



**In the Missouri Court of Appeals
Eastern District
DIVISION ONE**

ENERGY MARKET 709, LLC,)	No. ED108244
)	
Respondent,)	
)	Appeal from the Circuit Court
)	of St. Louis County
vs.)	Cause No. 17SL-CC01389
)	
CITY OF CHESTERFIELD, MISSOURI,)	
et al.,)	Honorable Kristine A. Kerr
)	
Appellants.)	Filed: December 22, 2020

OPINION

The City of Chesterfield, Missouri (the “City”) and its individual city council members and related employees (collectively, “Appellants”) appeal the trial court’s partial grant of Energy Market 709, LLC’s (“EM”) motion for partial summary judgment on EM’s claims against Appellants relating to rezoning conditions that the City placed upon real property owned by EM. Appellants raise seven points on appeal asserting why the trial court erred in granting partial summary judgment in favor of EM. As part of EM’s response, it argues that this Court lacks jurisdiction to hear Appellants’ appeal because there is no final and appealable judgment in this case.

Finding that the judgment in this case is not final and that we therefore lack jurisdiction, we dismiss the appeal.

I. Factual and Procedural Background

In May of 2009, EM entered into an agreement to purchase the 5.26-acre parcel of land located at the corner of Chesterfield Airport Road and Olive Street Road (the “Property”) that is situated within the geographical boundaries of the City and St. Louis County, Missouri (“St. Louis County”). The sale of the Property was finalized in December of 2013. While the sale was being finalized, EM filed an application with the City in August of 2013 to rezone the Property.¹ On November 3, 2014, the City’s city council passed Ordinance No. 2820 that rezoned the Property as a “planned commercial district” (as requested by EM), but with several conditions. Notably, Ordinance No. 2820 conditioned the rezoning of the Property upon EM constructing median barriers to prohibit left turns into and out of the eastern-most access point of the Property, providing a lighting plan for the Property,² among several other conditions.

Following the City’s passage of Ordinance No. 2820, EM submitted a revised site development plan on November 22, 2016. In response, Appellants notified EM that it would need to resubmit a site development plan that reflected the no-left-turn condition, showed where along the Property streetlights would be placed by EM, and excluded the architectural archways that were part of EM’s then-current site development plan; additionally, the City required that EM be responsible for installing and maintaining streetlights on the Property along Chesterfield Airport Road and Olive Street Road. EM thereafter submitted another revised site development plan and a letter from the deputy legal counsel for St. Louis County to the city attorney for the City on January 23, 2017. In the letter, the St. Louis County deputy legal counsel explained that

¹ Prior to EM’s purchase of the Property, it had been utilized as a convenience store and gas station since 1960. In its change of zoning application, EM states that the Property would be used for “Convenience Store/Commercial/Gas” if it is rezoned.

² In regards to the lighting plan, Ordinance No. 2820 specifically required that EM “[p]rovide a lighting plan and cut sheet in accordance with City of Chesterfield Code.”

St. Louis County had exclusive jurisdiction and control with regards to the traffic regulation of Chesterfield Airport Road as an “arterial road,” pursuant to St. Louis County ordinance, and that any prohibition on left-hand turns to and from the Property would be inconsistent with the conditions established by the St. Louis County Transportation and Public Works Department. On March 2, 2017, EM delivered plans exactly matching the revised site development plan that it submitted on January 23, 2017, but excluding the architectural archways indicated by Appellants. Appellants then notified EM on March 8, 2017, that the plans submitted on March 2, 2017, were being returned because they had not been timely submitted.

On or about April 13, 2017, EM filed its petition before the trial court asserting claims related to the conditions that Appellants required in rezoning of the Property. EM filed its second amended petition on January 9, 2018, in which EM asserted claims against Appellants and St. Louis County for declaratory judgment (Count I), injunction (Count II), mandamus (Count III), damages for 42 USCA § 1983 violation of EM’s due process rights (Count IV), damages for 42 USCA § 1983 violation of EM’s equal protection rights (Count V), and constitutional taking (Count VI).³ Specifically, in its Counts I and II, EM argued that Appellants (1) could not prohibit left turns into and out of the Property because St. Louis County has exclusive jurisdiction in regards to regulating traffic on Chesterfield Airport Road and Olive Street Road and (2) lacked authority to require that EM submit plans showing streetlights on the Property that ran along Chesterfield Airport Road. EM therefore asked the trial court to enter declaratory judgment and an injunction reflecting such.

