SC96885

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.*
ATTORNEY GENERAL JOSHUA D. HAWLEY and
THE BOARD OF TRUSTEES OF THE MISSOURI
PETROLEUM STORAGE TANK INSURANCE FUND,

Plaintiffs-Appellants,

vs.

PILOT TRAVEL CENTERS, LLC,

Defendant-Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Beetem, Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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SUMMARY OF THE ARGUMENT

Pilot defends its decision to renege on its agreement by attempting to insert jurisdictional ambiguity where none exists. The trial court unambiguously issued an order to vacate the initial judgment. Pilot contends that the vacatur was unlawful. But that argument fails because the trial court had inherent authority to vacate any judgment while it retained jurisdiction, and Rule 81.05 does not abrogate that authority. The trial court also complied with Rule 81.05 because it granted the very relief that the Attorney General and Board requested. Even if the trial court had lacked authority to vacate the judgment, it undoubtedly did so, and Pilot has never moved to reinstate that judgment. The clock for finality stopped when the trial court unequivocally vacated the judgment, leaving nothing to appeal.

On the merits, Pilot argues that the State has no interest in this suit because the Board and the Fund participants are interested in this suit. But those interests and the State's interests are not mutually exclusive. Regardless of any private benefit that some Fund participants might receive from this suit, the State has an interest in this suit because the Fund serves the critical public interests in ensuring funding for prompt cleanup of petroleum spills and in bringing stability to an industry that affects all Missourians. Pilot harmed those interests by reneging on its agreement. Pilot

does not dispute that these benefits are public, but it erroneously asserts that these benefits were not pleaded.

The State also has an interest for several other reasons. First, the class of Fund participants includes the State, so Pilot's admission that Fund participants have an interest is self-defeating. Second, the State always has an interest in suing to maintain the integrity of its own programs. And third, the State has a direct pecuniary interest because the Fund is stored "within the state treasury."

The Board also has authority to enter into subrogation agreements and sue to enforce those agreements. Pilot ignores Appellants' argument in their opening brief that the Board has this authority because of its express power to make "all decisions relating to payments from the fund." This Court has also held that the Board's power of "general administration" grants it power to sue. Moreover, when the State created the Board as an insurance organization, it gave the Board power to enter into subrogation agreements because those agreements are ubiquitous among insurance organizations.

Pilot cannot evade the claim for unjust enrichment by asserting that the subrogation agreement is unenforceable. That circumstance is what makes such a claim available at all. Pilot's argument that its actions were not unjust is also premature because the question whether its actions were unjust is a question of fact.

ARGUMENT

I. This Court has appellate jurisdiction because the trial court had the inherent power to vacate its order and, in the alternative, the trial court complied with Rule 81.05 by granting the Attorney General and Board the relief they requested.

Pilot does not dispute that the trial court unequivocally issued an order to vacate the June 22, 2016 judgment, and Pilot does not dispute that the trial court possessed the inherent power to vacate that judgment at common law. Resp. Br. 30. Pilot contends instead that the trial court lacked authority to issue the vacatur order because, according to Pilot, Rule 81.05 abrogates this inherent power. That argument fails for three reasons.

First, Pilot cannot meet the demanding burden of establishing that Rule 81.05 abrogated this inherent authority. Statutes abrogate the common law only in narrow circumstances. "Where the legislature intends to preempt a common law claim, it must do so clearly." *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 235 (Mo. banc 2001) (citation omitted), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013). "Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid . . . and if a close questions exists, we weigh our decision in favor of retaining the common law." *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855, 860 (Mo. App. W.D. 2002) (brackets and citations omitted). The same is true for

Supreme Court rules because those rules, like statutes, "have the force and effect of law." Mo. Const. art. V, § 5.

Pilot's argument fails because nothing in Rule 81.05 even mentions the inherent power to vacate orders, much less expressly abrogates that power. A separate rule, Rule 75.01, provides that a court retains jurisdiction over its judgments for 30 days and may vacate those judgments at any time during this period. Rule 81.05 merely extends this jurisdiction for 90 more days. Nothing in the rule purports to abrogate—much less "clearly abrogate"—the court's inherent power to vacate an order when it has jurisdiction.

