

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

No. SD27130

CITIZENS FOR THE PRESERVATION OF BUEHLER PARK, a non-profit corporation; THOMAS J. SAGER; LINDA MARIE NOVAK; PHILLIP D. LAMPERT; EDIE GALE HAYS; NEIL ELFRINK; LINDA S. GADDY; APRIL J. GADDY; and EILEEN LUNSFORD,

Plaintiffs-Appellants,

v.

CITY OF ROLLA, MISSOURI, a municipal corporation; JOSEPH E. MORGAN, Mayor; and MONTY JORDAN; TERRY RUCK; MATTHEW Z. WILLIAMS; DONALD Z. BARKLAGE; JIM ROLUFS; HARRY KIEFER; JUDY JEPSEN; LOUIS MAGDITS; JIM WILLIAMS; JIM WATERMAN; RICHARD D. SIBLEY; and CHARLOTTE WIGGINS, Members of City Council,

Defendants-Respondents.

**On Appeal from the Circuit Court of Phelps County
Cause No. CV305- 0352CC
The Honorable Tracie L. Storie, presiding**

BRIEF OF PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal is taken from a final judgment (LF 22) of the Circuit Court of Phelps County. The case presents no question to invoke the exclusive jurisdiction of the Supreme Court. Jurisdiction is vested in this Court. Article V, Section 3, Missouri Constitution.

STATEMENT OF FACTS

This appeal marks the second occasion the park known as “Buehler Park” has come before this Court.

History of Buehler Park

The City of Rolla acquired the Buehler Park property under a “warranty deed,” dated February 28, 1958, from the Rolla Chamber of Commerce. See *Ours v. City of Rolla*, 965 S.W.2d 343, 344 (Mo. App. S.D. 1998). The deed recites that the land is “conveyed to the City of Rolla, Missouri for Park purposes only and none other, and to be known as Buehler Park.” *Id.* Following the conveyance, the land was improved and maintained by the City as a Park. *Id.*

The Ours Case and the 1997 Contract for Sale

On March 3, 1997, the City of Rolla entered into a contract for the sale of Buehler Park to Cracker Barrel Old Country Store, Inc. (“Cracker Barrel”). 965 S.W.2d at 344. Several City of Rolla residents and taxpayers brought suit to enjoin the sale on the ground that Buehler Park had been dedicated to the public for use as a park and, for that reason, the City had no legal authority to sell the property. 965 S.W.2d at 344, 346. Following a non-jury trial, the circuit court entered judgment that the plaintiffs lacked

standing to challenge the proposed sale to Cracker Barrel. 965 S.W.2d at 344.¹

On appeal a majority of the three-judge panel affirmed the trial court's judgment on the ground that the plaintiffs lacked standing to bring the action. *Ours v. City of Rolla*, 965 S.W.2d 343, 346 (Mo. App. S.D. 1998). The majority did not decide the merits of the case.² Instead, the majority noted that "allegations and proof of an illegal expenditure of public funds, or the prospect of such illegal expenditures, is an essential element of taxpayer standing." According to the majority, plaintiffs had not "shown an illegal expenditure of public funds, nor that such is about to occur." *Id.* The majority went on to explain the basis for its decision:

Evidence in this case indicated that the only expenditures by the City related to the sale of Buehler Park were salaries for staff time of City employees, correspondence and telephone calls, and the payment of the real estate commission.

Such salaries are not the type of expenditure of public funds which would give standing, as they are general operating expenses which would be incurred whether or not the challenged transaction took place.

965 S.W.2d at 346.³

¹ The circuit court's judgment also appeared to decide the matter on the merits.

Ours v. City of Rolla, 965 S.W.2d at 344.

² Only Judge Garrison, in his dissenting opinion, addressed the merits, believing "that [Buehler Park] was, in fact, dedicated to the public." 965 S.W.2d 343, 346.

³ The majority held also that plaintiffs did not have standing to sue based upon their status as Rolla inhabitants, Rolla property owners, and users of the Park. 965 S.W.2d at 345.

