



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

CLAY COUNTY COMMISSION,            )  
                                                  )  
                          Appellant,            )  
                                                  )  
v.                                            )  
                                                  )  
                                                  )  
NICOLE GALLOWAY, AUDITOR        )  
OF THE STATE OF MISSOURI,        )  
                                                  )  
                                                  )  
                          Respondent.        )

WD83580

Opinion filed: December 29, 2020

**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
THE HONORABLE JON E. BEETEM, JUDGE**

Division One: Thomas N. Chapman, Presiding Judge,  
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

This matter involves the issuance of a subpoena for closed session minutes of the Clay County Commission ("Commission") by Nicole Galloway, Auditor of the State of Missouri ("Auditor"). The Commission claims the minutes contain confidential attorney-client communications. The Commission appeals the trial court's judgment granting the Auditor's motion to dismiss the Commission's amended petition, which sought declaratory and injunctive relief, for failure to state a claim upon which relief may be granted. On appeal, the Commission does not challenge the trial court's dismissal of its amended petition but, instead, claims that the trial court

erred in including language in its judgment which they claim could be construed as ruling on the substantive merits of the Auditor's subpoena. We affirm.

### **Factual and Procedural History**

The material facts are not in dispute. In August 2018, the Auditor notified the Commission that she would be performing an audit of Clay County, as requested by the requisite number of Clay County voters. In December 2018, while conducting the audit, the Auditor requested access to closed session minutes for the calendar years 2017 and 2018.

On January 31, 2019, the Commission filed a petition for declaratory relief, preliminary and permanent injunctions, and other relief ("Petition"). In the Petition, the Commission alleged that the closed session minutes requested by the Auditor contained attorney-client communications between the County and its attorneys. In count one, the Commission sought a declaratory judgment declaring that the Auditor does not have authority to access attorney-client communications between the County and its attorneys or the closed session minutes. In count two, the Commission sought injunctive relief alleging the County would be irreparably harmed by the exposure of the attorney-client communications. In count three, the Commission sought an accounting of the Auditor's charges. In count four, the Commission sought a determination that the Auditor's decision to seek attorney-client communications should be reversed or enjoined.

On the same date that the Commission filed the Petition, the Auditor served a subpoena ("Subpoena") on the assistant county administrator to produce all minutes of meetings of the Commission for the calendar years 2017 and 2018.

On February 4, 2019, the Commission filed an amended petition for declaratory relief, preliminary and permanent injunctions, and other relief ("Amended Petition"). The Amended Petition added the allegation that the Auditor served the Subpoena for the closed session minutes but otherwise sought the same relief sought by the Petition. On the same day, the parties filed a joint stipulated motion requesting the Subpoena be stayed during the pendency of the action.

On February 11, 2019, the Auditor moved to dismiss the Amended Petition on "on the ground that such claims are not justiciable, there is no reasonable likelihood of success on the merits, the Commission has failed to state a claim, and the Commission lacks standing." Therein, the Auditor alleged that the Commission's filing was a preemptive lawsuit claiming what *might* be at stake if it were to voluntarily comply with the Subpoena because the Auditor had not moved to enforce compliance with the Subpoena and the Subpoena was not self-enforcing.

On February 14, 2019, the Commission sought a preliminary injunction to enjoin the Auditor from taking any action to enforce the Subpoena for closed session minutes. On February 15, 2019, the trial court granted the joint stipulation motion to stay the Subpoena.

On March 26, 2019, a hearing was held on the Auditor's motion to dismiss and the Commission's motion for preliminary injunction. On April 8, 2019, the trial court

denied the Commission's motion for a preliminary injunction finding that "because enforcement of administrative subpoenas requires review by a circuit court, the Petitioners appear to have an adequate remedy at law. Accordingly, the Petitioners fail to demonstrate a likelihood of success on the merits and the request is denied."

On October 23, 2019, the trial court entered its order and judgment ("Judgment") granting the Auditor's motion to dismiss. The trial court found, in pertinent part:

[1] The Commission's primary complaint is that the State Auditor requested closed meeting minute records, and such a request is unconstitutional because it is indicative of a "performance audit" and not restricted to a financial post-audit of transactions.