Pilot argues that the rule abrogates the common law because "a trial court's authority to grant relief is constrained by and limited to the grounds raised" in the motion filed under that rule. Resp. Br. 26 (quoting *Massman Constr. Co. v. Highway & Transp. Comm'n*, 914 S.W.2d 801, 802–03 (Mo. banc 1996)). But that rule merely prevents a court from granting unrequested substantive relief. A court cannot, for example, amend an order awarding attorney's fees to add more billed hours if the moving party asks only for an adjustment to the hourly rate. This line of cases says nothing about the court's inherent power to *vacate* its own judgments at any time while it retains jurisdiction.

This Court has thus determined that Rule 81.05 "permit[s] the trial court to set aside [a] Judgment . . . in excess of 30 days after its entry" so long

as the Rule 81.05 motion is filed by a "party to the lawsuit." *Spicer v. Donald N. Spicer Revocable Living Tr.*, 336 S.W.3d 466, 470 (Mo. banc 2011) (rejecting vacatur because a *non*party filed the motion under Rule 81.05). That is because the trial court's jurisdiction under Rule 75.01 includes the power to "vacate, reopen, correct, amend or modify its judgments" and because, after thirty days, "the trial court is divested of [this] jurisdiction, *unless* a party timely files an authorized after-trial motion." *Id.* at 468–69 (citing Rule 81.05) (emphasis added). This authority makes clear that the trial court retained the power to vacate its judgment for any reason of its choosing, and that Rule 81.05 merely prevents the trial court from amending or modifying a judgment to affirmatively grant unrequested substantive relief.

Second, even if the trial court had no inherent power to vacate, Pilot's argument still fails because the trial court complied with Rule 81.05. Pilot asserts that Rule 81.05 limited the trial court to granting only the relief requested, Resp. Br. 26, but Pilot overlooks that the Attorney General and the Board explicitly requested vacatur in their authorized after-trial motion. The motion expressly stated that they "move[d] the Court to amend its judgment by *vacating* it." LF 153 (emphasis added). Because the trial court granted the precise relief requested, its vacatur order was not "inconsistent

with the requests of the parties." Resp. Br. 26 (quoting *In re Smythe*, 254 S.W.3d 895, 898 (Mo. App. S.D. 2008)).

Neither of Pilot's responses to this argument has merit. Pilot first asserts that the motion did not challenge each independent ground that warranted dismissal of the petition. Specifically, Pilot asserts that the motion did not challenge the trial court's determination that the Board could not sue because it could not enter into contracts or subrogate. Resp. Br. 26 n.4.

Not so. The motion argued that the State has an interest in this suit under binding precedent, so the Attorney General could sue regardless of whether the Board could. LF 151–53. Thus, the trial court's conclusions about the Board's ability to sue were not determinative. The motion also argued that those conclusions were incorrect because binding precedent holds that the Board's powers of "general administration" give it authority to bring suits like this one. *Id.*

Pilot next contends that the vacatur order, if initially valid, became invalid when the court did not issue a new judgment within 90 days of the filing of Appellants' Rule 81.05 motion. Resp. Br. 27–28. But Pilot misunderstands the effect of the vacatur order. When the trial court vacated the June 22, 2016 judgment, the clock for finality disappeared. That clock is tied to the judgment. It cannot measure the time until a judgment becomes final if no judgment exists. Once the trial court vacated the judgment, it

retained the same jurisdiction it would have had if it never issued a judgment in the first place.

This case is thus distinct from *In re Marriage of Noles*, 343 S.W.3d 2 (Mo. App. S.D. 2011), on which Pilot heavily relies. There, the initial judgment became final because the court did not alter it before 90 days elapsed. The trial court issued a docket entry that stated, in relevant part, "Judgment and parenting plan *to be* amended . . . . Amended judgment *to be* filed by counsel for Respondent." *Id.* at 4–5 (emphases added). But that docket entry signified only that the trial court would "amend the judgment at some *future* date." *Id.* at 8 (emphasis added). Indeed, the court delayed acting because it was waiting for the respondent to submit a proposed amended judgment. *Id.* Similarly, the trial court in *Ferguson v. Curators of Lincoln University*, 498 S.W.3d 481 (Mo. App. W.D. 2016), "sustained" a motion to alter but did not actually alter the judgment. *Id.* at 495–96. It merely issued an unsigned docket entry signifying that the court intended to change the judgment in the future. *Id.*

