In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI, EX REL. ATTORNEY GENERAL JOSHUA D. HAWLEY AND THE BOARD OF TRUSTEES OF THE MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,	)	**WD80532**
Appellant,	)	**OPINION FILED: November 21, 2017**
v.	)	
PILOT TRAVEL CENTERS, LLC,	)	
Respondent.	)	

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

Before Division Four: Mark D. Pfeiffer, Chief Judge, Presiding, Gary D. Witt, Judge and Edward R. Ardini, Jr., Judge

The Board of Trustees of the Missouri Petroleum Storage Tank Insurance Fund ("Board"), represented by the Missouri Attorney General (collectively "State"), appeals from the trial court's Amended Judgment ("Judgment") dismissing the State's Second Amended Petition for Breach of Contract, Unjust Enrichment, and Damages ("Petition"). The Judgment dismissed the Petition for lack of standing. The State argues that the trial

court erred in dismissing the Petition because the Attorney General has authority to bring suit on behalf of the Board, the Board has standing to sue, the Board has authority to enter into contracts, and the State can maintain an alternative claim for unjust enrichment. We affirm in part, reverse in part, and remand the case for further proceedings.

Factual Background[1]

Pilot Travel Centers, LLC ("Pilot") was a participant in the Missouri Petroleum Storage Tank Insurance Fund ("Fund"). The Fund is a special trust fund created by the Missouri legislature pursuant to Section 319.129 et. seq.[2], to provide insurance, as relevant to this action, to service station owners for the cleanup costs associated with spills and leaks from underground petroleum storage tanks. To become a participant in the Fund and have coverage for these types of damages, service station owners must apply for membership and pay annual fees based on the number and size of the underground petroleum storage tanks that it owns.

In 2003 Pilot purchased a service station ("service station") located in Higginsville, Missouri from Williams Travel Centers, Inc. ("Williams"). During Williams's ownership of the service station, Williams became a participant in the Fund and was issued a Participation Agreement[3] from the Board covering the petroleum storage tanks at the service station. Williams remained a participant in the Fund with coverage for the service

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[1] Because we are reviewing the trial court's grant of a judgment of dismissal on the pleadings for lack of standing we review the facts as they appear in the petition as true and in the light most favorable to the plaintiff. *Progress Mo., Inc. v. Mo. Senate,* 494 S.W.3d 1, 4 (Mo. App. W.D. 2016).

[2] All statutory reference to statutes are to RSMo. 2000 (supplemented through January 1, 2017), unless otherwise noted.

[3] The Participation Agreement was a claims made and reported insurance policy for pollution liability coverage on the underground petroleum storage tanks.

station until the service station was purchased by Pilot and the Participation Agreement was assigned to Pilot. Pilot maintained this coverage at all relevant times hereto. Under the terms of the Participation Agreement, if Pilot made a claim for coverage and it was determined by the Board that a third party may be partially or totally liable for causing the covered damages, Pilot was required to "cooperate" and "assist" the Board in the enforcement of any right against any person or organization that may be liable to Pilot. The Participation Agreement required Pilot, at the Board's request, to bring suit in its own name for the benefit of the Board or transfer any rights it had to bring such a claim against a third party to the Board.

In June 2007, there was a petroleum spill at Pilot's Higginsville service station. After the spill, pursuant to the Participation Agreement, Pilot remediated the spill and filed twenty-four reimbursement requests for the cost of cleaning up the spill, totaling $723,932.20. The Board paid all of these claims from the Fund. As a result of an investigation following the spill, the Board determined the spill was caused by a defective pipe produced by Environ Products, Inc. ("Environ"). In August 2007, the Board's private counsel contacted Pilot requesting Pilot's participation in an anticipated lawsuit against Environ. Pilot failed to respond to all communications from the Board's representatives to representatives of Pilot. In February 2012, the Board advised Pilot that the five-year statute of limitation for the would-be action against Environ was about to expire. The Board received no response to this communication.