On January 29, 2018, EM filed its motion for partial summary judgment on its Counts I and II of its second amended petition. EM argued in its motion for partial summary judgment

³ St. Louis County was only included in Count I of EM’s second amended petition, while the remaining counts were asserted against the City or some combination of Appellants collectively.

that it was entitled to judgment as a matter of law on its Counts I and II because St. Louis County ordinance clearly established that St. Louis County had exclusive jurisdiction to regulate traffic on arterial roads, such as Chesterfield Airport Road and Olive Street Road, thus making the part of Ordinance No. 2820 restricting left turns invalid.⁴ EM further contended that it was entitled to judgment as a matter of law on its Counts I and II because neither the city code of the City nor Ordinance No. 2820 required that EM include streetlights along Chesterfield Airport Road on the site development plan, and that such conditions required by Appellants were null and void.

After receiving further pleadings from the parties, the trial court granted EM's motion for partial summary judgment on its Counts I and II in regards to the left-turn prohibition set by Appellants. The court reasoned that St. Louis County ordinance established that St. Louis County had "exclusive right to control traffic movements and safeguard traffic safety" on St. Louis County arterial roads, including Chesterfield Airport Road and Olive Street Road. As a result, the court declared the portions of Ordinance No. 2820 restricting left-turn access to and from the eastern-most part of the Property invalid. However, the court denied EM's motion for partial summary judgment on its Counts I and II in regards to the City's streetlight requirements for the Property. Specifically, the trial found that the streetlight requirements pertained to illumination and did not constitute the control or regulation of traffic, and thus, "[t]here does not seem to be any statute or other law which conflicts with the streetlight requirements listed in [Ordinance No. 2820]." Shortly after the trial court entered its order and judgment granting in part and denying in part EM's motion for partial summary judgment, Appellants filed their motion to amend the

⁴ Although St. Louis County was a defendant in the action before the trial court, St. Louis County agreed with EM in its summary judgment pleadings that St. Louis County had exclusive right to control and regulate traffic on arterial roads within its geographical boundaries, including Chesterfield Airport Road and Olive Street Road.

order and judgment “to find there is no just reason for delay of an appeal from the Order and Judgment” pursuant to Rule 74.01(b), which the trial court granted.⁵

This appeal follows.

II. Discussion

Before addressing an appeal’s merits, we have a duty to determine *sua sponte* whether we have jurisdiction to hear the appeal. *Wilson v. City of St. Louis*, 600 S.W.3d 763, 765 (Mo. banc 2020); *White v. Anderssen Mobile X-Ray Srvcs.*, 389 S.W.3d 222, 223 (Mo. App. E.D. 2012). If we lack jurisdiction to hear an appeal, it must be dismissed. *Needy v. Hammond*, 601 S.W.3d 312, 313 (Mo. App. E.D. 2020). One such example of when we lack jurisdiction and are required to dismiss an appeal is when there is no final and appealable judgment. *Flower Valley, LLC v. Zimmerman*, 575 S.W.3d 497, 501 (Mo. App. E.D. 2019).

“The right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists.” *Wilson*, 600 S.W.3d at 767 (quoting *First Nat’l Bank of Dieterich v. Pointe Royale Prop. Owners’ Ass’n, Inc.*, 515 S.W.3d 219, 221 (Mo. banc 2017)). “Although many statutes govern ‘the right to appeal, the only statute even potentially applicable to the present case is section 512.020(5),’ which provides that ‘final judgments’ are appealable.”⁶ *Id.* (quoting *First Nat’l Bank of Dieterich*, 515 S.W.3d at 221). Typically, “[a] judgment is appealable as a ‘final judgment’ under section 512.020(5) if it resolves every claim, or at least the last unresolved claim, in a lawsuit.” *E.M. by and through McInnis v. Gateway Region Young Men’s Christian Ass’n*, 2020 WL 1921035 at *3 (Mo. App. E.D. Apr. 21, 2020) (citing *Wilson*, 600 S.W.3d at 768).

⁵ All references are to Missouri Supreme Court Rules (2019).