Here, in contrast, the trial court unequivocally altered the judgment by vacating it. It issued a signed order that stated that the judgment was "set aside," not—as in *Noles*—that the judgment was "to be" set aside in the future. LF 360. Pilot's assertion that the order here was "just like" the one in

Noles, Resp. Br. 28, is thus incorrect. The trial court stopped the clock for finality when it vacated the judgment.

Third, even if the court lacked authority to vacate the judgment, the vacatur still stopped the clock for finality. Regardless of whether the trial court overstepped its authority, there can be no doubt that the trial court in fact vacated the judgment. It signed an order that read, in relevant part, "Judgment set aside," LF 360; it referred to that order on the docket sheet as an "Order to vacate/set aside," LF 25; and "setting aside" an order is equivalent to "vacating" it. *Steiferman v. K-Mart Corp.*, 746 S.W.2d 145, 147 (Mo. App. W.D. 1988). The clock stopped because no judgment existed from which to appeal. So even if the trial court arguably overstepped its authority in vacating the judgment, it undoubtedly did vacate it—and Pilot has never asked the court to reinstate the judgment, nor has it petitioned for a writ of mandamus to compel reinstatement. To this day, the June 22, 2016 judgment does not exist. Any right Pilot might have had to reinstate that order became moot when the trial court issued the January 24, 2017 judgment.

To insist, as Pilot does, that the clock for finality continued to run even after the trial court vacated the order not only ignores that the clock cannot count time from an order that does not exist, but it also interjects needless confusion into this Court's rules. Procedural rules are not designed to pose complex obstacles to raising an appeal. Just the opposite. "[A]ppeals are

favored in the laws and statutes granting appeals are liberally construed." *St. Louis Bank v. Kohn*, 517 S.W.3d 666, 672 (Mo. App. E.D. 2017) (quoting *O'Malley v. Continental Life Ins. Co.*, 75 S.W.2d 837, 839 (Mo. banc 1934)). "The Supreme Court rules under the constitutional and statutory authority require their construction to be liberal to promote justice, to minimize the number of cases disposed of on procedural questions, and to facilitate and increase the disposition of cases on their merits." *Edmondson v. Edmondson*, 242 S.W.2d 730, 732 (Mo. App. 1951). Any reasonable litigant would expect that it would not need to appeal—indeed, that it *could not* appeal—from an adverse judgment that no longer existed because the trial court unambiguously vacated that judgment. The possibility that the vacatur order might have been erroneous under a dubious interpretation of procedural rules, and that a court might later reinstate that order, does not alter this expectation. A reasonable litigant would expect that the clock for finality stops running when the trial court vacates the judgment and does not begin to run again until after a final judgment is reinstated.

Even if the vacatur order were invalid, stopping the clock in situations like this one would be consistent with Rule 81.07. That rule provides that a party may file a notice of appeal up to six months after the deadline has expired if the party moves for leave and shows "that the delay was not due to appellant's culpable negligence." Rule 81.07(a). The rule does not apply here

because the Attorney General and Board had no reason to believe they could appeal at all. But the principle behind the rule applies, in that the Board and the Attorney General had an eminently reasonable understanding that they could not appeal from a non-existent judgment, and thus they had no culpable negligence. If, as Pilot asserts, the judgment became final in October 2016, the principle behind Rule 81.07 would excuse any delay in the notice of appeal because the Attorney General and the Board appealed less than six months later, and the delay was due not to culpable negligence but to the trial court's unambiguous order vacating the judgment.

Requiring a party to file a notice of appeal even after a trial court has unequivocally vacated a judgment would generate needless confusion about jurisdiction. When a party files a notice of appeal and a record on appeal, jurisdiction transfers to the appellate court. Rule 75.01. But the appellate court lacks jurisdiction if no final order exists. *Id.* So filing a notice of appeal in these situations, as Pilot suggests, would only cause confusion over which court had jurisdiction and interfere with the public policy favoring appeals.

