R.S.Mo. required St. Louis County to give two years certified mail notice before the monopoly trash districts could go into effect but St. Louis County had the monopoly trash districts go into effect without any certified mail notice, and because Article 2, Section 24, of the St. Louis County Charter expressly required an approving election before St. Louis County could impose or enact trash districts and no approving election was ever held. (L.F. page 29).

Defendants filed motions to dismiss. (L.F. pages 6, 7).

Before the motions to dismiss were heard and decided, the trial court granted Plaintiffs leave to file their amended petition and the motions to dismiss were considered against the amended petition. (L.F. page 346).

On January 5, 2010, the trial court erroneously dismissed with prejudice Plaintiffs' amended petition. (L.F. page 352). The trial court did not give any grounds, explanation, or reason for the complete dismissal. (L.F. page 352).

On January 11, 2010, Plaintiffs timely filed their notice of appeal to the Missouri Court of Appeals. (L.F. pages 353-63).

The Court of Appeals found that the Appellants had taxpayer standing to challenge the validity of St. Louis County's trash district scheme in relation to St. Louis County Charter Article 2.180.24. The Court of Appeals, however, held that the Appellants did not have taxpayer standing to challenge the validity of St. Louis County's trash district scheme in relation to §260.247. The Court of Appeals also found that the Appellants could not obtain the return of monies paid under duress to the illegally appointed monopoly trash hauling providers.

Appellants filed their motion for rehearing and/or transfer to the Missouri Supreme Court with the Court of Appeals on November 30, 2010. The motions were denied by the Court of Appeals denied on December 28, 2010.

Appellants filed their application for transfer with the Supreme Court of Missouri on January 12 , 2011. The application for transfer was granted by the Supreme Court of Missouri on March 1, 2011.

STATEMENT OF FACTS

As this case was dismissed, the allegations of the amended petition will be set forth as true.

Article 2 Section 24, of the St. Louis County Charter reads as follows:

> Provide for the creation of districts in the unincorporated areas of the county within which may be provided police protection, fire protection, public water supply, streets, sidewalks, street lighting sewers, sewage disposal facilities, garbage and refuse collection and disposal, and such other kindred facilities as the voters therein by a majority of those voting may approve, the same to be paid for from funds raised by special assessment, general taxation or service charge, or any combination thereof within such districts; and, when authorized by law, provide for the consolidation of such functions with those now performed in existing districts.

St. Louis County Charter Article 2, Section 24. (L.F. pages 25-26).

On or about December 12, 2006, St. Louis County purported to enact ordinance 23,023 by which St. Louis County would enter into the trash collection business in unincorporated St. Louis County, and St. Louis County would establish trash districts in unincorporated St. Louis County. (L.F. pages 41-147). A true and

accurate copy of St. Louis County Ordinance 23,023 was denoted “Exhibit #1” and was attached to the petition and amended petition.

On or about May 29, 2007, St. Louis County purported to enact ordinance 23,221 by which St. Louis County would enter into the trash collection business in unincorporated St. Louis County, and St. Louis County would establish trash districts in unincorporated St. Louis County. (L.F. pages 148-279). A true and accurate copy of St. Louis County Ordinance 23,221 was denoted “Exhibit #2” and was attached to the petition and amended petition.

On or about November 24, 2008, St. Louis County purported to enact ordinance 23,795 by which St. Louis County would enter into the trash collection business in unincorporated St. Louis County, and St. Louis County would establish trash districts in unincorporated St. Louis County. (L.F. pages 280-84). St. Louis County would select monopoly providers for each trash district, St. Louis County would exclude others from providing trash service in each district. (L.F. page 281). St. Louis County requires almost every person in a trash district to deal and pay the monopoly trash provided. (L.F. page 282). St. Louis County made a crime with a sentence of up to one year in jail and a fine of up to $1,000.00 for any person who did not pay the required trash service fee or to anyone who provided trash collection services in a district other than the selected monopoly provider.

(L.F. page 283). A true and accurate copy of St. Louis County Ordinance 23,795 was denoted "Exhibit #3" and was attached to the petition and amended petition.

St. Louis County established trash districts in unincorporated St. Louis County and designated the trash districts 1-8. (L.F. page 285).

St. Louis County published the "Waste Collection Districts" Map which was denoted "Exhibit 4" and attached to the petition and amended petition.(L.F. pages 28, 285).It has repeatedly admitted and stated that it has established trash districts. (L.F. pages 28, 285, 291). A true and accurate copy of the St. Louis County publication on Frequently Asked Questions was denoted "Exhibit 5" and was attached to the petition and amended petition. (L.F. pages 291-97).

During June and July, 2008, Defendant IESI MO Corporation contracted with St. Louis County to be the selected monopoly trash provider for trash districts 1, 2, and 8. (L.F. pages 298-305, 328-31). True and accurate copies of IESI contracts were denoted "Exhibits 6, 7, and 13" and were attached to the petition and amended petition. (L.F. pages 298-305, 328-31).

During April toJuly, 2008, Defendant Veolia ES Solid Waste Midwest, LLC, contracted with St. Louis County to be the selected monopoly trash provider for trash districts 3, 4, and 7. (L.F. pages 306-13, 323-27).True and accurate copies of Veolia contracts were denoted "Exhibits 8, 9, and 12" and were attached to the petition and amended petition. (L.F. pages 306-13, 323-27).

During July and August, 2008, Defendant Allied Services, LLC, contracted with St. Louis County to be the selected monopoly trash provider for trash districts 5 & 6. (L.F. pages 314-322). True and accurate copies of Allied contracts were denoted "Exhibits 10 & 11" and were attached to the petition and amended petition. (L.F. pages 314-22).

On October 21, 2008, the Missouri Court of Appeals for the Eastern District of Missouri ruled that St. Louis County and its monopoly trash district scheme were subject to §260.247 R.S.Mo. and St. Louis County was required to give two years certified mail notice to the preexisting trash haulers within the monopoly trash districts before St. Louis County's trash district ordinances and scheme went into effect.State ex rel. American Eagle Waste Indus.v. St. Louis County, 272 S.W.3d 336 (Mo. App. 2008).

St. Louis County and Defendants ignored §260.247 R.S.Mo. and ignored the Court of Appeals's decision inAmerican Eagle Waste Indus.v. St. Louis County.(L.F. pages 28, 29).St. Louis County never gave any certified mail notice to anyone and St. Louis County and Defendants went ahead with their trash district ordinances and scheme without obeying §260.247 R.S.Mo. (L.F. pages 28, 29).

St. Louis County ignored Article 2, Section 24, of its charter and no election approving the imposition of trash districts was ever held. (L.F. page 29). St. Louis County never held any election on trash districts and St. Louis County and

Defendants went ahead with their trash district ordinances and scheme without obeying St. Louis County Charter Article 2 Section 24. (L.F. page 29).

