IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITY OF FLAGSTAFF, *Plaintiff/Appellee*,

v.

ARIZONA DEPARTMENT OF ADMINISTRATION, et al.,
Defendants/Appellants.

No. 1 CA-CV 21-0655
FILED 2-21-2023

Appeal from the Superior Court in Maricopa County
No. CV2021-011210
The Honorable James D. Smith, Judge (Retired)

VACATED AND REMANDED

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OPINION

Acting Presiding Judge Randall M. Howe delivered the opinion of the court, in which Judge D. Steven Williams and Vice Chief Judge David B. Gass joined.

H O W E, Judge:

¶1 The State challenges the trial court's order granting the City of Flagstaff a preliminary injunction. The order temporarily stops the Arizona Department of Administration ("ADOA") from collecting an assessment imposed under Section 12 of Budget Bill S.B. 1827 (the "Bill"). Invoking the State's authority under A.R.S. § 35–121.01 to recoup costs from cities with higher minimum wages, the Bill authorizes ADOA to assess Flagstaff for costs attributable to Flagstaff's minimum wage in the 2022 fiscal year.

¶2 As explained below, we vacate the preliminary injunction because Flagstaff did not show the possibility of irreparable harm. We also decline the parties' invitation to decide the substantive issues raised on appeal because the parties and the trial court have yet to fully develop and analyze them. In deference to our tiered system of jurisprudence, we stay our hand to allow the parties to fully develop these issues in the trial court.

FACTS AND PROCEDURAL HISTORY

¶3 In 2006, Arizona voters passed Proposition 202—codified as A.R.S. § 23–364(I)—which authorized cities to set their local minimum wage above the State's. Flagstaff took advantage of this opportunity in 2016, raising the city's minimum wage by its own voter initiative. *See* Flagstaff City Code 15-01-001-0003; 23 No. 11 Ariz. Emp. L. Letter 1 (2017). Three years later, the Legislature enacted A.R.S. § 35–121.01(A) (the "2019 statute"), which allows the State to allocate and collect yearly assessments from any Arizona municipality with a minimum wage that exceeds the State's. The Legislature also amended A.R.S. § 35–113, which directs each state agency's "budget unit" (the department responsible for expending or receiving state monies) to submit yearly cost estimates reflecting the agency's financial requirements for the coming fiscal year. That amendment requires such cost estimates to contain a detailed estimate of costs

"attributable" to a city's "establishment of a minimum wage" that exceeds the State's minimum wage. A.R.S. §§ 35– 113, –101(5).

¶4 According to the 2019 statute, once the Legislature considers and approves the budget estimates, it may allocate an amount to the city or town with a higher minimum wage. A.R.S. § 35–121.01(A). After an amount is allocated, ADOA "shall assess" that amount on the city or town "not later than July 31" of the year the allocation is made. A.R.S. § 35–121.01(B). The amount is "payable immediately on assessment." *Id.* Failure to pay by December 31 of that year compels the treasurer to "subtract the amount owed[,] plus interest" from the city or town's share of tax revenues. *Id; cf.* A.R.S. § 42–5029(D)(1) (State must distribute 25 percent of shared tax revenue to municipalities).

¶5 The State issued no immediate assessments under the 2019 statute. But in October 2019, the Legislature asked state agencies to calculate projected costs attributable to Flagstaff's higher minimum wage in their 2021 budget estimates. Several agencies did so, calculating the total estimated costs at $1,110,992. Then, on June 30, 2021, the Legislature enacted S.B. 1827—specifically Section 12 of the Bill—which ordered ADOA to assess Flagstaff that amount. *See* S.B. 1827, 55th Leg., 1st Reg. Sess. § 12 (Ariz. 2021).

¶6 Aware of the Legislature's action, Flagstaff sued the State and ADOA in July 2021, asking the court to enjoin Section 12 and A.R.S. § 35–121.01 and declare both acts unconstitutional under the Voter Protection Act ("VPA"). It also claimed that the proposed assessment would prevent it from funding crucial infrastructure projects, including "police, fire, parks and recreation, facilities, fleet maintenance, administration, legal services, information technology, finance, and human resources."

¶7 Believing that S.B. 1827 would not be effective until 90 days after enactment, ADOA said it would not issue the assessment before September 29, 2021. On September 30, the court advised the parties to prepare for a preliminary injunction hearing "at which the evidentiary rules are relaxed." Five days later, the court held a one-day hearing on the preliminary injunction motion, replete with oral arguments and thousands of pages of exhibits.

¶8 Mid-hearing, Flagstaff moved to consolidate the preliminary injunction proceeding with a hearing on the merits under Arizona Rule of Civil Procedure 65(a). The court demurred, saying it would limit its ruling

to the preliminary injunction. The State agreed, arguing it lacked sufficient notice to prepare for a consolidated hearing, insisting it was "entitled to a regular discovery process—not the expedited one that Plaintiff[] [has] manufactured[.]" The State explained that a premature ruling on the merits would be prejudicial because it "ha[d]n't had the opportunity to review, much less brief or take a position." The court reassured the State that it did not intend to resolve the case "other than ruling on a preliminary injunction[.]"