⁶ All references are to Mo. Rev. Stat. Cum. Supp. 2019.

However, Rule 74.01(b) creates an exception to what may be considered a “final judgment” for purposes of appeal:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

See also Wilson, 600 S.W.3d at 768.

In sum, a “final judgment” for purposes of appeal under § 512.020(5) must meet two criteria: (1) it must actually be a “judgment” that resolves at least one claim in a lawsuit and establishes the rights and liabilities of the parties with respect to that claim; and (2) the judgment must be “final” in that it either disposes of all claims (or the last claim) in a lawsuit or has been certified for immediate appeal pursuant to Rule 74.01(b). *Id.* at 771; *E.M. by and through McInnis*, 2020 WL 1921035 at *3. The Supreme Court of Missouri recently clarified in *Wilson v. City of St. Louis*, 600 S.W.3d 763 (Mo. banc 2020) that a judgment is eligible for certification under Rule 74.01(b) for purposes of § 512.020(5)—and thereby satisfies the second criterion in that way—only if it disposes of a “judicial unit” of claims. *Wilson*, 600 S.W.3d at 771. This means that the judgment either “(a) disposes of all claims by or against at least one party, or (b) it disposes of one or more claims that are sufficiently distinct from the claims that remain pending in the circuit court.” *Id.* “[W]hether these criteria are met is a question of law and depends on ‘the content, substance, and effect of the order,’ not the circuit court’s designation.” *Id.* (quoting *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997)). If a judgment is eligible for certification under Rule 74.01(b), the trial court may exercise its discretion to certify the

judgment if it expressly finds in its certification that “there is no just reason” for delaying appeal of the judgment until dispositions are reached on the remaining claims. *Id.*

In the present case, the trial court entered its order and judgment granting in part and denying in part EM’s motion for partial summary judgment on its Counts I and II. It is clear that order and judgment satisfies the first criterion stated above because it is actually a “judgment,” as it resolved EM’s claim that Appellants impermissibly prohibited left turns to and from the eastern-most access point of the Property. *See id.* In regards to the second criterion (whether the judgment was “final”), the trial court’s order and judgment did not dispose of all claims or the last claim of EM’s suit; instead, the trial court certified the order and judgment under Rule 74.01(b). Thus, at issue is whether the the order and judgment was eligible for certification under Rule 74.01(b) pursuant to the Supreme Court of Missouri’s holding in *Wilson*. The trial court’s order and judgment did not dispose “of all claims by or against at least one party”; parts of EM’s Counts I and II and all of its Counts IV, V, and VI (which, in combination, assert claims against all Appellants and St. Louis County) have not been disposed of by the trial court.^{7,8} *See Wilson*, 600 S.W.3d at 771. Consequently, whether the trial court’s order and judgment was eligible for certification under Rule 74.01(b) hinges on the legal question of whether the order and judgment “disposes of one or more claims that are sufficiently distinct from” EM’s remaining claims within its Counts I, II, IV, V, and VI that are still pending before the trial court. *See id.*

“[A] judgment resolves a ‘distinct’ judicial unit if it resolves claims that do not arise ‘from the same set of facts, and the same transactions and occurrences, as the counts’ yet to be disposed of in the circuit court.” *Id.* at 770 (quoting *Gibson*, 952 S.W.2d at 244); *see also*

⁷ Count I of EM’s second amended petition in its entirety is against Appellants and St. Louis County generally, without any specific claim against only Appellants or St. Louis County.

⁸ EM’s Count III was dismissed prior to the trial court’s entry of its order and judgment.

Ndegwa v. KSSO, LLC, 371 S.W.3d 798, 802 (Mo. banc 2012) (“It is ‘differing,’ ‘separate,’ ‘distinct’ transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim.”) (quoting *Gibson*, 952 S.W.2d at 244). However, resolved and unresolved claims may still be distinct even if they share some facts or circumstances. *Wilson*, 600 S.W.3d at 770–71 (citing *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 452 (Mo. banc 1994) (explaining that the subject indemnity and patent infringement claims were distinct, even though they were connected, because “each involved different legal theories and different operative facts”)).