The 2005 Contract for Sale

Over the past several months defendants-respondents have engaged in a second attempt to sell Buehler Park for development, this time for a restaurant district. See petition, paragraph 8 (LF 16). Plaintiffs alleged that this proposed sale is different from the sale proposed in 1997 in that the City of Rolla is expending public funds including, but not limited to, funds for advertising and mailing requests in the pursuit of its unlawful effort to alienate Buehler Park (petition, LF 17, ¶ 12), expenditures that go beyond the “general operating expenses which would be incurred whether or not the challenged transaction took place.” *Ours v. City of Rolla*, 965 S.W.2d at 346.⁴

Proceedings below

On March 3, 2005, plaintiffs filed their petition in the circuit court. LF 15. The petition alleges that the individual plaintiffs pay taxes to the City of Rolla. ¶ 1, LF 15. Almost all of the individual plaintiffs are frequent users of Buehler Park. ¶ 1, LF 15.

Plaintiff Citizens for the Preservation of Buehler Park is a membership organization, organized and existing under Missouri’s not-for-profit corporation laws for the purpose of promoting and preserving historic Buehler Park. ¶ 2, LF 15, 16. Almost all of the members of Citizens for the Preservation of Buehler Park are frequent users of

4 On or about March 21, 2005, plaintiffs served interrogatories and requests for documents upon defendants to fully identify the unlawful expenditures. LF 5. Defendants did not respond to the discovery. LF 1-14. However, before suit was brought, the City of Rolla disclosed that the City had advertised a notice in the Rolla Daily News requesting development proposals, and also solicited requests for proposals by mail at a cost of \$214.72. See App. Ex. 2, attached to suggestions in opposition to motion to dismiss appeal (filed in this Court on August 15, 2005). Plaintiffs also served upon the City of Rolla requests for admissions regarding these expenditures. LF 12.

the Park. ¶ 2, LF 16. All of the organization's members have an interest in promoting and preserving historic Buehler Park for park purposes. *Id.*

Defendants are the City of Rolla, its mayor and members of the city council, collectively referred to as the City of Rolla. ¶¶ 3,4, LF 16.

The petition incorporated by reference the 1958 deed. ¶ 5, LF 16. The petition alleged that the City of Rolla, its mayor and city council are planning to sell and convey Buehler Park for use as a restaurant district. ¶ 8, LF 16. The petition further alleged that the City of Rolla is expending public funds including, but not limited to, funds for advertising and mailing requests for development proposals in the pursuit of its effort to alienate Buehler Park. ¶ 12, LF 17.

Plaintiffs sought a declaratory judgment that the City of Rolla has no lawful authority at this time to sell, transfer, or convey Buehler Park for use as a restaurant district. LF 17. Plaintiffs also sought to enjoin the City of Rolla from alienating Buehler Park. LF 18.

Defendants moved to dismiss the claims or, in the alternative, for judgment on the pleadings, asserting that the petition fails to state a cause of action, that plaintiffs have no standing, and that the petition is barred by *res judicata*. LF 20.

On June 14, 2005, the circuit court sustained defendants' motion to dismiss for lack of standing. LF 12. The court entered judgment on July 18, 2005. LF 22. This appeal followed. LF 23.

POINTS RELIED ON

I. The court below erred in entering judgment for defendants, ruling that plaintiffs lack standing to challenge the proposed sale of dedicated park property by the City of Rolla, because plaintiffs have standing to challenge the abuse of the public trust in that:

A. As taxpayers, plaintiffs have standing; and

Ours v. City of Rolla, 965 S.W.2d 343 (Mo. App. S.D. 1998)

National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources, 964 S.W.2d 818 (Mo. banc 1998)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 132 (Mo. banc 1997)

Eastern Missouri Laborers District Council v. St. Louis County, 781 S.W.2d 43 (Mo. banc 1989)

B. As users of the park, plaintiffs have standing.

Coffey v. State ex rel. County of Stone, 893 S.W.2d 843 (Mo. App. 1995)

Tracy v. Bittle, 112 S.W. 45 (Mo. 1908)

Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504 (Mo. banc 1993)

Ours v. City of Rolla, 965 S.W.2d 343 (Mo. App. S.D. 1998)

II. The court below erred in entering judgment for defendants because, had the court ruled that res judicata bars plaintiffs' claims, res judicata does not act as a bar in that the cause of action is different from the cause of action brought in 1997.

