SUPREME COURT OF MISSOURI
en banc

SUSAN GALL, et al.,	)	***Opinion issued May 22, 2018***
	)	
Respondents,	)	
	)	
v.	)	No. SC96188
	)	
RUSSELL E. STEELE,	)	
	)	
Appellant,	)	
	)	
KRISTIE H. SWAIM,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
The Honorable Gary Oxenhandler, Judge

Susan Gall ("Gall") and Linda Decker ("Decker" and, with Gall, "Plaintiffs") brought a declaratory judgment action against Judge Russell E. Steele ("Judge Steele") and Judge Kristie Swaim ("Judge Swaim") challenging two amendments to a consolidation agreement the parties entered into in 2008. Plaintiffs alleged these amendments usurped Decker's statutory appointing authority to hire and fire deputy clerks pursuant to section 483.245.2.[1] The circuit court entered summary judgment

[1] All statutory references are to RSMo 2000.

invalidating the two amendments and holding Decker has sole appointing authority over deputy clerks in the Second Judicial Circuit. Judge Steele appeals,[2] and this Court has jurisdiction under article V, section 10, of the Missouri constitution.

This Court holds Decker voluntarily subjected her statutory appointing authority to the terms of the consolidation agreement she entered into in 2008. Part of that agreement provided that all disputes would be submitted for resolution to the Second Judicial Circuit *en banc*. When a dispute arose concerning Decker's appointing authority, the circuit court, *en banc*, resolved that dispute by modifying the 2008 consolidation agreement to vest appointing authority in Judge Steele (the "May 2013 amendment") and, by later modification, in Judge Swaim (the "April 2014 amendment"). Accordingly, the circuit court's judgment that these two amendments are invalid is reversed and, under Rule 84.14, judgment is hereby entered for Judge Steele.

Background

Judge Steele is the presiding judge of the Second Judicial Circuit, which includes Adair, Knox, and Lewis counties. Judge Swaim is an associate circuit judge in Adair

[2] Judge Swaim does not join this appeal. Plaintiffs moved in the court of appeals to dismiss Judge Steele's appeal on the ground that only Judge Swaim, and not Judge Steele, has standing to appeal because, after the May 2014 amendment, the dispute as to appointing authority lies only between Decker and Judge Swaim. Even though the court of appeals overruled this motion, that action was vacated by this Court's order transferring the case. Rule 83.09. Accordingly, the motion remains pending. However, this Court overrules Plaintiffs' motion on the same ground adopted by the court of appeals, i.e., that, as presiding judge, Judge Steele has standing to appeal a judgment attacking the validity of administrative orders of the Second Judicial Circuit. Moreover, because this Court enters judgment for Judge Steele under Rule 84.14, that judgment necessarily confirms Judge Swaim's authority under the April 2014 amendment.

County. Decker has served as Adair County's elected circuit clerk since 1991. Gall was employed as a deputy circuit clerk in Adair County.

In March 2008, Judge Steele, Judge Swaim, and Decker entered into an agreement consolidating the Adair County circuit court's clerical functions (the "2008 consolidation agreement"). The 2008 consolidation agreement stated, "All clerical functions performed by the Associate Division and the Probate Division Clerks for whom the Associate Circuit Judge has been the appointing authority shall be consolidated into the office of the Adair County Circuit Clerk." The 2008 consolidation agreement designated Decker as the sole appointing authority for all deputy circuit clerks and division clerks and provided she would have sole authority and discretion to hire, discipline, discharge, or terminate such clerks. It also specifically provided that "[a]ny disputes" between the parties concerning the 2008 agreement or any matter covered by that agreement would be "submitted to the Judges of the Second Judicial Circuit Court *en banc* for consideration and resolution upon majority vote."

In 2013, a dispute arose as to whether Decker should continue to exercise authority under the 2008 agreement. On May 2, 2013, after receiving the votes of a majority of the circuit court *en banc* to do so, Judge Steele signed an administrative order amending the 2008 consolidation agreement. The May 2013 amendment designated the presiding judge of the Second Judicial Circuit as the appointing authority for all deputy and division clerks and gave the presiding judge sole authority and discretion to hire, discipline, discharge, or terminate such clerks.

In August 2013, Judge Steele notified Gall she was being terminated from her employment as deputy clerk and suspended her without pay. Gall requested a pre-termination hearing with Decker, whom Gall believed was her proper appointing authority. Decker held the hearing and reversed Judge Steele's decision to terminate Gall's employment. Judge Steele countermanded Decker's reinstatement decision and issued Gall a letter terminating her employment in November 2013.