Immediately before the statute of limitation would have expired, the Board filed a product liability lawsuit in Pilot's name against Environ and other defendants in the Circuit

Court of Lafayette County. After filing the action, the Board requested assistance, cooperation, and contact from Pilot. The Board also requested Pilot to sign a Standstill Agreement.[4] Pilot failed to respond to these requests for cooperation. The Board then dismissed the lawsuit against Environ and did not re-file it due to Pilot's failure to assist.

The Attorney General on behalf of the Board then filed a Petition against Pilot, alleging "breach of contract and, in the alternative, for unjust enrichment arising from Pilot's refusal to cooperate and assist in the lawsuit against Environ." The Board sought $723,932.20 for the amount paid to Pilot for reimbursement, $31,585.05 for litigation expenses, and $12,962.61 for the cost of employing a third party administrator in its attempts to subrogate the claim. Pilot filed separate motions to dismiss the Petition[5] for lack of standing and failure to state a claim on which relief can be granted. On June 22, 2016, the trial court granted Pilot's motion to dismiss for lack of standing ("Prior Judgment"). The trial court found that the Attorney General does not have authority to bring suit on behalf of the Board, the Board does not have standing to sue Pilot, and the Board does not have authority to enter into contracts with Fund participants and therefore could not bring a breach of contract action. The trial court also held that a claim of unjust enrichment cannot be maintained if there is an "express contract" and that the State did not allege an "unjust" act sufficient to support a claim of unjust enrichment.

On July 22, 2016, the State filed a motion to Amend the Judgment based on the Missouri Supreme Court's recent decisions in *State ex rel. Koster v. ConocoPhillips Co.*,

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[4] The Standstill Agreement was an agreement between the parties that Pilot would refrain from taking any further legal action against Environ and the other defendants.

[5] The Petition which is the subject of this appeal is the Second Amended Petition.

493 S.W.3d 397 (Mo. banc 2016) and *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738 (Mo. banc 2016). The trial court held a hearing on the motion, and on October 11, 2016 set aside its Prior Judgment. On January 24, 2017, the trial court entered the Judgment, dismissing the Petition for the same reasons as provided for in the Prior Judgment. The trial court did however address the recent Missouri Supreme Court cases, adding that the language in *City of Harrisonville* stands for the proposition that the Board could be sued for certain claims but does not authorize the converse, and that the language in *ConocoPhillips* is not controlling because it is *dicta* and does not address the issues that had been argued by the parties. This appeal followed.

Pilot's Argument Regarding Untimeliness of Appeal

Before we address the merits of the State's appeal, we will first address Pilot's argument that the State's appeal is untimely. Pilot argues in its brief that the State's appeal is untimely because the trial court did not rule on the motion to amend within ninety days, as prescribed by Rule 81.05(a)(2)[6,7]. Pilot alleges that the trial court's order to set aside the Prior Judgment was not alone a "ruling on the motion" as defined under *Ferguson v. Curators*, 498 S.W.3d 481, 495 (Mo. App. W.D. 2016), and since the trial court did not file the Judgment until after the ninety day period had expired, the motion was denied by operation of law due to the passage of time. Pilot argues that therefore the Prior Judgment

[6] All rule references are to Missouri Supreme Court Rules (2017).

[7] Rule 81.05(a)(2) states in pertinent part: "If a party timely files an authorized after-trial motion, the judgment becomes final at the earlier of the following: (A) ninety days from the date the last timely motion was filed, on which date all motions not ruled shall be deemed overruled; or (B) if all motions have been ruled, then the date of the last motion to be ruled or thirty days after entry of judgment, whichever is later."

became the final judgment on October 20, 2016, ninety days following the State's Motion to Amend, making this appeal untimely.