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Elam v. City of St. Ann, 784 S.W.2d 330 (Mo. App. E.D. 1990)

City of Hardin v. Norborne Land Drainage Dist. Of Carroll County
232 S.W.2d 921 (Mo. 1950)

King General Contractors, Inc. v. Reorganized Church of
Jesus Christ of Latter Day Saints,
821 S.W.2d 495, 501 (Mo. 1991)

III. The court below erred in entering judgment for defendants because, had the court ruled that collateral estoppel bars plaintiffs' claims, collateral estoppel does not act as a bar in that:

Shelton v. City of Springfield, 130 S.W.3d 30 (Mo. App. S.D. 2004)

A. The issue decided in the 1997 case is not identical with the issue presented here;

Ours v. City of Rolla, 965 S.W.2d 343 (Mo. App. S.D. 1998)

B. The 1997 case did not result in a judgment on the merits; and

In re Delany's Estate, 258 S.W.2d 613 (Mo. 1953)

Lomax v. Sewell, 50 S.W.3d 804 (Mo. App. W.D. 2001)

Cheatham v. Walsh, 669 S.W.2d 587 (Mo. App. E.D. 1984)

C. None of the parties has had a full and fair opportunity to litigate the issue of whether Buehler Park has been dedicated to the public for use as a park.

In re Delany's Estate, 258 S.W.2d 613 (Mo. 1953)

Lomax v. Sewell, 50 S.W.3d 804 (Mo. App. W.D. 2001)

Cheatham v. Walsh, 669 S.W.2d 587 (Mo. App. E.D. 1984)

ARGUMENT
STANDARD OF REVIEW

The appellate court’s standard of review when considering a trial court's grant of a motion to dismiss is de novo. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005); *Burnside v. Gilliam Cemetery Ass'n of Gilliam*, 96 S.W.3d 155, 156 (Mo. App. W.D. 2003).

On review of a motion to dismiss for failure to state a claim⁵ the reviewing court assumes that all of plaintiffs’ averments are true, and liberally grants to plaintiffs all reasonable inferences. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001). If the facts pleaded and the reasonable inferences to be drawn from these facts, looked at most favorably from the plaintiffs’ viewpoint show any ground for relief, then the petition should not be dismissed. *Loven v. Davis*, 783 S.W.2d 152, 154 (Mo. App. S.D. 1990).

I. The court below erred in entering judgment for defendants, ruling that plaintiffs lack standing to challenge the proposed sale of dedicated park property by the city of rolla, because plaintiffs have standing to challenge the abuse of the public trust

The court below ruled that plaintiffs lack standing to sue. LF 22. However, plaintiffs have standing to challenge the proposed sale on two separate grounds.

A. As taxpayers, plaintiffs have standing

The petition alleges that defendants spent money to advertise for requests for development proposals, and spent money soliciting request for proposals. LF 17, ¶ 12. The petition further alleges that all of the individual plaintiffs pay taxes to the City of Rolla. LF 15, ¶ 1. As taxpayers, the individual plaintiffs have standing. “To establish

⁵ The defenses of res judicata and issue preclusion are defenses alleging that plaintiffs have failed to state a claim. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002).

standing, [plaintiff], like all Missouri taxpayers, need only show ‘that [his] taxes went or will go to public funds that have or will be expended due to the challenged action.’” *National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources*, 964 S.W.2d 818, 819 (Mo. banc 1998), citing *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 98 (Mo. banc 1993). See also *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997); *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58, 60 (Mo. banc 1994); and *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989).

Consistent with these decisions, in *Ours v. City of Rolla*, this Court held that “[a]llegations and proof of the illegal expenditure of public funds or the prospect of such illegal expenditures,” apart from “general operating expenses which would be incurred whether or not the challenged transaction took place,” are sufficient to confer standing upon the plaintiffs. 965 S.W.2d at 346. Allegations of these expenditures are in the petition (LF 17, ¶ 12). Accordingly, the petition alleges facts sufficient to support plaintiffs’ standing as taxpayers.