[2] If there is content in such records that should not be disclosed, such an issue is properly raised in a proceeding to enforce an administrative subpoena.

[3] THEREFORE, this Court finds that the Commission has failed to state a claim upon which relief may be granted as a matter of law, and this case is hereby dismissed with prejudice.<sup>1</sup>

On November 11, 2019, the Commission filed a motion to alter or amend the Judgment ("Motion to Amend") pursuant to Rule 73.01(d). The Commission requested that the trial court clarify that its judgment does not impair the Commission's right to challenge any subpoena issued by the Auditor in a subsequent proceeding by the Auditor to enforce her subpoenas. The Commission submitted a proposed judgment adding the following language after paragraph 2:

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<sup>1</sup>The Judgment does not contain numbered paragraphs. The paragraphs are enumerated here for clarity of the analysis.

Whether the Auditor is acting within the limits of her constitutional authority by requesting specific records is to be determined in a proceeding to enforce an administrative subpoena, not in this case. To be clear therefore, this judgment does not determine whether the Commission must produce any particular records.

Notably, the Commission's proposed judgment did not reflect any change to the dismissal of the case with prejudice. As the trial court did not rule on the Motion to Amend, it was deemed denied by operation of law after 90 days pursuant to Rule 78.06.<sup>2</sup> The Commission appeals.

### **Standard of Review**

"A judgment sustaining a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo." *Smith v. Humane Society of United States*, 519 S.W.3d 789, 797 (Mo. banc 2017). "A motion to dismiss for failure to state a claim' is solely a test of 'the adequacy of a plaintiff's petition.'" *Id.* (citation omitted). In reviewing a dismissal for failure to state a claim for relief, the appeals court should affirm the lower court if the dismissal is supported by any ground, whether or not the trial court relied on that ground. *Dujakovich v. Carnahan*, 370 S.W.3d 574, 577 (Mo. banc 2012).

### **Analysis**

For its sole point on appeal, the Commission claims that the trial court erred in including language in its Judgment that could be construed as ruling on the substantive merits of the Auditor's subpoena for closed session minutes, because its order of dismissal had to be limited to the grounds asserted in the Auditor's motion

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<sup>2</sup>All rule references are to Missouri Rules of Civil Procedure (2019), unless otherwise indicated.

to dismiss, in that the motion to dismiss the Commission's claims for declaratory and injunctive relief was limited to an argument that those claims were not justiciable. Notably, the Commission is not challenging the dismissal of the action.

Preliminarily, the Commission's point violates Rule 84.04(e), which requires the argument include the applicable standard of review. "Compliance with Rule 84.04 is mandatory." *Wynn v. BNSF Railway Co.*, 588 S.W.3d 907, 913 (Mo. App. W.D. 2019) (citation omitted). "A party's failure to comply with Rule 84.04 preserves nothing for appellate review." *Id.* (citations omitted). Nonetheless, we review the merits of the Commission's claim *ex gratia*.

***(a) In the motion to dismiss, the Auditor expressly asserted that the Amended Petition should be dismissed for failure to state a claim upon which relief may be granted***

The Commission claims that the trial court improperly dismissed the Amended Petition on grounds not raised in the Auditor's motion to dismiss. We disagree.

We will affirm a judgment of dismissal "if it can be sustained on any ground supported by the motion to dismiss," regardless of whether the trial court relied on that ground. *Basye v. Fayette R-III School Dist. Bd. of Educ.*, 150 S.W.3d 111, 114 (Mo. App. W.D. 2004); *Kinder v. Holden*, 92 S.W.3d 793, 805 (Mo. App. W.D. 2002). "In fact, 'if the court correctly dismissed the [action], the ground upon which the dismissal is based is immaterial.'" *Kinder*, 92 S.W.3d at 805 (citation omitted). "[W]e 'must affirm the trial court's dismissal if any ground asserted in the defendant's

motion is valid." *I.R. Kirk Farms, Inc. v. Pointer*, 876 S.W.2d 283, 285 (Mo. App. W.D. 1994) (citation omitted).