In 2014, a dispute arose as to whether Judge Steele should continue to exercise authority under the May 2013 amendment to the 2008 agreement. On April 1, 2014, the Second Judicial Circuit met *en banc*, with Decker in attendance, and approved an administrative order amending the 2008 consolidation agreement again. The April 2014 amendment designated Judge Swaim as the sole appointing authority for all deputy and division clerks and gave her sole authority and discretion to hire, discipline, discharge, or terminate such clerks.

Gall filed a 42 U.S.C. § 1983 civil rights suit against Judge Steele and Judge Swaim in federal district court, alleging her procedural due process rights were violated because only the elected circuit clerk – not the presiding judge – had the authority to terminate her employment. Judge Steele and Judge Swaim filed motions to dismiss. The federal district court held Gall's case raised a controlling question of Missouri law that was unclear and issued a stay giving the parties an opportunity to seek resolution of the state-law issues by a Missouri court.

In March 2015, Plaintiffs filed a two-count declaratory judgment action in Adair County.[3] Count I challenged the validity of the May 2013 and April 2014 amendments. In Count I, Plaintiffs alleged the May 2013 and April 2014 amendments are unlawful because they are inconsistent with Missouri Constitution article V, section 15.4 and section 483.245.2 and because they violate separation of powers. Count II challenged only the May 2013 amendment, claiming it was void under Missouri's sunshine law. Plaintiffs later dismissed count II without prejudice.

The parties filed cross-motions for summary judgment. The circuit court entered judgment for Plaintiffs that Decker, as the duly elected circuit clerk, was the proper appointing authority for deputy clerks pursuant to section 483.245.2. The circuit court held the May 2013 amendment was invalid because "first, the attempt [to modify the 2008 agreement] was procedurally defective; and second, even if it was procedurally proper, Judge Steele had no right to unilaterally take away the Clerk's statutorily granted appointing authority without her consent." The circuit court further held the 2014 amendment was invalid because Decker's appointing authority over deputy clerks was established in section 483.245.2. Because this Court holds the circuit court erred as a matter of law in reaching both conclusions, the judgment is reversed.[4]

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[3] A special judge was assigned by this Court to hear the case. Venue was transferred to Boone County upon consent of the parties.

[4] Because the Court grants Judge Steele relief on this basis, it is unnecessary to consider his alternative arguments, including his arguments that Gall lacks standing and that she was required to pursue an administrative remedy before proceeding with this action for declaratory judgment.

Analysis

This Court reviews a grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993); Rule 74.04. "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642, 644 (Mo. banc 2015).

The central question in this case is whether the May 2013 amendment to the 2008 consolidation agreement giving Judge Steele appointing authority (which he subsequently used to terminate Gall) is valid. The circuit court found the May 2013 amendment was invalid because Judge Steele solicited votes from the Second Judicial Circuit *en banc* by e-mail rather than holding an in-person meeting. This Court disagrees.

By its plain and unambiguous terms, the 2008 agreement provides that "[a]ny disputes" between the parties concerning the 2008 agreement would be "submitted to the Judges of the Second Judicial Circuit Court *en banc* for consideration and resolution upon majority vote." The agreement does not specify how such disputes shall be "submitted," nor does it preclude the manner employed by Judge Steele in 2013.

"*En banc*" is defined as "in full court; with full judicial authority." WEBSTER'S THIRD NEW INT'L DICTIONARY 745 (2002). It is undisputed Judge Steele sent an e-mail to Decker and all of the judges of the Second Judicial Circuit. This e-mail explained that a dispute had arisen under the 2008 agreement regarding whether appointing authority should be transferred from Decker to the presiding judge. Judge Steele indicated both he

and Decker had signed an order amending the 2008 consolidation agreement to transfer appointing authority from Decker to Judge Steele, but Judge Swaim had declined to do so. Judge Steele attached to his e-mail the order amending the 2008 consolidation agreement. The two judges in the Second Judicial Circuit other than Judge Steele and Judge Swaim responded and confirmed their vote to adopt the May 2013 amendment. Accordingly, the May 2013 amendment is valid because Judge Steele submitted the dispute to the entire court *en banc* by e-mail and a majority of the members approved that amendment in accordance with the 2008 consolidation agreement's provisions.