On September 11, 2009, Plaintiffs Paul Marquis and Cathy Armbruster filed their petition in four counts declaratory judgment, money had and received, theMerchandising Practices Act, §§ 407.010, R.S.Mo., et seq.,and unjust enrichment.(L.F. pages 1, 24-40). Plaintiffs correctly challenged Defendants' trash ordinances, actions, and scheme as void ab initio because the trash districts, ordinances, and scheme violated §260.247 R.S.Mo. and Article 2, Section 24, of the St. Louis County Charter. (L.F. page 29). Plaintiffs properly prayed that the trash districts, ordinances, and scheme be declared void ab initio and that all service charges collected by Defendants be returned to the payors. (L.F. pages 36-39). Plaintiffs sought class action status. (L.F. pages 32-34).

Plaintiff Paul Marquis is a taxpaying St. Louis County citizen who lives within trash district 4 and was forced to contract and pay Defendant Veolia. (L.F. pages 24, 28).

Plaintiff Cathy Armbruster is a taxpaying St. Louis County citizen who lives within trash district 6 and was forced to contract and pay Defendant Allied. (L.F. 25, 28).

In response to the petition, Defendants filed motions to dismiss. (L.F. pages 3, 9-23, 347-51).

Plaintiffs filed an amended petition and the trial court allowed the amendment before the motion hearing and the motions to dismiss were considered against the amended petition. (L.F. pages 24-40, 346).

The amended petition made more overt the Plaintiffs' taxpayer standing, corrected some minor typographical errors, and added Plaintiff Mike Weber.(L.F. pages 24-40). He is a taxpaying St. Louis County citizen who lives within trash district 8 and was forced to contract and pay Defendant IESI. (L.F. pages 24, 28).

Defendants' trash district ordinances make it a crime, punishable by a fine up to $1,000.00 and imprisonment of up to a year, for not contracting with or paying the selected monopoly service provider for the particular trash district. (L.F. pages 27-30). St. Louis County has been prosecuting its own citizens for not obeying its void trash ordinances. (L.F. page 30). If residentsfall behind on their trash bill, the Defendant monopoly hauler turns them in to St. Louis County, and St. Louis County criminally prosecutes its own citizens for not obeying its void ordinances. (L.F. page 30).

The motions to dismiss were argued on December 11, 2009. (L.F. pages 4, 346).

The motions to dismiss were granted, on January 5, 2010, completely dismissing with prejudice all of Plaintiffs' claims and causes of action.(L.F. pages 4, 352).The trial court gave no explanation for its ruling. (L.F. page 355).

Plaintiffs filed their notice of appeal on January 11, 2010. (L.F. pages 4, 353-63).

The Court of Appeals found that the Appellants had taxpayer standing to challenge the validity of St. Louis County's trash district scheme in relation to St. Louis County Charter Article 2.180.24. The Court of Appeals, however, held that the Appellants lacked taxpayer standing to challenge the validity of St. Louis County's trash district scheme in relation to §260.247. Italso found that the Appellants could not obtain the return of monies paid under duress to the illegally appointed monopoly trash hauling providers.

Appellants filed their motion for rehearing and/or transfer to the Missouri Supreme Court with the Court of Appeals on November 30, 2010. The motions were denied by the Court of Appeals on December 28, 2010.

Appellants applied for transfer with the Supreme Court of Missouri on January 12, 2011. The application for transfer was granted by the Supreme Court of Missouri on March 1, 2011.

POINTS RELIED ON

1. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE AMENDED PETITION CORRECTLY AND COMPLETELY PLED THAT ST. LOUIS COUNTY'S ORDINANCES AND DEFENDANTS' AGREEMENTS AND ACTIONS ESTABLISHING TRASH DISTRICTS WITHOUT AN ELECTION WERE IN DIRECT VIOLATION OF ST. LOUIS COUNTY CHARTER ARTICLE 2, SECTION 24, WHICH REQUIRES AN ELECTION BEFORE ST. LOUIS COUNTY CAN ESTABLISH TRASH DISTRICTS, IN THAT A COUNTY MUST OBEY ITS CHARTER AND ST. LOUIS COUNTY'S CHARTER EXPRESSLY REQUIRES AN APPROVING ELECTION BEFORE TRASH DISTRICTS MAY BE ESTABLISHED, AND ST. LOUIS COUNTY NEVER HELD ANY APPROVING ELECTION.

Schmoll v. Housing Authority of St. Louis County, 321 S.W.2d 494, 498, 499(Mo. 1959).

Barber v. Jackson County Ethics Comm'n, 935 S.W.2d 62, 67 (Mo. Ct. 1996).

State ex rel. St. Louis County v. Campbell, 498 S.W.2d 833, 836 (Mo. App. 1973).

Lancaster v. County of Atchison, 180 S.W.2d 706, 708 (Mo. banc 1944).

2. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE AMENDED PETITION CORRECTLY AND COMPLETELY PLED THAT ST. LOUIS COUNTY'S ORDINANCES AND DEFENDANTS' AGREEMENTS AND ACTIONS ESTABLISHING TRASH DISTRICTS WERE IN DIRECT VIOLATION OF § 260.247 R.S.MO. AND VOID AB INITIO, IN THAT § 260.247 REQUIRES A COUNTY TO GIVE TWO YEARS' CERTIFIED MAIL NOTICE BEFORE ST. LOUIS COUNTY'S TRASH DISTRICTS GO INTO OPERATION AND DISPLACE PREEXISTING TRASH HAULERS, AND ST. LOUIS COUNTY PURPORTED TO ESTABLISH TRASH DISTRICTS BUT NEVER GAVE ANY CERTIFIED MAIL NOTICE.

State ex rel. American Eagle Waste Indus.v. St. Louis County, 272 S.W.3d 336 (Mo. App.2008).

Section 260.247 R.S.Mo.

3. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' AMENDED PETITION BECAUSE MISSOURI TAX PAYING CITIZENS SUBJECT TO A VOID COUNTY ORDINANCE HAVE STANDING TO CHALLENGE THE LEGALITY OF THE VOID COUNTY ORDINANCE, IN THAT:

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE RESIDENTS OF AN ILLEGAL MONOPOLY TRASH DISTRICT REQUIRED BY A VOID ORDINANCE TO ACCEPT MONOPOLY TRASH SERVICE AND PAY THE SET SERVICE CHARGE OR FACE CRIMINAL PROSECUTION;

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE COUNTY TAXPAYERS WHOSE TAXES WERE USED TO DESIGN THE ILLEGAL MONOPOLY TRASH DISTRICT SCHEME, WHOSE TAXES WERE USED TO CARRY OUT THE ILLEGAL COUNTY MONOPOLY TRASH DISTRICT SCHEME, AND WHOSE TAXES WERE USED ILLEGALLY TO ENFORCE AND PROSECUTE INNOCENT COUNTY CITIZENS FOR VIOLATING THE VOID COUNTY TRASH DISTRICT ORDINANCES; PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD A RIGHT TO VOTE ON THE ST. LOUIS COUNTY MONOPOLY TRASH DISTRICT SCHEME ACCORDING TO

ARTICLE 2, SECTION 24, OF THE ST. LOUIS COUNTY CHARTER BUT WERE NEVER ALLOWED TO VOTE ON THE COUNTY MONOPOLY TRASH DISTRICT ORDINANCES AND SCHEME; AND

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD EACH PAID SUMS MANDATED BY THE ILLEGAL MONOPOLY TRASH ORDINANCE AND SCHEME TO THE COUNTY-SELECTED MONOPOLY TRASH REMOVER.

Brink v. Kansas City, 198 S.W. 2d 710 (Mo. 1947).

O'Reilly v. City of Hazelwood, 850 S.W. 2d 96, 98 (Mo. banc 1993).

Kinder v. Holden, 92 S.W.2d 793, 802-03 (Mo. App. 2002)

Gray v. Sanders, 372 U.S. 368, 375 (1963).

4. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE LACHES WAS NOT SHOWN TO APPLY BY THE ALLEGATIONS OF THE AMENDED PETITION AND LACHES IS ONLY A DEFENSE TO EQUITABLE CLAIMS IN THAT THE ALLEGATIONS OF AMENDED PETITION DO NOT SHOW ANY ELEMENTS OF LACHES BEING SATISFIED AND IN THAT PLAINTIFFS DID NOT BRING ANY EQUITABLE CLAIM IN THIS ACTION.

Sheehan v. Sheehan, 901 S.W.2d 57, 59 (Mo. banc 1995).

City of Lake St. Louis v. City of O'Fallon, No.ED 93289, 2010 WL 289189, at **4-5 (Mo. App. Jan. 26, 2010), cause transferred to Missouri Supreme Court on May 25, 2010.

Rentschler v. Nixon, 311 S.W.3d 783, 787 n.3 (Mo. banc 2010).

Kellogg v. Moore, 196 S.W. 15, 16 (Mo. 1917).

5. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE CLAIMS OF PLAINTIFFS WERE NOT MOOT IN THAT THE TRIAL COURT HAD THE POWER AND AUTHORITY TO DECLARE THE TRASH DISTRICTS AND ORDINANCES VOID AND TO ORDER THE RETURN OF MONEY PAID BY PLAINTIFFS PURSUANT TO THE VOID TRASH DISTRICTS ORDINANCES.

Fields v. Millsap & Singer, P.C., 295 S.W. 3d 567, 570 (Mo.App. 2009).

O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 100 (Mo. banc 1993)

Levinson v. City of Kansas City, 43 S.W.3d 312, 320 (Mo. App. 2001) (enacted tax declared void).

6. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE ILLEGAL GOVERNMENT EXACTIONS ARE RIGHTFULLY RECOVERABLE UNDER THE CAUSES OF ACTION OF MONEY HAD AND RECEIVED OR UNJUST ENRICHMENT IN THAT

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Shipley v. Cates, 200 S.W. 3d 529 (Mo. banc. 2006).

Brink v. Kansas City, 198 S.W. 2d 710 (Mo. 1947).

Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654, 1895 WL 1669 (Mo. App. 1895).

7. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE A CLAIM, THE MERCHANDISING PRACTICES ACT, IMPOSES LIABILITY FOR DECEPTIVE AND UNFAIR PRACTICES IN THAT PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT DEFENDANTS' FALSE STATEMENTS ABOUT THE LEGALITY OF THE TRASH ORDINANCES AND ABOUT NO NEED FOR A VOTE AND THE UNFAIR PRACTICE OF IMPOSING MONOPOLY TRASH SERVICE AND CRIMINALLY PROSECUTING NONPAYMENT FOR SUCH ILLEGAL MONOPOLY TRASH SERVICE ARE ALL

DECEPTIVE AND UNFAIR PRACTICES ACTIONABLE UNDER THE MERCHANDISING PRACTICES ACT.

State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 837-38 (Mo.App. 2000).

Fredrick v. Bensen Aircraft Corp., 436 S.W.2d 765, 770 (Mo. App. 1968).

Bowles v.All Counties Inv. Corp., 46 S.W.3d 636, 640 (Mo. App.2001).

8. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY WHEN THE PAYOR PAYS UNDER DURESS, NOR DOES THE DOCTRINE APPLY TO CLAIMS UNDER THE MERCHANDISING PRACTICES ACT IN THAT PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THE THREAT, AND ACTUAL, CRIMINAL PROSECUTIONS FOR NONPAYMENT CONSTITUTED ACUTE AND LEGAL DURESS, AN EXCEPTION TO THE VOLUNTARY PAYMENT DOCTRINE.

Huch v. Charter Communications, Inc., 290 S.W.3d 721, 727 (Mo. banc 2009).

Eisel v. Midwest BankCentre, 230 S.W.3d 335, 339 (Mo. banc 2007).

Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654, 1895 WL 1669 (Mo. App. 1895).

ARGUMENT

Defendants wrongfully prevailed in this case by "Motion to Dismiss." The trial court gave no explanation for the complete dismissal of all Plaintiffs' claims. (L.F. page 352). Amotion to dismiss is "solely a test of the adequacy of plaintiff's petition." Snodgras v. Martin &Bayley, Inc., 204 S.W.3d 638, 640 (Mo. banc 2006).

It assumes that all of the plaintiffs' averments are true, and liberally grants to the plaintiffs all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002); Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo. banc 2001).

STANDARD OF APPELLATE REVIEW

The Supreme Court of Missouri reviews dismissals for failing to state a claim de novo without any deference to the circuit court decision. Huch v. Charter Communications, Inc., 290 S.W.3d 721, 724 (Mo. banc 2001); Hess v. Chase Manhattan Bank, 220 S.W.3d 758, 768 (Mo. banc 2007).

Appellate review of whether a litigant has standing is de novo, as a question of law based upon the allegations of the petition. Kinder v. Holden, 92 S.W.3d 793, 803 (Mo.App. 2002).

1. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE AMENDED PETITION CORRECTLY AND COMPLETELY PLED THAT ST. LOUIS COUNTY'S ORDINANCES AND DEFENDANTS' AGREEMENTS AND ACTIONS ESTABLISHING TRASH DISTRICTS WITHOUT AN ELECTION WERE IN DIRECT VIOLATION OF ST. LOUIS COUNTY CHARTER ARTICLE 2, SECTION 24, WHICH REQUIRES AN ELECTION BEFORE ST. LOUIS COUNTY CAN ESTABLISH TRASH DISTRICTS, IN THAT A COUNTY MUST OBEY ITS CHARTER AND ST. LOUIS COUNTY'S CHARTER EXPRESSLY REQUIRES AN APPROVING ELECTION BEFORE TRASH DISTRICTS MAY BE ESTABLISHED, AND ST. LOUIS COUNTY NEVER HELD ANY APPROVING ELECTION.

Plaintiffs completely and fully pled and overpled ever element of their claims.

Plaintiffs pled that St. Louis County established trash districts. (L.F. pages 146, 278, 280-81, 285, 291). Plaintiffs attached copies of St. Louis County party

admissions, statements, ordinances, and publications where St. Louis County created and admitted to creating trash districts.

Plaintiffs pled that the trash districts service was paid for by service charges. (L.F. pages 27-30). Plaintiffs attached copies of St. Louis County party admissions, statements, ordinances, and publications where St. Louis County admitted that the trash services were to be paid for by service charges. (L.F. pages 292-93, 297).

County charters are authorized by Article VI, Section 18, of the Missouri Constitution. Section 18(j) requires courts to take judicial notice of the content of a county charter.

St. Louis County is a constitutional charter county, its charter is the fundamental organic law of St. Louis County, and acts inconsistent with the charter are void. Schmoll v. Housing Authority of St. Louis County, 321 S.W.2d 494, 498-99 (Mo. 1959); see,e.g.,Barber v. Jackson County Ethics Comm'n, 935 S.W.2d 62, 67 (Mo.App. 1996); State ex rel. St. Louis County v. Campbell, 498 S.W.2d 833, 836 (Mo. App. 1973). For Missouri counties, doubts about the existence or extent of county power are resolved against the county. Lancaster v. County of Atchison, 180 S.W.2d 706, 708 (Mo. banc 1944); Browning-Ferris Indus.of Kansas City, Inc. v. Dance, 671 S.W.2d 801, 808 (Mo.App. 1984).

"Whenever the county steps outside of and beyond this authority its acts are void."Browning-Ferris Indus. of Kansas City, Inc., 671 S.W.2d at 808. "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the [county] and the power is denied."Id.(citingLancaster, 180 S.W. 2d at 708).

Article 2, Section 24, of the St. Louis County Charter bars St. Louis County from enacting trash districts without a vote of the people.It reads:

> 24. Provide for the creation of districts in the unincorporated areas of the county within which may be provided police protection, fire protection, public water supply, streets, sidewalks, street lighting, sewers, sewage disposal facilities, garbage and refuse collection and disposal, and such kindred facilities **as the voters therein by a majority of those voting thereon may approve**, the same to be paid for from funds raised by special assessment, general taxation or service charge, or any combination thereof within such districts; and, when authorized by law, provide for the consolidation of such functions with those now performed in existing districts;

St. Louis County Charter Article 2 § 24 (emphasis added). (L.F. pages 25-26).

When a charter or statute requires something be done a certain way then it cannot be done otherwise.Lancaster, 180 S.W.2d at 709.

St. Louis County's own charter requires voter approval before St. Louis County establishes trash districts. St. Louis County purportedly established trash districts through Ordinances 23,023, 23,221, and 23,795. St. Louis County admitted to creating trash districts through party admissions on their own web page. (L.F. pages 285, 291). The trash service is paid for by service charges. (L.F. pages 295, 293, 297). No vote approving the trash districts was ever held. (L.F. pages 29, 293).

Article 2,Section 24, is a specific grant of and limitation upon St. Louis County power. "Where general and special provisions [of a Charter] are in conflict, the special provision will control so far as its scope demands, leaving the general provision to control in cases where the special provision does not apply." Childress v. Anderson, 865 S.W. 2d 384, 387 (Mo. App. 1993).

The County Trash Districts Ordinances have been enforced by St. Louis County without the required authorizing vote by the citizens in each district. As such, the trash districts that were subsequently established and which purport to create a monopoly for trash haulers are in violation of the Charter.

Therefore, because as Plaintiffs pled, St. Louis County purported to impose trash districts on unincorporated St. Louis County without an approving election, St. Louis County violated Article 2, Section 24, of its own charter, St. Louis

County's actions were void ab initio, and the Circuit Court erred in dismissing the well pleaded amended petition.

2. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE AMENDED PETITION CORRECTLY AND COMPLETELY PLED THAT ST. LOUIS COUNTY'S ORDINANCES AND DEFENDANTS' AGREEMENTS AND ACTIONS ESTABLISHING TRASH DISTRICTS WERE IN DIRECT VIOLATION OF §260.247 R.S.MO. AND VOID AB INITIO, IN THAT §260.247 REQUIRES A COUNTY TO GIVE TWO YEARS' CERTIFIED MAIL NOTICE BEFORE ST. LOUIS COUNTY'S TRASH DISTRICTS GO INTO OPERATION AND DISPLACE PREEXISTING TRASH HAULERS, AND ST. LOUIS COUNTY PURPORTED TO ESTABLISH TRASH DISTRICTS BUT NEVER GAVE ANY CERTIFIED MAIL NOTICE.

Plaintiffs completely and fully pled and over pled every element of their claims. Theypled that St. Louis County established trash districts. (L.F. page 27). Theyattached copies of St. Louis County statements, ordinances, and publications where St. Louis County admitted to creating trash districts. (L.F. pages 146, 278, 280-282, 285, 291).

Plaintiffs pled and were prepared to prove that St. Louis County did not give any certified mail notice (about trash districts) of any kind to any preexisting haulers. (L.F. page 27).

In 2008, before St. Louis County's trash districts went into operation, theMissouri Court of Appeals, Eastern Division, decided the case of American Eagle Waste Indus.v. St. Louis County, 272 S.W.3d 336 (Mo. App. 2008). In that decision, the Court of Appeals decided and announced that St. Louis County was required, by §260.247 R.S.Mo., to give two years' written, certified mail notice before St. Louis County's trash districts went into effect.

St. Louis County and the other Defendants ignored §260.247, ignored the appellate court's decision inAmerican Eagle, and St. Louis County and the other Defendants started operatingmonopoly trash districts and displaced preexisting haulers, all without obeying §260.247 and the appellate court's decision.

As pled by Plaintiffs, St. Louis County and the other Defendants and their monopoly trash district scheme and operation was void ab initio since St. Louis County and Defendants started their monopoly trash districts without the certified mail notice required by §260.247 R.S.Mo. and the American Eagle decision. St. Louis County and Defendants knowingly and intentionally violated the law by putting into operation their monopoly trash district scheme.