II. The Attorney General is a party to this suit, and Pilot's assertion that the State has *no* interest in this suit fails.

Pilot raises two objections to the Attorney General's standing to sue. First, Pilot asserts that the Attorney General is not even a party to this suit,

even though he is plainly listed in the case caption. Second, Pilot asserts that the State has no interest in the outcome of this suit. These contentions fail.

A. The Attorney General is a party to this litigation.

Pilot uses its counterstatement of facts to argue that "the Attorney General is not a party to this appeal," and that "[t]he Attorney General is, at best, the Board's counsel." Resp. Br. 16, 20. This argument was not properly raised, *see Rogers v. Hester ex rel. Mills*, 334 S.W.3d 528, 534 (Mo. App. S.D. 2010) (holding that "[i]nterspersing argument throughout the statement of facts violates Rule 84.04"), and the argument has no merit.

The case caption lists the Attorney General as a party to this suit. Pilot mentions a scrivener's error in the petition that incorrectly states "Plaintiff" instead of "Plaintiffs," Resp. Br. 15, but as Pilot admits, that error is "immaterial because it is the pleaded facts in the Petition that define this . . . action," *id.* at 16. The petition plainly lists the Attorney General as a party. LF 31 ¶ 1. And despite Plaintiff's assertion that the Attorney General is simply the Board's counsel, the petition plainly states that the Attorney General brings this suit on behalf of the State, not only on behalf of the Board. LF 31.

Pilot acknowledges these facts but nonetheless complains that the petition pleads the Attorney General's involvement only "in a *single paragraph*" and asserts only a legal conclusion. Resp. Br. 20 (emphasis in

original). But identifying the Attorney General as a party in a single paragraph is sufficient—in fact, that is how parties are routinely identified. And Pilot is wrong to contend that the pleading asserts only a legal conclusion. The petition pleads that the Attorney General brings this suit because the suit serves the public interest. LF 31–32. "[W]hether a fact is a matter of public interest is a question of fact to be decided by the jury." *Hawkins By & Through Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 146 (S.C. 1986); *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 501 (Mo. App. E.D. 1990) (citing *Hawkins* for this proposition). The Attorney General's pleading that this suit serves the public interest is a factual pleading, not a pure conclusion of law.

Pilot asserts that the petition should have pleaded the public interest with greater specificity. Pilot contends, for example, that the petition does not allege that the Fund promotes environmental interests or that Pilot harmed the fiscal integrity of the Fund. Resp. Br. 51. Not so. The Petition specifically pleads both environmental and financial harms: It pleads that the Fund was created in part to promptly rectify petroleum spills because "[s]uch releases cause or threaten harm to human health and the environment." LF 33 ¶ 7. And as Pilot elsewhere admits, the petition plainly pleads that the "Fund suffered damages." Resp. Br. 19 (quoting LF 42 ¶ 31).

Pilot insists that the petition must include minute details, but "the petition need not plead evidentiary or operative facts showing an entitlement to the relief sought." *Whipple v. Allen*, 324 S.W.3d 447, 449 (Mo. App. E.D. 2010) (citation omitted). It need only "plead ultimate facts demonstrating such an entitlement." *Id.* (citation omitted). Moreover, the operative petition, "like all petitions, is to be given its most liberal construction and accorded all reasonable inferences deducible from the facts stated." *McBee v. Gustaaf Vandecnocke Revocable Tr.*, 986 S.W.2d 170, 172 (Mo. banc 1999) (citation and internal quotation marks omitted).

Thus, contrary to Pilot's assertions, the petition did not need to state, verbatim, that Pilot's actions harmed the "fiscal integrity of the Fund." Resp. Br. 72–73. The petition pleads that Pilot caused the Fund to incur more than $700,000 in damages. It is an ordinary and natural inference that depriving the Fund of that sum negatively affects its fiscal stability—especially when Pilot's actions may embolden others to take similar actions in the future. Similarly, Pilot asserts that the petition does not plead that the Fund brings stability to the petroleum industry, Resp. Br. 20, but a fund that brings financial stability to thousands of critical actors in the petroleum industry necessarily increases the stability of the petroleum market itself, not just the stability of its critical actors. Additionally, Pilot asserts that the petition must specifically plead that harming the environment or destabilizing the

petroleum industry harms the public. Resp. Br. 20. But that inference is obvious. Each of Pilot's contentions about the pleading fails because those facts are either expressly pleaded or plainly inferred.