Here, the trial court dismissed the action finding that the Commission failed to state a claim upon which relief may be granted. The Commission claims that the Auditor's motion to dismiss was limited to an argument that the Commission's claims were not justiciable and, therefore, the trial court improperly dismissed on the ground that the Amended Petition failed to state a claim. The record does not support the Commission's argument. In its motion to dismiss, the Auditor moved for dismissal of "all claims on the ground that such claims are not justiciable, there is no reasonable likelihood of success on the merits, *the Commission has failed to state a claim*, and the Commission lacks standing." The Commission fails to even acknowledge or address this fact in its brief. The Commission cites *Continent Foods Corp v. National-Northwood, Inc.*, 470 S.W.2d 315 (Mo. App. 1971), only for the statement that trial courts may not dismiss a petition for reasons not raised in the motion to dismiss. Where, as here, the ground relied on by the trial court was raised in the motion to dismiss, *Continent Foods Corp.* has no application. Thus, the trial court's dismissal of the action was properly based on a ground asserted in the Auditor's motion to dismiss.

***(b) The Judgment expressly provides that a challenge to the merits of the Subpoena should be made in an action to enforce the Subpoena and, thus, does not support the conclusion that the Judgment foreclosed the Commission's ability to challenge a similar subpoena in a future proceeding***

The Commission argues that the court's conclusion that the allegations in the Amended Petition did not state a claim could be read as ruling on the merits of the Amended Petition. The Commission claims that its concern is that the Judgment could be construed by a subsequent court as an order on the substantive merit of the Commission's objections to the Subpoena. Ultimately, the Commission requests that this court issue "a simple opinion holding that the dismissal of the Commission's [action] did not adjudicate the merits of the Commission's objections to the Auditor's subpoena[.]" This reading of the Judgment is uncontested by the Auditor on appeal.

The Auditor states,

The language from the judgment directly addresses and affirms the right of the Commission to challenge any records request from the Auditor in an appropriate proceeding. . . . Because the trial court explicitly held that any challenge to the compulsory production of records is to be made in an action to enforce an administrative subpoena, there is no reasonable reading of the court's judgment that would suggest that the trial court was ruling that the Commission would be foreclosed from challenging the authority of the Auditor to obtain specific records in another proceeding.

However, the Auditor maintains that this court should decline to issue an opinion requested by the Commission because the trial court offered no such ruling on the merits directly or by implication in the first place.

We agree that the Judgment did not adjudicate the merits of the Commission's objections to the Subpoena. Instead, the trial court ruled that such objections should be addressed in an action to enforce a subpoena. At the time of such an enforcement action, *any* appropriate challenge to the subpoena may be made.<sup>3</sup> Accordingly, the

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<sup>3</sup>The Commission challenged the Auditor's constitutional power to obtain certain records. The trial court found there was nothing *per se* unconstitutional about the records request. We do not



Commission is not foreclosed from challenging the authority of the Auditor to obtain specific records in future proceedings. We find the language of the Judgment is clear and, therefore, the trial court did not err in denying the Commission's Motion to Amend.

***(c) The Commission's argument that the Judgment of dismissal should have been entered "without prejudice" was not raised with the trial court and, therefore, is not preserved for our review***

The Commission requests that we enter an order pursuant to Rule 84.14 that the trial court should have entered, dismissing the suit *without* prejudice. Rule 78.07(c) requires "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." The Commission filed a motion to amend but did not include its claim that the Judgment should be entered "without prejudice." In fact, *the proposed judgment submitted by the Commission* with its motion to amend *specifically stated the Judgment should be entered with prejudice*. Thus, the claim is not preserved for our review. Moreover, in light of our determination that the Judgment does not foreclose the Commission from challenging the authority of the Auditor to obtain specific records in another proceeding where the Auditor seeks to enforce a subpoena, we fail to see how a ruling without prejudice is necessary.

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determine whether the trial court correctly found that the Auditor has such power because, like *all* challenges made against such a subpoena, it should be made in an appropriate enforcement action.

Nonetheless, such a designation triggers an inquiry of our ability to review the matter. Upon review, we find that whether the Judgment was entered with or without prejudice is of no consequence in this case because either designation results in the same outcome: that a challenge to such a subpoena should be made in an enforcement proceeding and not the declaratory relief action chosen by the Commissioner.

Point is denied.

### **Conclusion**

We affirm the trial court's judgment.

  
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W. DOUGLAS THOMSON, JUDGE

All concur.