Therefore, because, as pled by Plaintiffs, St. Louis County and Defendants ignored §260.247 and theappellate court's American Eagle decision by putting into operation their monopoly trash district scheme without any certified mail notice to preexisting haulers, Defendants' trash district or ordinances and actions were void ab initio and the Circuit Court erred in dismissing Plaintiffs' lawsuit.

3. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' AMENDED PETITION BECAUSE MISSOURI TAX PAYING CITIZENS SUBJECT TO A VOID COUNTY ORDINANCE HAVE STANDING TO CHALLENGE THE LEGALITY OF THE VOID COUNTY ORDINANCE, IN THAT:

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE RESIDENTS OF AN ILLEGAL MONOPOLY TRASH DISTRICT REQUIRED BY A VOID ORDINANCE TO ACCEPT MONOPOLY TRASH SERVICE AND PAY THE SET SERVICE CHARGE OR FACE CRIMINAL PROSECUTION;

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY WERE COUNTY TAXPAYERS WHOSE TAXES WERE USED TO DESIGN THE ILLEGAL MONOPOLY TRASH DISTRICT SCHEME, WHOSE TAXES WERE USED TO CARRY OUT THE ILLEGAL COUNTY MONOPOLY TRASH DISTRICT SCHEME, AND WHOSE TAXES WERE

USED ILLEGALLY TO ENFORCE AND PROSECUTE INNOCENT COUNTY CITIZENS FOR VIOLATING THE VOID COUNTY TRASH DISTRICT ORDINANCES; PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD A RIGHT TO VOTE ON THE ST. LOUIS COUNTY MONOPOLY TRASH DISTRICT SCHEME ACCORDING TO ARTICLE 2, SECTION 24, OF THE ST. LOUIS COUNTY CHARTER BUT WERE NEVER ALLOWED TO VOTE ON THE COUNTY MONOPOLY TRASH DISTRICT ORDINANCES AND SCHEME; AND

PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THEY HAD EACH PAID SUMS MANDATED BY THE ILLEGAL MONOPOLY TRASH ORDINANCE AND SCHEME TO THE COUNTY-SELECTED MONOPOLY TRASH REMOVER.

Plaintiffs are all subject to St. Louis County trash districts and are each forced to pay the monthly service fee to the hauler Defendants. (L.F. page 28). Theyare also taxpayers in St. Louis County, which has subjected them to the illegal and void monopoly trash district ordinance. (L.F. page 28). Plaintiffs also had their right to vote on trash districts illegally taken and denied by St. Louis County. (L.F. page 29). As such, Plaintiffs have standing to challenge the illegal trash districts, and ordinances set up by Defendants.See, e.g.,Russell v. Callaway County, 575 S.W.2d 193, 196 (Mo. banc. 1978).

Plaintiffs have standing in several ways. First, St. Louis County has illegally hired and designated contracts with Defendants as monopoly trash removers, and Plaintiffs have been forced by St. Louis County to pay Defendants for trash collection. (L.F. page 28). Plaintiffs are entitled to recover the funds that they have been required to pay pursuant to the illegal ordinances and scheme. SeeBrink v. Kansas City, 198 S.W. 2d 710 (Mo. 1947).

Second, Plaintiffs have taxpayer standing to bring their claims. Missouri law is clear that a party challenging an illegal government action "merely must show that their taxes went or will go to public funds that have been or will be expended due to the challenged action." Duvall v. Coordinating Bd. for Higher Educ., 873 S.W.2d 856, 858 (Mo. App. 1994) (quoting O'Reilly v. City of Hazelwood, 850 S.W. 2d 96, 98 (Mo. banc 1993)); see alsoEastern Mo. Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43 (Mo banc. 1989) (taxpayer had standing to challenge the legality of actions of public officials if there was "a direct expenditure of public funds generated through taxation"); Tichenor v. Missouri State Lottery Comm'n, 742 S.W. 2d 170, 172 (Mo banc 1988) (finding that funds of lottery commission were '"state funds' . . . and that the plaintiff as a citizen and taxpayers of Missouri has the standing to challenge the legality of those expenditures in court."); Duvall, 873 S.W.2d 856 (plaintiff had standing to bring

an action where he alleged that rules and procedures were illegal and that taxpayer funds were being used to comply with those rules and procedures).

Plaintiffs are citizens and taxpayers of St. Louis County. (L.F. page 28). There are numerous ways in which the tax dollars they paid are expended by St. Louis County in furtherance of the illegal program at issue here. For example, the County has made expenditures negotiating the trash haulers fees and administering this illegal ordinance. (L.F. page 30). In addition, the County is certainly expending tax dollars in enforcing these illegal ordinances and convicting innocent County residents of crimes. (L.F. page 30). As such, Plaintiffs as taxpayers have standing to challenge the illegal actions of St. Louis County and Defendants.

Third, Plaintiffs, as residents and homeowners in three of St. Louis County's illegal monopoly trash districts, are each threatened by criminal prosecution and imprisonment if they do not contract with and pay the monopoly trash hauler Defendants.(L.F. pages 28-30). Theyare subject to, have contracted with, and have paid illegal service charges to each of the monopoly trash hauler Defendants. (L.F. page 28). Plaintiffs are each directly and adversely affected by Defendants illegal ordinances and illegal trash districts.

> Reduced to its essence, standing roughly means that the parties seeking relief must have some personal stake in the dispute, even if that interest is attenuated, slight, or remote. Standing is related to the

> doctrine which prohibits issuance by courts of advisory opinions. Appellate review of whether a litigant has standing is de novo. This court determines standing as a matter of law on the basis of the petition, along with any other non-contested facts accepted as true by the parties at the time the motion to dismiss was argued.
>
> In the context of an action for declaratory judgment, Missouri courts require that the plaintiff have a legally protectible interest at stake in the outcome of the litigation. A legally protectible interest exists if the plaintiff is directly and adversely affected by the action in question of if the plaintiff's interest is conferred by statute.

Kinder v. Holden, 92 S.W.2d 793, 802-803 (Mo. App. 2002) (citations and quotation marks omitted); accordSte. Genevieve Sch. Dist. R-II v. Board of Alderman, 66 S.W.3d 6, 11 (Mo. banc 2002).

As innocent citizens and homeowners subject to and mandated to pay Defendants or face imprisonment by Defendants' illegal ordinances and actions, Plaintiffs have standing to challenge the illegal actions and ordinances of Defendants.

Finally, as citizens whose right to vote on trash districts has been illegally denied by Defendants, Plaintiffs have standing to challenge any denial of their opportunity to vote on trash districts. See,e.g.,Gray v. Sanders, 372 U.S. 368, 375

(1963); Missouri Growth Assoc. v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 620 (Mo.App. 1997).