B. As users of the park, plaintiffs have standing

In *Ours v. City of Rolla*, this Court held that the users of Buehler Park do not have standing to sue. 965 S.W.2d at 345. Appellants respectfully request that this Court overrule that part of *Ours* and, in its stead, adopt the rule from an unbroken line of cases going back to 1908. See *Tracy v. Bittle*, 112 S.W. 45, 49 (Mo. 1908); *Whittom v. Alexander-Richardson Partnership*, 851 S.W.2d 504 (Mo. banc 1993); and *Coffey v. State ex rel. County of Stone*, 893 S.W.2d 843, 844, 845 (Mo. App. 1995). These cases uphold the standing of persons who use the dedicated property to enforce the dedication.

If a dedication is a "contract" between the dedicator and the public, it is meaningless if the public cannot enforce it. If the entities who traditionally have the authority to enforce dedicated uses of public

property do not do so, the public who use the facilities should have standing to present the issue to the courts.

Ours v. City of Rolla, 965 S.W.2d at 348 (Garrison, J., dissenting).

Because the petition alleges (¶ 1, LF 15) that almost all of the individual plaintiffs are frequent users of Buehler Park, appellants respectfully argue that the petition alleges facts sufficient to support the standing of the individuals as users of the park.⁶ However, because the petition alleges facts sufficient to support the standing of the individual plaintiffs as taxpayers, this Court need not address the question of whether plaintiffs have standing as users of Buehler Park. See *Kinder v. Holden*, 92 S.W.3d 793, 804 (Mo. App. W.D. 2002) (because plaintiffs have alleged taxpayer status, it is unnecessary to address the other types of standing alleged by them). See also *National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources*, 964 S.W.2d 818, 819 (Mo. banc 1998) (where one plaintiff taxpayer has standing, the court need not address the standing of the other plaintiffs).

Summary

For the reasons set forth above, plaintiffs have alleged facts sufficient to support their standing to bring this suit.

⁶ The petition also alleges facts to support the standing of the plaintiff organization. Citizens for the Preservation of Buehler Park is a membership organization, organized and existing under Missouri's not-for-profit corporation laws for the purpose of promoting and preserving historic Buehler Park. ¶ 2, LF 15, 16. Almost all of the members of Citizens for the Preservation of Buehler Park are frequent users of the Park. ¶ 2, LF 16. All of the organization's members have an interest in promoting and preserving historic Buehler Park for park purposes. *Id.*

II. The court below erred in entering judgment for defendants because, had the court ruled that res judicata bars plaintiffs' claims, res judicata does not act as a bar in that the cause of action is different from the cause of action brought in 1997

For res judicata to bar a claim there must be an identity of the cause of action. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. 1991); *In re Marriage of Evans*, 155 S.W.3d 90, 96 (Mo. App. S.D. 2004). The cause of action here is different from the one brought in 1997.⁷

To determine whether there is “identity of the cause of action” “the question is whether the claim arises out of the same ‘act, contract or transaction.’” *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318-319 (Mo. banc 2002) (citations omitted). The contract or transaction before this Court is not the same contract or transaction that was before the Court in *Ours*. The prospective buyer on the contract before the *Ours* court was Cracker Barrel Old Country Store, Inc. That transaction ended years ago. The transaction before this Court involves a completely different contract for sale, a buyer unrelated to the buyer in the first case, different plans for developing Buehler Park, and different expenditures by the City of Rolla in pursuit of its effort to sell the Park.

To decide whether a claim arises out of the same act, contract or transaction, the key question is “[a]re there some ultimate facts, unknown or yet-to-occur at the time of the first action, that form the basis of a new claim for relief?” *Chesterfield Village, Inc.*

⁷ The ruling of the trial court on the merits of the prior claim is not res judicata because this Court affirmed the lower court’s judgment solely on the ground that the plaintiffs lacked standing. E.g., *In re Delany’s Estate*, 258 S.W.2d 613, 616 (Mo. 1953); *Lomax v. Sewell*, 50 S.W.3d 804, 810-11 (Mo. App. W.D. 2001); *Cheatham v. Walsh*, 669 S.W.2d 587, 589-90 (Mo. App. E.D. 1984).

v. *City of Chesterfield*, 64 S.W.3d at 320. In other words,

res judicata ‘extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of litigants.’