B. The State has substantial interest in this suit.

Pilot does not dispute that the Attorney General has authority to sue if the State has any interest in this suit. *E.g.*, Resp. Br. 80. Pilot instead argues that the State cannot have an interest in this suit because the Board and Fund participants do. Resp. Br. 77. This argument fails for many reasons.

First, Pilot's argument assumes that the State and the public can never have an interest in a suit if Fund participants also have an interest. But that argument makes no sense. Multiple different parties can simultaneously have an interest in the same suit. Pilot contends that precedent compels this conclusion because, according to Pilot, this Court held that the Fund creates no benefits for those who are not owners or operators of storage tanks. Resp. Br. 79 (citing *Reidy Terminal, Inc. v. Dir. of Revenue*, 898 S.W.2d 540, 542 (Mo. banc 1995)). That argument misreads *Reidy*. There, this Court held that the Fund could not, consistent with the dormant Commerce Clause, charge a storage tank operator fees because the operator was ineligible to receive insurance payments from the Fund. *Reidy*, 898 S.W.2d at 540. Although this Court held that Reidy received no *private* benefit from the Fund (eligibility for payouts), *id.* at 542–53, this Court never discussed whether the general

public, including Reidy, received any *public* benefit. Reidy, like all others in Missouri, received the benefit of prompt cleanup of environmental spills and greater stability in the petroleum market.

Pilot's argument that participants in the Fund have an interest in this suit is also self-defeating. Pilot asserts that a suit that benefits the Fund would benefit only the "class" of "[o]wners and operators of petroleum storage tanks." Resp. Br. 77–78. But Pilot overlooks that the class of owners and operators of storage tanks includes "the state of Missouri and its political subdivisions and public transportation systems." § 319.129.2, RSMo. Because the State is itself a Fund participant, the State has an interest in the lawsuit by Pilot's own admission.

Pilot's repeated assertion that this suit concerns only private benefits is further belied by the General Assembly's careful decision to construct the Fund as a public entity. Because the Fund serves critical public interests, the members of the Board must include, among others, the "director of the department of natural resources or the director's designee" and two members of "the nonregulated public at large" who "shall have no petroleum-related business interest." § 319.129.4, RSMo. If the Fund were for the sole benefit of storage tank owners, as Pilot argues, Resp. Br. 77–78, the State would have had no reason to ensure that the Board includes members of the general public and government officials.

The legislature also placed the statutes within Title XXI, which is entitled "Public Safety and Morals," and it provided that employees of the program "shall be state employees," *id.* § 319.129.8; that the Board be an "agency" of the state, *id.*; that the Board hold "a public meeting with an opportunity for public comment," *id.* § 319.132.4(1); and that disclosure of financial audits "be made available to the public," *id.* § 319.129.17. The Fund is a public fund that pursues public goals, and the fact that private parties also derive benefits from the Fund does not undermine its public nature.

Second, the State has an interest in this suit because it created the Fund. The State has an interest in safeguarding its own statutory creations because "[t]he Attorney General is, of course, generally authorized to seek enforcement of the General Assembly's statutory purposes." *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. W.D. 2009). The public, through their representatives, created the Fund. Indeed, this Court has already held that the State has an interest in suing to maintain the Fund. In *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397 (Mo. banc 2016), this Court held that the statute that authorizes the Attorney General to sue "to protect the rights and interests of the state" gave the Attorney General authority to sue "for amounts improperly received from the Fund." *Id.* at 403 (citing § 27.060, RSMo). If the State had no interest in maintaining the Fund, this Court

would not have held that the Attorney General could sue to rectify financial harm to the Fund.