Therefore, because Plaintiffs pled and were prepared to prove that they are taxpayers whose taxes are being used to create, run, and prosecute illegal trash districts, because Plaintiffs pled and were prepared to prove that they are subject to the illegal trash districts and paying Defendants pursuant to the illegal trash district scheme, and because Plaintiffs right to vote on illegal trash districts has been illegally denied, Plaintiffs have standing to challenge the illegal trash districts, and void ordinances in court.

4. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE LACHES WAS NOT SHOWN TO APPLY BY THE ALLEGATIONS OF THE AMENDED PETITION AND LACHES IS ONLY A DEFENSE TO EQUITABLE CLAIMS IN THAT THE ALLEGATIONS OF AMENDED PETITION DO NOT SHOW ANY ELEMENTS OF LACHES BEING SATISFIED AND IN THAT PLAINTIFFS DID NOT BRING ANY EQUITABLE CLAIM IN THIS ACTION.

Defendants incorrectly asserted that Plaintiff's challenges to the trash district ordinances and trash districts were barred by laches.

For a motion to dismiss, a defense such as laches may only be a basis for dismissal if the petition allegations clearly establishes on its face and without

question that the defense applies. Sheehan v. Sheehan, 901 S.W.2d 57, 59 (Mo. banc 1995); Hemar Ins. Corp. of Am. v. Ryerson, 108 S.W.3d 90, 92 (Mo. App. 2003).

The Missouri Court of Appeals reversed a dismissal based upon laches:

> Moreover, there are insufficient facts contained on the face of the petition to determine whether Lake St. Louis' claim is barred by the statute of limitation or laches. When an affirmative defense such as the statute of limitations is asserted in support of a motion to dismiss, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. . . . As such, the petition does not clearly establish on its face and without exception that Lake St. Louis' action is barred.

City of Lake St. Louis v. City of O'Fallon, No. ED 93289, 2010 WL 289189, at **4-5 (Mo. App. Jan. 26, 2010), cause transferred to the Missouri Supreme Court on May 25, 2010.

In the instant case, nothing in the Amended Petition establishes any element of laches. Laches requires neglect and an unreasonable and unexplained delay in bringing legal action. Rentschler v. Nixon, 311 S.W.3d 783,787 n.3 (Mo. banc 2010). In the instant case, trash district Ordinance #23,795 was enacted on or about November 24, 2008. (L.F. pages 27, 283).Plaintiffs filed their lawsuit less than one

year lateron December 1, 2009. (L.F. page 1). There is no unreasonable delay from the facts, the case, or the allegations of the amended petition. Therefore, no element of laches exists in this case or arises from Plaintiffs'allegations in the amended petition.

Furthermore, the amended petition sets forth claims for declaratory judgment, money had and received, theMerchandising Practices Act, and Unjust Enrichment.(L.F. pages 24-40). No claim for equity or injunction was made. Laches is only a defense to equitable claims and not to legal claims. Kellogg v. Moore, 196 S.W. 15, 16 (Mo. 1917);Rabius v. Brandon, 257 S.W.3d 641, 648 (Mo. App. 2008). Consequently laches is not an available defense to the legal claims brought by the Plaintiffs.

Consequently, because the affirmative defense and elements of laches were not clearly established by the allegations of the amended petition, because no unreasonable delay exists in this case, and because laches is not a defense to legal claims, the Circuit Court erred in dismissing the amended petition and this Supreme Court should reverse the dismissal.

5. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE CLAIMS OF PLAINTIFFS WERE NOT MOOT IN THAT THE TRIAL COURT HAD THE POWER AND AUTHORITY TO DECLARE THE TRASH DISTRICTS AND

ORDINANCES VOID AND TO ORDER THE RETURN OF MONEY PAID BY PLAINTIFFS PURSUANT TO THE VOID TRASH DISTRICTS ORDINANCES.

Mootness only applies when events occur which render a court's decision unnecessary or make it impossible for the court to grant effectual relief. Fields v. Millsap & Singer, P.C., 295 S.W. 3d 567, 570 (Mo.App. 2009).

Because Defendants have actually put into motion their illegal and void trash district ordinances, conspiracy, and scheme does not mean the courts cannot order a halt and order a return of the money paid pursuant to the void ab initio trash district ordinances. See, e.g.,O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 100 (Mo. banc 1993) (special boundary commission law declared unconstitutional, existing boundary commission declared void and powerless, past decision of preexisting boundary commission declared void, annexation election declared void, annexation declared void); Levinson v. City of Kansas City, 43 S.W.3d 312, 320 (Mo. App. 2001) (enacted tax declared void).

Therefore, because the courts of Missouri have the power and authority to stop the illegal and void ab initio trash district ordinances and trash district scheme and order the return of the money paid pursuant to the void ordinances and scheme, the issues and claims in this case are not moot, and this SupremeCourt should reverse the dismissal of Plaintiffs' amended petition.

6. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE ILLEGAL GOVERNMENT EXACTIONS ARE RIGHTFULLY RECOVERABLE UNDER THE CAUSE OF ACTION OF MONEY HAD AND RECEIVED OR UNJUST ENRICHMENT IN THAT PLAINTIFFS PROPERLY PLED AND WERE PREPARED TO PROVE THAT DEFENDANTS, BY OBTAINING MONOPOLY PAYMENTS PURSUANT TO VOID AB INITIO TRASH DISTRICT ORDINANCES AND SCHEME, HAD BEEN UNJURSTLY ENRICHED AND HAD RECEIVED MONEY THAT IN EQUITY AND GOOD CONSCIENCE SHOULD BE RETURNED TO PLAINTIFFS AND THEIR NEIGHBORS.

Illegal exactions improperly required by governments are commonly recovered by an action for money had and received. See, e.g., Shipley v. Cates, 200 S.W.3d 529 (Mo. banc. 2006); Brink, 198 S.W.2d 710; Niedermeyer v. Curators of Univ.of Mo., 61 Mo.App. 654, 1885 WL 1669 (Mo.App. 1895). As the Missouri Supreme Court found generations ago:

> This cause is for money had and received. Such an action is founded 'upon the principle that no one ought to unjustly enrich himself at the expense of another, and it is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to

retain it and, ex aequo et bono it belongs to another.' 4 Am.Jur.p. 509, Sec. 20.

Brink, 198 S.W. 2d at 716-17.

In the instant case, it is unjust for Defendants, in conspiracy and privity of contract with St. Louis County, to keep money they have collected pursuant to an illegal and void *ab initio* trash ordinance scheme. (L.F. pages 30-32). Defendants cannot "require" citizens to deal only with them and to pay the monopoly charge set by St. Louis County under threat of criminal prosecution and possible imprisonment pursuant to void trash district ordinances. Any payments received through such illegal coercion are unjust and in justice should be returned to the citizens.