"A motion to amend the judgment is not 'ruled on' for purposes of Rule 81.05 unless, within ninety days of its filing: (1) the motion is explicitly denied; (2) the trial court takes no action on it; or (3) an amended judgment is actually executed and filed." *Ferguson*, 498 S.W.3d at 495 (citing *In re Marriage of Noles*, 343 S.W.3d 2, 9 (Mo. App. S.D. 2011)). In *Ferguson*, this Court held that a motion to amend was not ruled on for purposes of Rule 81.05 when the trial court issued an order sustaining the motion but was ruled on only after an amended judgment was also issued. *Id* at 495-496. However, here the trial court was not required to issue a judgment within ninety days because the trial court ordered that the Prior Judgment be set aside, which vacated the Prior Judgment, and this occurred within the ninety day period as allowed by Rule 75.01. "During this 90-day period created by Rule 81.05, the court retains the same power under Rule 75.01 and may vacate, reopen, correct, amend or modify the judgment." *Steiferman v. K-Mart Corp.*, 746 S.W.2d 145, 147 (Mo. App. W.D. 1988). Therefore, the Prior Judgment did not become final and the trial court retained control until the new Judgment was filed and the time for post-trial motions had passed. *See Klaus v. Shelby*, 4 S.W.3d 635, 639 (Mo. App. E.D. 1999). We find the State's appeal to be timely.

Standard of Review

> Our review of a dismissal for failure to state a claim or for lack of standing is *de novo*. When reviewing for failure to state a claim, we treat the facts contained in the petition as true and construe them liberally in favor of the plaintiffs. The petition states a cause of action if it sets forth any set of facts that, if proven, would entitle the plaintiffs to relief. Similarly, this court determines standing as a matter of law

> on the basis of the petition, along with any other noncontested facts accepted as true by the parties at the time the motion to dismiss was argued, and resolves the issue as a matter of law on the basis of the undisputed facts.

McGaw v. McGaw, 468 S.W.3d 435, 438 (Mo. App. W.D. 2015) (internal quotation omitted).

Analysis

The State raises four points on appeal. In Point One, the State argues that the trial court erred in determining that the Attorney General lacks standing to bring suit on behalf of the Board. The State argues in Point Two that the trial court erred in determining that the Board lacks standing to sue. In Point Three, the State argues that the trial court erred in determining that the Board does not have authority to enter into contracts with Fund participants. The State argues in Point Four that the trial court erred in dismissing the alternative theory of unjust enrichment.

Point One

The State argues in Point One that the trial court erred in determining that the Attorney General lacks standing to bring suit on behalf of the Board because the Attorney General is authorized to protect the state's interest under section 27.060, as well as, under the Attorney General's constitutional and common law powers. The State further argues that the Board implicates state and public interests as the Fund, which the Board operates, was created by the State for a public purpose.

In *ConocoPhillips*, the Supreme Court reviewed the denial of Cory Wagnor's ("Wagnor") motion to intervene in a case between the Board and ConocoPhillips Company to recover certain costs previously reimbursed from the Fund. 493 S.W.3d at 399. Wagnor

was a Fund participant and potential claimant against the Fund. *Id.* In affirming the trial court's denial, the Court looked at Wagnor's original motion, which alleged in part that the Attorney General lacks standing to sue, and determined that the arguments presented were "not well taken." *Id* at 403. In the Court's decision, the Court stated that "[t]he Attorney General is merely representing the Board, …, as he is authorized to do. *See* [section] 27.060." *Id* at 403-404.

The trial court found this language to be *dicta* and therefore not binding. This statement is not merely *dicta* because it is essential to the Court's ruling that Wagnor's motion to intervene was correctly denied, in part because Wagnor's arguments were meritless and did not address the elements necessary for intervention. *Id.* The Attorney General is authorized to represent the Board.[8] Point One is granted.[9]

Point Two

In Point Two, the State argues that the trial court erred in determining that the Board lacks standing to sue on behalf of the Fund. The State argues that the Board's authority to sue lies within the scope of its enumerated duties under section 319.129.4 and is necessary to carry out those duties.