The circuit court also erred in declaring the May 2013 and April 2014 amendments invalid because they conflict with section 483.245.2. There is no need to address the circuit court's precise holding, i.e., that "Judge Steele had no right to unilaterally take away the Clerk's statutorily granted appointing authority without her consent," because that holding is based on two plainly incorrect premises. First, Judge Steele did not take away Decker's appointing authority "unilaterally." Instead, a majority of the judges of the Second Judicial Circuit did so. Second, the circuit court *en banc* did not act without Decker's "consent." Instead, it acted pursuant to the terms of the 2008 consolidation agreement into which Decker voluntarily entered.

By joining the 2008 agreement, Decker broadened her appointing authority beyond that given to her under section 483.245.2. In exchange, however, Decker agreed to hold this expanded authority subject to the terms of the 2008 agreement, including the term that the agreement (and, therefore, her authority) could be modified by a majority of the circuit court *en banc*. The May 2013 and April 2014 amendments were made in

compliance with the procedures to which Decker consented in voluntarily joining the 2008 consolidation agreement.[5] Accordingly, Judge Steele held appointing authority over deputy and division clerks (including deputy clerk Gall) from the date of the order adopting the May 2013 amendment until the date of the order adopting the April 2014 amendment and transferring that authority to Judge Swaim.

Conclusion

For the reasons set forth above, the circuit court's judgment is reversed, and this Court enters judgment on Plaintiffs' petition for Judge Steele.[6]

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Paul C. Wilson, Judge

Fischer, C.J., Russell, Powell and Breckenridge, JJ., concur;
Draper, J., concurs in separate opinion filed;
Stith, J., concurs in opinion of Draper, J.

[5] There is no dispute the Second Judicial Circuit followed the proper procedure to adopt the April 2014 amendment under the 2008 consolidation agreement. The Second Judicial Circuit met *en banc* and approved the April 2014 amendment to the 2008 agreement (as modified in the May 2013 amendment).

[6] Substantial portions of the circuit court's judgment and the parties' appellate briefs are devoted to Plaintiffs' arguments concerning the scope and validity of this Court's 2009 order mandating consolidation of appointing authority in the circuit courts, as well as this Court's 2013 order amending those consolidation procedures. Nothing in these orders, however, purports to alter or abrogate voluntary consolidation agreements previously entered into in a given circuit, including the 2008 consolidation agreement at issue here. In fact, the 2009 order states: "If a court has submitted a plan to the circuit court budget committee prior to October 1, 2009, and it has been approved, it shall be deemed in compliance with the consolidation requirements under this order." Therefore, because this Court holds that Plaintiffs' claims are defeated by operation of the 2008 consolidation agreement alone – without regard to this Court's 2009 and 2013 orders – this Court need not consider and does not reach these other arguments.

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CONCURRING OPINION

I concur in the principal opinion's holding reversing the circuit court's judgment and entering judgment for Judge Steele and Judge Swaim.[1] While I agree Decker waived her statutory authority by entering into the 2008 consolidation agreement, I believe Plaintiffs likewise waived their challenge to the validity of this Court's 2009 order through their pleadings. More importantly, I am compelled to write separately to discuss that which the principal opinion is unwilling to address: the impact of this Court's 2009 and 2013

[1] However, I am concerned with the lack of legal authority cited by the principal opinion in its analysis of all of the claims presented by the parties.

orders on the 2008 consolidation agreement, which the principal opinion acknowledges consumed substantial portions of the circuit court's judgment and the parties' appellate briefs and argument before the court of appeals and this Court.

Waiver

A careful reading of Plaintiffs' pleadings and the procedural posture of this case establishes Plaintiffs waived their challenge to the validity of the 2009 court order in their summary judgment motion. Count I focused solely on the May 2013 and April 2014 amendments, arguing the purported appointment of any judge, or anyone other than the elected circuit clerk, violated Missouri constitutional provisions and section 483.245.[2] Count II concerned alleged state sunshine law violations, which were dismissed voluntarily.

Judge Steele's motion to dismiss noted that to invalidate the May 2013 and April 2014 amendments, the circuit court also would have to find the 2009 court order and the circuit court budget committee's (hereinafter, "the CCBC") approval of the amendments was unconstitutional. Judge Swaim's motion to dismiss argued, "This case belongs in [this Court], because only [this Court] may resolve a dispute over the authority of a circuit court, and only [this Court] may determine the validity of its own orders." Judge Swaim's memorandum in support of her motion to dismiss recognized Plaintiffs were contesting the validity of the 2009 court order.