Defendants argued that because there was a hypothetical "benefit" involuntarily imposed upon Plaintiffs, Plaintiffs' cause should be dismissed. First, this argument is improper on a Motion to Dismiss. A Motion to Dismiss is "solely a test of the adequacy of plaintiff's petition." Snodgrass v. Martin &Bayley, Inc., 204 S.W. 3d 638, 640 (Mo. banc 2006). The court "may not address the merits of the case or consider evidence outside the pleadings." Weems v. Montgomery, 126 S.W. 3d 479, 484 (Mo. App. 2004) (internal quotations omitted). The matter of whether Plaintiffs received a benefit is at least a matter of factual dispute

appropriate for the jury and would, at most, go to the determination of the amount of damage. The argument does not extinguish Plaintiffs' cause of action.

However, Defendants' argument of "benefit" fails in any event. According to the Missouri Supreme Court, the benefit from an illegal government exaction is not considered and the entire illegal exaction should be returned. SeeBrink, 198 S.W.2d at 716. In Brink, Kansas City enacted a void special assessment and contract with contractors to build a sewer system. The victims of the illegal exaction sued aftercompletion of the sewer. Kansas City asserted that it was entitled to a setoff for the benefit the landowners received from the new sewer. The Missouri Supreme Court found that no consideration of any benefit should be made:

> Defendant also makes the point that plaintiff's assignors got value received for the payments made on the tax bills, and in equity and good conscience should not be heard to complain, and that in any event, 'defendant is entitled to a setoff for the value of such benefit.' **The benefit which defendant invokes for the basis of the claimed setoff was not asked for nor voluntarily accepted**, **but was imposed by fraud and conspiracy**….

Id. (emphasis added). Therefore, Defendants' argument that Plaintiffs' claims should be dismissed because they were forced to receive a (hypothetical) benefit based on Defendants' illegal acts must fail.

The Restatement (Third) of Restitution and Unjust Enrichment requires the return of monies under the circumstances of the instant case. Section 6(2) Restatement (Third) of Restitution and Unjust Enrichment (T.D. No. 12991).

The Restatement provides:

> Payment of money resulting from a mistake by the payor as to the existence or extent of the payor's obligation to an intended recipient gives the payor a claim in restitution against the recipient to the extent the payment was not due.

Section 6(2) Restatement (Third) of Restitution and Unjust Enrichment (T.D. No. 12991).

Therefore, because Defendants were in league and in privity of contract with St. Louis County, and because Defendants received their monopoly power and designation through void ab initio ordinances, and because Defendants used St. Louis County and the void ordinances to threaten and prosecute and collect their bills, Plaintiffs properly pled an action for unjust enrichment and for money had and received and the trial court erred in dismissing Plaintiffs' amended petition.

7. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE MERCHANDISING PRACTICES ACT IMPOSES LIABILITY FOR DECEPTIVE AND UNFAIR PRACTICES IN THAT PLAINTIFFS' PLED AND WERE PREPARED TO PROVE THAT DEFENDANTS FALSE STATEMENTS ABOUT THE LEGALITY OF THE TRASH ORDINANCES AND ABOUT NO NEED FOR A VOTE AND THE UNFAIR PRACTICE OF IMPOSING MONOPOLY TRASH SERVICE AND CRIMINALLY PROSECUTING NONPAYMENT FOR SUCH ILLEGAL MONOPOLY TRASH SERVICE ARE ALL DECEPTIVE AND UNFAIR PRACTICES ACTIONABLE UNDER THE MERCHANDISING PRACTICES ACT.

The Merchandising Practices Act (MPA), §§ 407.010, R.S.Mo.,et seq., is designed to preserve and require fundamental honesty, fair play, and right dealings and to provide a remedy for any merchandise transaction or sale which involves deception, false pretense, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale of merchandise. Section 417.020.1 R.S.Mo.; State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 837-38 (Mo.App. 2000). "From the MMPA's inception, Missouri courts have emphasized that Chapter 407 . . . should be liberally construed to protect consumers." State ex rel. Nixon v. Continental Ventures Inc., 84 S.W.3d 114, 117 (Mo. App. 2002).

In this case, Defendants have used (1) the illegal and void trash district ordinances, the threat and actual prosecution, conviction, and sentence under such ordinances of those who do not transact business with Defendant or of those who do not pay the amounts that Defendants demand in payments, and (2) false statements concerning the validity of the illegal ordinances, the lack of an election, and the illegal ordinance requirements, to coerce Plaintiffs and thousands of other St. Louis County residents to in connection with the sale of "merchandise." "Merchandise" is defined broadly by the MMPA to include "services," such as those coercively sold by Defendants. See §407.010(4) R.S.Mo. ("Merchandise', any objects, wares, goods, commodities, intangibles, real estate or services.")

Defendants employed the unfair practice of coercing citizens to transact business via illegal and void ordinances. Defendants employed the unfair practice of coercing citizens to transact business through the threat, and actual conduct, of prosecutions, convictions and sentences for citizens who do not conduct transactions with Defendants or who do not pay the amounts Defendants assessed by Defendants. (L.F. page 36).

The MMPA prohibits more than deceptive conduct.

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in

> connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose . . . is declared to be an unlawful practice.

Mo. Rev. Stat. § 407.020.1 (emphasis added).

Defendants' actions constituted "unfair practice" and violated other portions of Section 407.020.1 as well. For example, by failing to inform consumers that an election was required to approve the establishment of trash district and that the ordinances were void *ab initio*, Defendants' omissions and concealments are independent bases for liability under the MMPA. (L.F. pages 37-38). SeeState ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 838 (Mo. App. 2000) (by advertising and selling alcoholic beverages as part of beer-of-the-month club program under terms which did not satisfactorily require proof of age and not revealing any of these violations to its Missouri customers, Beer Nuts, Ltd.'s conduct constituted concealments or omissions of material facts in connection with the sale or advertisement of merchandise in trade or commerce that are unlawful practices under §407.020.1). Moreover, it is an unfair practice to require Plaintiffs to conduct the trash transactions under void and illegal trash district ordinances. Further, it is an unfair practice, to threaten prosecution, conviction, and sentence and to prosecute, sentence, and convict for up to a year in jail, to coerce Plaintiffs to engage in these transactions under void ab initio trash district ordinances.