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[8] The trial court also found that the *ConocoPhillips*'s decision did not address *Mo. Pub. Ser. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134 (Mo. Ct. App. 2009) or *In re Exhumation of Body of D.M.*, 808 S.W.2d 37 (Mo. Ct. App. 1991) and thus, did not overrule those cases. Both cases involve the standing of a state agency, not the Attorney General. Therefore, this finding by the trial court will be addressed in Point Two.

[9] The State argues further that the Attorney General has authority to represent the Fund and bring this action in the name of the Office of the Attorney General, irrespective of the Board's standing, and that the trial court does not have the authority to narrow the Attorney General's authority to sue on behalf of a state entity. As we find the first argument dispositive, we need not address these further arguments regarding the Attorney General's separate standing to bring this action in its own name.

Further in *ConocoPhillips*, the Court found that Wagnor failed to articulate a specific, legally protectable interest in the subject matter as required for a motion to intervene under Rule 52.12(a)(2). *Id* at 404-405. The Court determined that Wagnor, as a potential future claimant of the Fund, did not have a right to intervene, and cited to *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994) for the proposition that "when the legislature has established other means of enforcement, [the court] will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." *Id* at 404. As part of the Court's analysis, the Court states, in pertinent part, "[t]he Board certainly has the right to sue to recover moneys owed to the Fund, *see* [section] 319.129.4 …." *Id.*

While the trial court determined that this statement to be *dicta* and therefore not binding on its determination, we find the statement is not *dicta* because it is essential to the Court's holding that Wagnor's motion to intervene was correctly denied as it did not state a specific, legally protectable interest since the Board has the authority to represent the Fund; foreclosing any right Wagnor may have had to bring a private civil action. *Id.* The Court held that the Board has authority to sue to recover money owed to the Fund. *Id.* We find the Board has the authority to bring this action on behalf of the Fund.

The trial court also determined that the holdings in *Mo. Pub. Ser. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134 (Mo. Ct. App. 2009) and *In re Exhumation of Body of D.M.*, 808 S.W.2d 37 (Mo. Ct. App. 1991), that agencies must have statutory authority to sue, are still binding on the Board since *ConocoPhillips* does not address either of these decisions. Neither *Oneok* nor *In re Exhumation of Body of D.M.* involved the Board or the Fund.

Oneok involved the authority of the Missouri Public Service Commission and *In re Exhumation of Body of D.M.* involved the authority of the Missouri Department of Social Services. Since neither case involved the Board, the Fund, or the same statutory framework, we find no reason why the holdings in *Oneok* or *In re Exhumation of Body of D.M.* are in conflict with *ConocoPhillips* and would require them to be expressly overruled by *ConocoPhillips*. We find the trial court's reading of *Oneok* and *In re Exhumation of Body of D.M.* to be too broad. The language of *ConocoPhillips* regarding the Board's right to sue is authoritative and binding. Point Two is granted.

Point Three

In Point Three, the State argues that the trial court erred in determining that the Board lacks the authority to enter into contracts with Fund participants, and therefore lacks standing to sue for breach of contract. The State argues that the Board has authority to enter into contracts based on the plain language of section 319.129.4, which requires the Board to manage the Fund as an insurance fund. The State further argues that contracting is necessary and required to accomplish that purpose.

"The general administration of the [F]und and the responsibility for the proper operation of the [F]und, including all decisions relating to payments from the [F]und, are hereby vested in a board of trustees". Section 319.129.4. "[T]he Fund is merely an account and only its Board of Trustees is responsible for the administration and operation of the Fund." *City of Harrisonville*, 495 S.W.3d at 752. In order for the Fund to function, the Board must be able to enter into contracts with Fund participants regarding the coverage the Fund will provide. In exchange for service station owners registering and paying the

required annual fee, the Board must administer reimbursements for expenses associated with the cleanup of spills and leaks from registered underground petroleum storage tanks. "The basic elements of a contract are offer, acceptance of that offer and consideration to support the contract." *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.810, 813 (Mo. App. W.D. 2005). The statute provides the general framework for the coverage of the Fund but the Participation Agreements provide the details and specific terms of how that coverage is to be applied. Therefore, for the Board to properly operate the Fund, the Board must be able to enter contracts with Fund participants regarding the terms of their coverage. While the terms of the Participation Agreements may not conflict with the authorizing statutes and administrative rules, they can provide more specific details of the arrangement between the participants and the Fund. Point Three is granted.