Pilot tries to undercut this interest by asserting that, in passing the enabling statutes creating the Fund, the "General Assembly expressly divorced the state from any interest in the Fund." Resp. Br. 77. In support, Pilot notes that the Fund is administratively separate from the general revenue of the State and that sovereign immunity does not extend to the Fund. Resp. Br. 77–78. This argument contradicts this Court's holding that the Attorney General can sue "for amounts improperly received from the Fund" because the State has an interest in this suit. *ConocoPhillips Co.*, 493 S.W.3d at 403.

Moreover, Pilot provides no support for its conclusion that the State is interested only in State-created programs that fall within the general revenue or are covered by sovereign immunity. In fact, separating the Fund from the general revenue indicates a *greater* State interest in the program, because doing so ensures that the program remains funded during times of budgetary volatility. Pl. Br. 34. Accepting Pilot's argument would mean that the State has no interest in any of the other 80 funds that the General Assembly separated from the general revenue, including the Motor Fuel Tax Fund, which collects gasoline taxes, and the Antiterrorism Fund, which collects funds to combat terrorism. Pl. Br. 33. The State also has a direct

pecuniary interest in the Fund because the Fund, although separate from the general revenue, still lies "within the state treasury." § 319.129.1, RSMo; Pl. Br. 31. And the State retains an interest in protecting the security and fiscal health of its programs. *ConocoPhillips Co.*, 493 S.W.3d at 403; *Fogle*, 295 S.W.3d at 510.

Tellingly, Pilot has chosen not to engage any of these arguments. It entirely ignores the Attorney General's arguments that administrative separation indicates a greater State interest in the Fund's solvency, and that the State has a direct pecuniary interest because money in the Fund is held "within the state treasury." § 319.129.1, RSMo. Pilot does not acknowledge the argument that the State has an interest in maintaining its programs. And Pilot's only remark about the 80 funds the General Assembly separated from the general revenue is to assert that these funds do not "implicitly authorize the *treasurer* to bring lawsuits." Resp. Br. 42 n.8 (emphasis added). Of course, the Attorney General has not argued that the statutes permit the *Treasurer* to sue; rather, they permit the *Attorney General* to sue to protect the integrity of these funds.

III. This Court held in *ConocoPhillips* that the Board has authority to sue, and the Board independently has that same authority because, as a public insurance organization, it has the same powers private insurance organizations ordinarily would possess.

As this Court has already held, "[t]he Board certainly has the right to sue to recover moneys owed to the Fund." *ConocoPhillips*, 493 S.W.3d at 404. Pilot's attempt to distinguish this holding as dictum fails. And Pilot's assertion that the legislature must spell out every detail of the Board's authority and practice conflicts with this Court's precedent.

A. This Court has held that the Board has authority to sue.

Pilot asserts that this Court's holding in *ConocoPhillips* was dictum because, according to Pilot, the issue was not "raised by the record, considered by the court, and necessary to the decision." Resp. Br. 55 (citation omitted). None of these contentions is correct.

The Attorney General and Board have already demonstrated the necessity of the statement to the decision, which also means this Court considered and decided the issue. Pilot correctly states that *ConocoPhillips* concerned the right of a Fund participant, Cory Wagoner, to intervene. Resp. Br. 58. But Pilot overlooks the *reason* this Court rejected Wagoner's attempt to intervene. The Board sued "to recover certain costs previously reimbursed by the Board," and Wagoner tried to intervene because he believed "the Board might not recover as much from Phillips as he could." *ConocoPhillips*,

493 S.W.3d at 398, 404. This Court rejected the motion to intervene, holding that "when the legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." *Id.* (quoting *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994)). This Court determined that the "legislature ha[d] established other means of enforcement" because it gave the Board "the right to sue to recover moneys owed to the Fund" by passing "§ 319.129.4"—the statute that provides the Board with the power of "general administration." *Id.*

Pilot urges that the issue was not "raised by the record." Resp. Br. 55–57. But that argument is demonstrably false. Citing *Kraft* (the same case this Court cited in *ConocoPhillips*), the Attorney General argued in the briefs that Wagoner could not intervene because the enabling statutes granted State entities the right to bring an action. LF 222. The Attorney General thus raised the issue of whether the legislature had established a means for State entities to rectify financial harm to the Fund. This Court answered that the legislature had done so. Citing the statute that gives the Board the power of "general administration," this Court held that the legislature gave the Board power to sue to rectify financial harm to the Fund. *ConocoPhillips*, 493 S.W.3d at 404 (citing § 319.129.4, RSMo). Pilot provides no basis to reconsider that holding.