[2] All statutory references are to RSMo 2000.

The circuit court addressed the issues raised in the motions to dismiss in a docket entry order on July 17, 2015, stating in part:

> It appears to [the circuit court] that the ultimate issue before it is whether the Supreme Court [of Missouri] has the authority (1) to issue an administrative order that may, upon implementation, [divest] an elect[ed] official of her statutory authority to be the appointing authority with hire and fire power over her staff and (2) do so without violating the [s]eparation of [p]owers?
>
> By their written suggestions in support of their respective motions to dismiss and in their oral arguments, [Judge] Swaim and [Judge] Steele, jointly and severally, suggest that original jurisdiction in this matter lies in the Supreme Court [of Missouri] ….

The circuit court analyzed whether Plaintiffs should have filed a writ with this Court to resolve the 2009 court order's validity. However, the circuit court determined first it should decide whether Judge Steele acted in accord with the 2009 court order's procedure. The circuit court reasoned, if Judge Steele failed to follow the proper procedure, his failure would render moot the issue of whether the 2009 court order was valid. The circuit court overruled the motions to dismiss but expressed a willingness to allow the parties to seek a writ with this Court, which did not occur.

A month after the July 17, 2015, order, Plaintiffs filed their motion for summary judgment, framing two issues to be resolved: (1) whether the circuit court could designate anyone other than the elected circuit clerk as the appointing authority without violating the separation of powers, the Missouri constitution, and section 483.245; and (2) assuming the transfer of the circuit clerk's appointing authority was proper, whether Judge Steele's purported transfer without approval of the Second Judicial Circuit *en banc* complied with the procedural requirements of the 2009 court order. Plaintiffs expressly conceded:

> [The 2009 court order] itself does not raise a separation of powers question, and Plaintiffs do not challenge it in this action. [The 2009 court order] avoids constitutional issues because its language left discretion about its implementation to the circuit courts themselves, in view of the fact that not every Missouri circuit court has the same internal organization. The [2009 court order] is not in tension with [section] 483.245, because section 2 of that provision provides that county charters may vest the appointing authority of the circuit clerk in others …. Plaintiffs challenge the Second Circuit's implementation of the [2009 court order], not the [2009 court order] itself.

Plaintiffs proceeded under the *express* assumption the 2009 court order was valid and applied to the Second Judicial Circuit when arguing Judge Steele did not comply with its procedural requirements in seeking to adopt the May 2013 amendment.

Judge Swaim responded that the April 2014 amendment complied with the 2009 and 2013 court orders because it was adopted by unanimous vote of the Second Judicial Circuit *en banc* and approved by the CCBC. Judge Swaim further argued the 2009 and 2013 court orders did not violate the Missouri Constitution or section 483.245.2. Judge Steele made substantially similar arguments and additionally argued Plaintiffs' procedural defect argument must fail because they voluntarily dismissed count II.

"Generally, a party on appeal 'must stand or fall' by the theory on which he tried and submitted his case in the court below." *State v. Pierce*, 433 S.W.3d 424, 428 (Mo. banc 2014) (quoting *Walker v. Owen*, 79 Mo. 563, 568 (Mo. 1883)). "Under this general rule, issues that are not raised in the trial court are waived." *Id*. Plaintiffs never raised a constitutional challenge to the 2009 or 2013 court order. To the extent the motions to dismiss raised the issue, it is apparent Plaintiffs' subsequent summary judgment motion explicitly waived and abandoned this issue. Hence, I agree this Court need not address or resolve Plaintiffs' waived constitutional challenges to the 2009 court order.

This Court's 2009 and 2013 Orders

Approximately eighteen months after Decker entered into the 2008 consolidation agreement, then-Chief Justice William Ray Price Jr. signed an order on behalf of this Court pursuant to article V, section 4 of the Missouri Constitution directing "all circuit courts that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority shall be consolidated." Consolidation of court personnel was necessary in light of the budget constraints facing the state at the time. The 2009 court order stated, "The appointing authority shall be either the circuit clerk or court administrator if the county does not have a circuit clerk, an associate circuit judge of the county, or the presiding judge of the circuit." The 2009 court order further provided, "The presiding judge, after consultation with the court en banc, the circuit clerk, and any other appointing authority, shall submit a plan to the [CCBC] designating the appointing authority for all deputy circuit clerks and division clerks …." Finally, the 2009 court order stated, "If a court has submitted a plan to the … [CCBC] prior to October 1, 2009, and it has been approved, it shall be deemed in compliance with the consolidation requirements under this order."