Defendants cited two non-MMPA fraud cases, Fredrick v. Bensen Aircraft Corp., 436 S.W.2d 765, 770 (Mo. App. 1968), and Bowles v. All Counties Inv. Corp., 46 S.W.3d 636, 640 (Mo. App. 2001), for the proposition that that "fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." Defendants have not pointed to, and Plaintiffs' research has not revealed, any cases applying that proposition to the MMPA. In any event, Bowles and Fredrick each describe

> two recognized exceptions to the foregoing general rule: (1) where there is a relationship of trust and confidence between the parties, and (2) where one party is possessed or claims to be possessed of superior knowledge of the law and takes advantage of the other party's ignorance of the law to mislead him.

Fredrick, 436 S.W.2d at 770; Bowles, 46 S.W.3d at 640.

Although the court need not reach the issue of whether these exceptions apply to the instant action, because Plaintiffs have alleged multiple violations of §407.020.1, the exceptions nonetheless apply. Plaintiffs had a relationship of trust and confidence between them and Defendants, and Defendant St. Louis County certainly possessed superior knowledge of the law, including its ordinances, and took advantage of Plaintiffs' ignorance of the law to mislead St. Louis County citizens. Defendant St. Louis County has been prosecuting and convicting St.

Louis County citizens who would resist its illegal scheme or fall behind in their payment of the illegal monopoly trash service charges.

To survive a motion to dismiss for failure to state a claim, as to the damages issue, Plaintiffs need only allege they were damaged. Plaintiffs alleged and were damaged by being forced to contract with and pay Defendants. Seee.g.,Sunset Pools of St. Louis, Inc. v. Schaefer, 869, S.W.2d 883 (Mo.App. 1994). Determination of the precise amount of the payments is matter to be developed through discovery and determined by the jury.

Defendants argued that because they conveyed some benefit upon Plaintiffs, Defendants' wrongs should be ignored. The response to this argument is the same as Defendants' argument as to the benefit related to the claim of Money Had and Received: (1) the issue of benefit is a factual dispute that should be left for a jury to decide; and (2) the benefit was not voluntary accepted and was imposed by an illegal ordinance. Therefore, any hypothetical benefit is a defense.SeeBrink, 198 S.W. 3d at 716 (proof that property owners in city sewer district had knowledge of facts indicating invalidity of tax bills issued by city to sewer construction contractor, if established, would not operate to make subsequent payments on tax bills by property owners "voluntary," so as to preclude property owners from recovering their payments after cancellation of the tax bills).

In the instant action, Plaintiffs' payments were involuntary and are therefore recoverable. SeeDouglas v. Kansas City, 48 S.W. 851, 854 (Mo. 1898) ("If the officers and agents of a city exact in its behalf an unauthorized and illegal license tax, under threat of immediate arrest in case of refusal, and they are clothed with power to carry their threat into execution at once, a payment made to avoid such consequences is not voluntary, and the money may be recovered back."). At a minimum, Plaintiffs paid for trash services that were forced upon them by threat and coercion. At this stage, the court need not determine whether Plaintiffs are entitled to the full amount of the payments they were forced to pay to the Hauler Defendants, plus treble damages and punitive damages, or some lesser amount; the damages are capable of ascertainment.

Finally, the measure of damages for the MMPA is not limited to "benefit of the bargain." See, e.g., State v. Polley, 2 S.W.3d 887, 892 (Mo. App. 1999) (remedy not limited to benefit of bargain and may include restitution damages); State ex. rel. Webster v. Areaco Inv. Co, 756 S.W.2d 633, 637 (Mo. App. 1988) (remedy not restricted to benefit of bargain and may include rescission damages).

Therefore, because Plaintiffs pled and were prepared to prove numerous deception and unfair practices committed by Defendants, the trial court erred in dismissing Plaintiffs' amended petition, and this Supreme Court should reverse the erroneous dismissal.

8. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED PETITION BECAUSE THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY WHEN THE PAYOR PAYS UNDER DURESS NOR DOES THE DOCTRINE APPLY TO CLAIMS UNDER THE MERCHANDISING PRACTICES ACT IN THAT PLAINTIFFS PLED AND WERE PREPARED TO PROVE THAT THE THREAT, AND ACTUAL, CRIMINAL PROSECUTIONS FOR NONPAYMENT CONSTITUTED ACUTE AND LEGAL DURESS AN EXCEPTION TO THE VOLUNTARY PAYMENT DOCTRINE.

First, on August 4, 2009, the Missouri Supreme Court held: "In light of the legislative purpose of the merchandising practices act, the voluntary payment doctrine is not available as a defense to a violation of the act." Huch v. Charter Communications, Inc., 290 S.W.3d 721, 727 (Mo. banc 2009).

Second, the voluntary payment doctrine does not apply to payments made under duress. See, e.g., id.at726; Eisel v. Midwest BankCentre, 230 S.W.3d 335, 339 (Mo. banc 2007); Niedermeyer, 61 Mo. App. 654, 1895 WL 1669. Defendants threatened criminal prosecution of citizens and Plaintiffs if they did not pay the service charges demanded by Defendants. (L.F. pages 28, 30, 283). Criminal prosecution constitutes acute and legal duress rendering the voluntary payment

doctrine inapplicable.SeeNiedermeyer, 61 Mo. App. 654. It is not voluntary to pay service charge under threat of criminal prosecution or imprisonment.

Therefore, because the voluntary payment doctrine does not apply to Plaintiffs' claims under the Merchandising Practices Act and because Plaintiffs were threatened with criminal prosecution and imprisonment if they did not pay and acted under duress, the voluntary payment doctrine does not apply, and this Court should reverse the erroneous dismissal of Plaintiffs' amended petition.

CONCLUSION

This Court should reverse the dismissal of Plaintiffs' amended petition because the trash district ordinances and scheme were void ab initio as they were enacted and carried out in violation of §260.247 R.S.Mo. and Article 2, Section 24, of St. Louis County's Charter. Plaintiffs and their neighbors are entitled to the return of the money they were forced to pay according to these void ordinances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 10,225 words, exclusive of the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Word. The undersigned counsel further certifies that the CD-ROM has been scanned and is free of viruses.

_____

CERTIFICATE OF SERVICE

The undersigned counsel of record for Appellants hereby certifies that copies of Appellants' Brief were delivered via U.S. Mail, postage prepaid, along with an electronic copy on CD-ROM, toPatricia Redington, County Counselor, 41 South Central Ave., Clayton, MO 63105; Robert Epperson and Edward Dowd, Dowd Bennett LLP, 7733 Forsyth, Suite 1410, Clayton, MO 63105; Brian McGovern, McCarthy Leonard Kaemmerer, L.C., 400 S. Wood Mill Rd., Chesterfield, MO 63017; and Scott Dickenson and John Ryan, Lathrop & Gage LLP, 10 S. Broadway, Ste. 1300, St. Louis, MO 63102 on this 21st day of March, 2011.

_____

APPENDIX