Point Four

In Point Four, the State argues that the trial court erred in dismissing the State's claim of unjust enrichment because a claim of unjust enrichment can be pled in the alternative to a claim of breach of contract.

"A party has the right to plead in the alternative and may state as many separate claims or defenses as he has, regardless of consistency…" *Forry v. Dep't of Natural Res.*, 889 S.W.2d 838, 847 (Mo. App. W.D. 1994). "It is permissible to ask for alternative relief, either on a contract or in quantum merit." *Id.* The State may plead a claim of unjust enrichment in the alternative to a claim of breach of contract as authorized by Rule 55.10. *Howard v. Turnbull,* 258 S.W.3d 73, 76 (Mo. App. W.D. 2008).

The State further argues that the trial court erred in dismissing the State's claim for unjust enrichment because it sufficiently pled a theory of unjust enrichment. The State claims that whether a benefit was unjustly retained is poorly suited for disposition through a motion to dismiss and should be determined by a jury.

"To establish the elements of an unjust enrichment claim, plaintiff must prove that (1) he conferred a benefit on the defendant, (2) defendant appreciated the benefit and (3) defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. App. W.D. 2010). Demonstrating unjust retention of the benefit is the most significant element of unjust enrichment and also the most difficult to establish. *Executive Bd. Of Mo. Baptist Convention v. Windermere Baptist Conference Ctr.*, 280 S.W.3d 678, 697 (Mo. App. W.D. 2009). "Mere receipt of benefits is not enough, absent a showing that it would be unjust for the defendant to retain the benefit." *Id.*

Here, the State pled that Pilot received a reimbursement of $723,932.20 in cleanup costs from a spill believed to be ultimately caused by Environ. The State pled that Pilot appreciated the reimbursement because it accepted the amount given and was not the cause of the spill. The State pled that this was an unjust retention of a benefit because Pilot failed to assist, cooperate, and help the Board recoup the reimbursement from Environ.

The problem with the State's argument is that pursuant to its pleadings, Pilot failed to assist, cooperate, and help the Board recoup the funds from Environ, however, the source of Pilot's alleged duty to take these actions on the Board's behalf arises solely from the terms of the written Participation Agreement. The State's petition fails to allege any duty

by Pilot to cooperate with them in recouping the cleanup costs other than its obligations established by the written agreement. If the parties entered into an express contract for which the plaintiff seeks recovery, unjust enrichment does not apply, as the parties' rights are limited to the express terms of the contract. *Howard v. Turnbull,* at 436. *See also Hunt v. Estate of Hunt*, 348 S.W.3d 103, 111 (Mo. Ct. App. 2011) (Payments to defendant were plaintiff's "responsibility under the contract" and, therefore, cannot establish claim for unjust enrichment). In order to succeed on its claim for unjust enrichment, there must be a finding that no contract existed between the parties, but absent the express terms of the contract Pilot owed no duty to cooperate and assist the State in recovering any amounts from Environ.[10]

We affirm the trial court's dismissal of the State's claim for unjust enrichment. Point Four is denied.

Conclusion

The judgment of the trial court is affirmed in part, reversed in part, and we remand this case for further proceedings on the State's claim for Breach of Contract consistent with this opinion.

Gary D. Witt, Judge

[10] Further, there is no allegation that Pilot has received or has even attempted to recover any amounts from Environ. It appears that the unjust enrichment would only occur if Pilot received a double recovery by collecting reimbursement of the cleanup expenses from the Fund and then in addition recovered some or all of those same damages from Environ. Based on the pleadings, Pilot has only received the amounts it was entitled to under the Participation Agreement and has not been unjustly enriched by receiving these funds. However, we do not have to finally decide this issue as the Point is fully resolved by our holding herein.

All concur