B. The Board's statutory powers include the power to enter into and sue to enforce subrogation agreements.

Pilot makes no attempt to address the Board's argument that it has the power to enter into and enforce subrogation agreements because of its express power to make "all decisions relating to payments from the fund," § 319.129.4, RSMo; Pl. Br. 42–43. Companies have to apply to participate in the Fund. *E.g.*, § 319.131.3(1). When the Board conditioned Pilot's admission on Pilot's promise to subrogate, it made a decision "relating to payments from the fund" because Pilot could not receive payments from the Fund without satisfying the Board's reasonable preconditions for participation. It is telling that Pilot makes no attempt to engage this argument.

Pilot responds only to the argument that the Board's power of "general administration" enables it to subrogate. It argues that the Board cannot rely on this power because entities cannot enter into agreements or contracts unless "specifically authorized" by statute. *E.g.*, Resp. Br. 43–46, 48, 56, 62–63.

That argument contradicts this Court's holding that the Board possesses not only "those powers expressly conferred" but also those powers "necessarily implied by statute." *Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. banc 1995). Indeed, even Pilot admits that other organizations do not need "specific authority" to sue. Pilot

acknowledges that public corporations implicitly "possess[] the usual powers of corporations," including the power to sue, because of their status as corporations. Resp. Br. 47 (quoting *Sch. Dist. v. Pace*, 87 S.W. 580, 582 (Mo. App. E.D. 1905)). As this Court has held, a state-created body implicitly "is empowered to initiate any action that would be available to a private individual in the same circumstances." *State ex rel. Sch. Dist. of City of Indep. v. Jones*, 653 S.W.2d 178, 186 (Mo. banc 1983).

Pilot tries to limit this principle to public corporations. Resp. Br. 47. But Pilot offers no authority for this claim, and *Jones* undercuts it. This Court held in *Jones* that a school district that had no express authority to sue could still do so because its authority was "necessarily implied from the district's duty to maintain schools." *Id.* at 185. And even though the school district in *Jones* was a public corporation, this Court refused to limit that principle to public corporations. Indeed, it adopted the same standard that applies to other state-created entities when it reiterated that school districts are "but creatures of the legislature whose only powers are those expressly granted by or necessarily implied from statute." *Id.*

Thus, under *Jones*, the Board's status as a public insurance organization gives it the power to enter into subrogation agreements and sue to enforce those agreements. The Board has that power because that power is "available to a private" insurance organization. *Jones*, 653 S.W.2d at 186; *see,*

e.g., 2 *Insurance Claims and Disputes* § 10:5 (6th ed. 2017) ("Insurance policies routinely include a provision entitling the insurer, on paying a loss, to be subrogated . . . ."). And just as the district in *Jones* had the "duty to maintain schools," the legislature expressly imposed on the Board the duty of "fiduciary management of the fund," § 319.129.10, RSMo, and it equipped the Board with the broad power of "general administration" to ensure that it could exercise that duty, *id.* § 319.129.4. Pilot admits that implied powers exist if they "support the very purposes of the Board and the Fund." Resp. Br. 41. Because the legislature created a public insurance organization, permitting the Board to enter into subrogation agreements serves those very purposes.

Pilot does not dispute that entering into and enforcing subrogation agreements is common and essential practice for insurance organizations. It instead argues that the Board and the Fund are not part of a public insurance organization. Resp. Br. 34, 41. That position is untenable. It cannot reasonably be disputed that the Board, which manages the "Petroleum Storage Tank *Insurance* Fund," is anything other than a public insurance organization. § 319.129.1, RSMo (emphasis added). Pilot points out that the statutes that create some other funds provide that participation "has the same *effect* as [the] purchase of *insurance*," and Pilot contends that "the statutes here contain no such language." Resp. Br. 49 (citation omitted)

(emphases and brackets in original). But of course no similar language is needed here because participation in the Fund *is* the purchase of insurance. Indeed, Pilot elsewhere admits that the Fund is an "alternative to private insurance." Resp. Br. 34.