In this case, although EM’s claims contained within both its Counts I and II do concern technically different legal assertions (that the left-turn prohibition in Ordinance No. 2820 was invalid and void because St. Louis County had exclusive jurisdiction and control over the traffic regulation of arterial roads and that the City lacked authority to require EM to show streetlights along Chesterfield Airport Road and Olive Street Road on its site development plan), those claims were based on the same operative facts. Specifically, all of EM’s claims contained within the counts asserted in its petition were premised upon: EM’s multiple submissions of site development plans for the Property to Appellants; that Ordinance No. 2820 conditioned the rezoning of the Property upon EM both restricting left-turn access to and from the eastern-most portion of the Property and submitting a lighting plan for the Property (among several other conditions); and Appellants’ refusals to approve the revised site development plans submitted by EM because the plans did not conform with the conditions set by Ordinance No. 2820 in that they did not reflect the left-turn prohibition or show streetlights located along Chesterfield Airport Road and Olive Street Road.

Appellants’ argument that EM’s claims in its Counts I and II pertaining to the left-turn restriction are a distinct judicial unit that can be separated from the remaining unresolved claims is unpersuasive. Appellants point out the differing legal theories underlying EM’s claims and ask that we micro-analyze the events preceding EM filing its petition,⁹ but such contentions miss the mark as to what is required for resolved claims to be a judicial unit distinct from the unresolved claims: that the resolved claims “do not arise from the same set of facts, and the same transactions and occurrences, as the counts yet to be disposed of in the circuit court.” *See Wilson*, 600 S.W.3d at 770 (internal quotations omitted). “[D]iffering legal theories or issues presented for recovery on the same claim” do not create a distinct judicial unit that allows for certification of a judgment pursuant to Rule 74.01(b). *Ndegwa*, 371 S.W.3d at 802; *see also Wilson*, 600 S.W.3d at 770. EM’s left-turn prohibition claims contained within its Counts I and II undoubtedly “arise from the same set of facts, and the same transactions and occurrences” as the remainder of EM’s unresolved claims that are still before the trial court, including parts of Counts I and II regarding the streetlight requirement and Counts IV-VI—which directly relate to Appellants’ actions alleged in Counts I and II. *See Wilson*, 600 S.W.3d at 770 (internal quotations omitted). All of EM’s claims asserted in its second amended petition are premised upon EM’s submittals of multiple site development plans for the Property, conditions set by

⁹ Specifically, Appellants argue that the streetlight requirement originated from a letter sent by the City’s senior planner to EM after Ordinance No. 2820 was enacted. However, that letter very clearly references the lighting plan requirement that is set forth in Ordinance No. 2820, relevantly stating:

At your earliest convenience, please submit fully executed Mylars of the Site Development Plan and Landscape Plan to the City of Chesterfield for review and signatures. **A paper copy of the Lighting Plan should also be submitted. All of these plans should reflect the conditions of approval** [(the left-turn prohibition for the eastern-most access point of the Property, streetlights along Chesterfield Airport Road and Olive Street Road for which EM would be responsible for placing and maintaining, and exclusion of the architectural archways)] **listed above.**

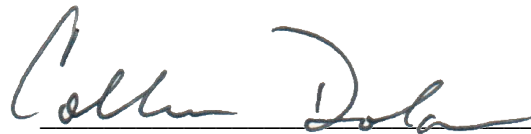
(Emphasis added).

Appellants in Ordinance No. 2820, and Appellants' refusals to approve EM's submitted revised site development plans because the plans did not conform with those conditions.

As such, the resolved left-turn restriction claims that partially comprised EM's Counts I and II do not constitute a distinct judicial unit. *See id.* Because the trial court's order and judgment granting in part and denying in part EM's motion for partial summary judgment did not dispose of a distinct judicial unit, it is ineligible for certification under Rule 74.01(b) for purposes of § 512.020(5). *See id.* at 771. Consequently, the judgment in this case is not final, and we therefore lack jurisdiction to hear the appeal. *See id.* at 773; *Flower Valley, LLC*, 575 S.W.3d at 501.

III. Conclusion

As the trial court's order and judgment does not constitute a "final judgment" in accordance with § 512.020(5), we dismiss the appeal because we lack jurisdiction to hear it.

A handwritten signature in black ink, appearing to read "Colleen Dolan". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Colleen Dolan, P.J.

Mary K. Hoff, J., concurs.

Robert M. Clayton III J., concurs.