Elam v. City of St. Ann, 784 S.W.2d 330, 334 (Mo. App. E.D. 1990), quoting *City of Hardin v. Norborne Land Drainage Dist. Of Carroll County*, 232 S.W.2d 921, 925 (Mo. 1950).

The key facts underlying plaintiffs’ claims, including the expenditures made by the City of Rolla in pursuit of its effort to sell the Park, take place eight years after the first action. To answer the question posed by the Supreme Court, “yes,” these are facts that were “yet-to-occur” at the time of the first suit. They form the basis of a new claim for relief.

III. The court below erred in entering judgment for defendants because, had the court ruled that collateral estoppel bars plaintiffs’ claims, collateral estoppel does not act as a bar

Missouri Courts apply a four-part test to determine whether to apply collateral estoppel: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *E.g., Shelton v. City of Springfield*, 130 S.W.3d 30, 34-35 (Mo. App. S.D. 2004). All four elements must exist before a court may apply collateral estoppel. 130 S.W.3d at 36. Further,

the first element -- that the issue decided in the prior adjudication is

identical with the issue presented in the present action -- is paramount because it represents the very crux of the doctrine.

Id.

A. The issue decided in the 1997 case is not identical with the issue presented here

First, on the issue of whether plaintiffs have standing if they show an illegal expenditure of public funds beyond general operating expenses, the *Ours* Court made clear that plaintiffs have standing to sue here. When the City tried to sell Buehler Park to Cracker Barrel eight years ago, the “only expenditures by the City” were “general operating expenses which would be incurred whether or not the challenged transaction took place.” *Ours v. City of Rolla*, 935 S.W.2d at 346. These expenditures were not sufficient to show “an illegal expenditure of public funds, nor that such is about to occur.” *Id.* For this reason, plaintiffs lacked standing as taxpayers to challenge the proposed sale. *Id.* For the current proposal to develop Buehler Park as a restaurant district, the petition alleges expenditures beyond “general operating expenses which would be incurred whether or not the challenged transaction took place.” Not only is the issue before this Court not “**identical**” to the issue decided in *Ours*, it is the converse issue.

B. The 1997 case did not result in a judgment on the merits

Second, only Judge Garrison, in his dissenting opinion, addressed the issue of whether Buehler Park was dedicated to the public for use as a park. Accordingly, after the decision of the Court of Appeals in *Ours*, there is no judgment on the merits. See *In re Delany’s Estate*; *Lomax v. Sewell*; and *Cheatham v. Walsh*, p. 10 n. 7, *supra*.

C. None of the parties has had a full and fair opportunity to litigate the issue of whether Buehler Park has been dedicated to the public for use as a park

Finally, none of the parties has had a full and fair opportunity to litigate the question of whether Buehler Park was dedicated to the public for use as a park because there is no judgment on that issue. *In re Delany’s Estate*; *Lomax v. Sewell*; and

Cheatham v. Walsh, p.10 n. 7, *supra*. Moreover, the key facts underlying plaintiffs claims, including the expenditures made by the City of Rolla in pursuit of its effort to sell the Park, take place eight years after *Ours*. See page 10, *supra*.

Summary

Neither *res judicata* nor collateral estoppel bars plaintiffs' claims.

CONCLUSION

The petition alleges facts sufficient to support plaintiffs' standing to bring this suit. The suit is not otherwise barred from going forward. Accordingly, this Court should reverse the judgment of the Court below.

Respectfully submitted,

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Certifications

The undersigned certifies that on the 3rd day of November, 2005, two copies of the brief of plaintiffs-appellants, together with an electronic copy, were sent to counsel for respondents via next day delivery to the following address:

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The undersigned further certifies that the brief contains the information required by Rule 55.03, the brief complies with the limitations contained in rule 84.06 (b), and that there are 4,088 words in the brief.