Pilot next contends that the Board need not enter into subrogation agreements and sue to enforce those agreements because the Missouri Department of Natural Resources purportedly can rectify harms. Resp. Br. 51–53. But the possibility of alternative remedies does not divest the Board of its authority to rectify the harm Pilot has caused. Moreover, even though the Department can act to abate an environmental threat and recover costs "incurred *by the Department*" in taking that action, Resp. Br. 53; § 319.125.4, RSMo (emphasis added), Pilot has failed to identify anything that helps the *Fund* recoup the more than $700,000 in losses it has incurred.

IV. Pilot cannot avoid an unjust enrichment claim by attempting to litigate the facts at this stage of the proceedings.

Pilot raises two arguments against the unjust enrichment claim, neither of which succeeds. First, Pilot argues that a state-created organization cannot bring an action at equity unless specifically authorized to do so by statute. Resp. Br. 69. But Pilot misconstrues the only two cases on which it relies for this proposition. Both cases hold only that a state-created agency cannot *adjudicate* rights at equity unless the legislature gives it that

adjudicatory authority. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940) ("Like other administrative tribunals, [the Workmen's Compensation Commission] is a creature of the Legislature and does not have any jurisdiction or authority except that which the Legislature has conferred upon it."); *State ex rel. Jenkins v. Brown*, 19 S.W.2d 484, 486 (Mo. 1929) ("The Public Service Commission . . . has no power to declare or enforce any principal of law or equity."). Pilot provides nothing to suggest that state-created organizations are unable to pursue remedies in equity, and Pilot does not even contend that the Attorney General cannot bring this kind of action.

Second, Pilot argues that the Attorney General and Board cannot establish the elements of an unjust enrichment claim. Resp. Br. 70. Pilot does not dispute that the Attorney General and Board can establish the first two elements: the plaintiff conferred a benefit that the defendant appreciated. *Id.* It contends only that the Attorney General and Board cannot meet the third element: that retention of that benefit was inequitable or unjust. *Id.*

Pilot's only argument for this element is that it was not unjust to retain the benefits of the Participation Agreement because Pilot asserts that the agreement was unenforceable. Resp. Br. 71–72. But Pilot's argument is premature at this stage of litigation because the question whether retention of a benefit is unjust is a question of fact. *See, e.g.*, *Chouteau Dev. Co., LLC v. Sinclair Mktg., Inc.*, 200 S.W.3d 68, 71 (Mo. App. W.D. 2006) ("The extent of

[Pilot's] unjust enrichment is a question of fact to be decided on remand."); *Pitman v. City of Columbia*, 309 S.W.3d 395, 403 (Mo. App. W.D. 2010); *Tracy v. Tracy*, 581 N.W.2d 96, 101 (Neb. 1998) ("The issue of unjust enrichment is a question of fact."). It is for a future fact-finder to decide whether Pilot's retention of benefits was unjust. And that fact-finder will have plenty of grounds to determine that Pilot's retention was unjust because Pilot obtained admission into the Fund and the benefits from the Fund only because it agreed to subrogate "in return for" insurance coverage. LF 35 ¶ 14.

Pilot's contention that retaining a benefit cannot be unjust if the agreement is unenforceable also misunderstands the nature of an unjust-enrichment claim. A claim of unjust enrichment can be brought *only* when a contract is unenforceable. *Steelhead Townhomes, L.L.C. v. Clearwater 2008 Note Program, LLC*, 537 S.W.3d 855, 861, 863 (Mo. App. W.D. 2017). Pilot's assertion that a claim for unjust enrichment fails if the agreement is unenforceable would eliminate all claims for unjust enrichment.

CONCLUSION

The decision of the trial court should be reversed and this matter remanded for further proceedings.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on May 7, 2018, to all counsel of record. The undersigned further certifies that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 6,217 words.

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