On June 28, 2013, then-Chief Justice Richard B. Teitelman signed an order on behalf of this Court modifying 2009 court order, recognizing the 2009 court order failed to provide a procedure to modify previously ordered consolidation plans. The 2013 court order directed "the circuit court en banc, after consultation with the circuit clerk and other appointing authority, may submit any proposed revisions to its consolidation plan to the [CCBC] for its approval."

In this case, the Second Judicial Circuit *en banc* resolved the dispute between Decker and Judge Steele by transferring Decker's appointing authority to Judge Steele. Later, the Second Judicial Circuit *en banc* transferred this authority from Judge Steele to Judge Swaim. Its authority for this action was the 2009 court order, which expressly provided it was made pursuant to article V, section 4, which provides, "The supreme court shall have general superintending control over all courts and tribunals…. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power."

The 2009 court order provided several options to choose from when designating the appointing authority, including "either the circuit clerk or court administrator if the county does not have a circuit clerk, an associate circuit judge of the county, or the presiding judge of the circuit." The 2008 consolidation agreement initially chose the circuit clerk as its appointing authority. The 2009 court order recognized if a consolidation plan had been adopted before the 2009 court order, "it shall be deemed in compliance with the consolidation requirements under this order." Hence, the 2008 consolidation agreement was brought under the auspices of the 2009 court order or "grandfathered in."

On appeal, the parties debated the validity of the 2009 court order and whether this Court has any constitutional authority—express, inherent, or otherwise—to order the consolidation of court personnel under a single appointing authority. This Court's power to exercise "superintending control" over the lower courts has been guaranteed constitutionally since 1820 and has remained relatively unchanged since its inception. *See* Mo. Const. art. V, sec. 3 (1820) ("The supreme court shall have a general superintending

control over all inferior courts of law. It shall have power to issue writs of Habeas Corpus, Mandamus, Quo Warranto, Certiorari, and other original remedial writs, and to hear and determine the same."); Mo. Const. art. VI, sec. 3 (1865) (same); Mo. Const. art. VI, sec. 3 (1875) ("The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same."). However, the current Missouri constitution grants this Court "superintending control over all courts and tribunals" along with "[s]upervisory authority over all courts" which may be delegated. Mo. Const. art. V, sec. 4.1.

"This Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *Pestka v. State*, 493 S.W.3d 405, 409 (Mo. banc 2016) (quoting *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. banc 2013)). Hence, "superintending control" and "supervisory authority" are distinct powers constitutionally granted to this Court. "Superintending control" historically contemplates this Court's ability to control a lower court's actions or jurisdiction by way of writ proceedings. *See, e.g.*, *State ex rel. Barker v. Wurdeman*, 163 S.W. 849, 850 (Mo. banc 1914) ("Under the Constitution of this state …, this court has a general superintending control over all inferior courts and as a means of maintaining same is clothed with power to issue writs of habeas corpus, quo warranto, certiorari, and other original remedial writs and to hear and determine same."). By contrast, "supervisory authority" contemplates administration of the courts. For example, article V, section 8 of the Missouri Constitution provides this Court's chief justice "shall be the chief administrative officer of the judicial

system and, *subject to the supervisory authority of the supreme court*, shall supervise the administration of the courts of this state." (Emphasis added); *see also Heinen v. Healthline Mgmt., Inc.*, 982 S.W.2d 244, 247 (Mo. banc 1998).

This Court's 2009 order was signed by this Court's then-Chief Justice, pursuant to article V, section 4, and concerned the administration of the courts of this state by ordering consolidation of court personnel. Plaintiffs conceded the 2009 court order "avoided constitutional issues," in essence recognizing it was a valid exercise of this Court's constitutional authority. Because the 2009 court order contemplated applying to all circuit courts regardless of when consolidation was achieved, and because article V, section 4 grants this Court the express supervisory authority over all courts, which may be delegated, I contend the Second Judicial Circuit's May 2013 and April 2014 amendments were constitutional exercises of this Court's delegated supervisory authority to name an appointing authority and would reverse the circuit court's judgment on this basis.

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GEORGE W. DRAPER III, JUDGE