¶9 After the hearing, the court enjoined the assessment without deciding whether the Bill or the 2019 statute violated the VPA. It applied the preliminary injunction factors set forth in *Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021) and *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Focusing on Flagstaff's likelihood of success on the merits, it found the assessment untimely, in part because it believed that S.B. 1827 was not effective until 90 days after its enactment. It also concluded that "statutory construction favor[ed] Flagstaff" because the assessment ostensibly sought only "indirect costs." The court explained it would interpret the statute narrowly to prevent "unbridled assessments against municipalities with higher minimum wages[,]" because a broader interpretation would be "difficult to reconcile with Proposition 202, which . . . could be repugnancy the VPA prohibits."

¶10 The court saw no need to address the remaining preliminary injunction factors because it had found that the assessment's issuance date violated the 2019 statute's July 31 deadline. It declared that "a plaintiff showing a violation of a statute need not show a balance of hardships favoring it." Nevertheless, the court briefly addressed the remaining preliminary injunction factors "out of an abundance of caution."

¶11 It found Flagstaff had shown "a *possibility* of irreparable harm" because, although Flagstaff retained a $23 million balance, "remitting the assessment put[] it much closer to mandatory recessionary spending protocols, which could hinder city programs." This meant that the assessment's "possible budgetary effects" on Flagstaff were "not severe," but also "not meaningless[,]" making "[t]he balance of hardships tip[] modestly in Flagstaff's favor." Finally, it found that public policy favored an injunction because "ADOA did not meet the July 31 deadline[,]" and the court "need only address how the executive branch is interpreting and implementing the legislation this fiscal year." The State timely appealed, and we have jurisdiction. *See* A.R.S. § 12–2101(A)(5)(b).

DISCUSSION

¶12 The State argues that the court misapplied the preliminary injunction standard. As relevant here, it contends that the court erred in ruling that Flagstaff had shown that it would suffer irreparable harm from paying the assessment and that Flagstaff did not have an adequate remedy at law. We review the grant of a preliminary injunction for an abuse of discretion. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶ 14 (App. 2009). A trial court abuses its discretion if it applies the incorrect substantive law or preliminary injunction standard, bases its decision on an erroneous material finding of fact, or misapplies an appropriate preliminary injunction standard. *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 ¶ 8 (App. 2013).

I. Preliminary Injunction Standard

¶13 By design, preliminary injunctions involve expedited proceedings, so "legal conclusions reached at the preliminary injunction phase of litigation do not constitute law of the case." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 280 (App. 1993). "The trial court often must quickly make a decision concerning the merits in the preliminary injunction phase of litigation[.]" *Id.* Because preliminary injunction orders are by nature interlocutory, they provide "only a prediction about the merits[,]" and should not be treated as binding. *Id.* A trial court's "legal conclusions, like [its] fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation[.]" *Id.* (citation and internal quotation marks omitted).

¶14 A court's ruling on a preliminary injunction should therefore not be conflated with a final decision unless the preliminary injunction hearing has been properly consolidated with a hearing on the merits. *See* Ariz. R. Civ. P. 65(a); *Powell-Cerkoney*, 176 Ariz. at 280. To obtain a preliminary injunction, the movant must prove (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury or harm not remediable by damages, (3) a balance of hardships favoring that party, and (4) public policy favoring the injunction. *Shoen*, 167 Ariz. at 63. Alternatively, the movant can seek to prove one of two conjunctive pairings: (1) probable success on the merits and the possibility of irreparable harm, or (2) the presence of serious questions and the balance of hardships tipping sharply in the movant's favor. *Fann*, 251 Ariz. at 432 ¶ 16.

¶15 The two tests are worded differently. The standard four-part test from *Shoen* lists "public policy" as a distinct and separate factor, but it is not mentioned anywhere in the conjunctive-pairing test, which lists the "presence of serious questions." And *Shoen* identifies the conjunctive pairing test as a means of establishing the balance of hardships, which it names as the "critical factor" in the preliminary injunction analysis. *Shoen*, 167 Ariz. at 63. The supreme court in *Fann*, however, presents the conjunctive-pairing test as an alternative to the four-part *Shoen* test, rather than a means of establishing just the balance of hardships. *See Fann*, 251 Ariz. at 432 ¶ 16 (describing the conjunctive-pairing test as a means to meet the preliminary injunction burden).

¶16 Although the two tests contain different wording, the difference in wording does not change the analysis because the standard is "not absolute, but sliding." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10 (2006). The "principles are not necessarily separate tests but rather are extremes of a single continuum." *See Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 363 (D. Ariz. 1983). And here, the trial court focused on the first conjunctive pairing, so we turn there first.

A. First Conjunctive Pairing

¶17 The relationship between probable success on the merits and the possibility of irreparable harm is inversely proportionate: "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Fann*, 251 Ariz. at 432 ¶ 16 (quoting *Shoen*, 167 Ariz. at 63). Here, the trial court focused on Flagstaff's likelihood of success on the merits. It then found Flagstaff had also shown the possibility of irreparable harm. Because this second factor is dispositive, we consider it first. *See Sw. Barricades, L.L.C. v. Traffic Mgmt., Inc.*, 240 Ariz. 139, 142 ¶ 17 n.3 (App. 2016) (dispositive issue governs decision on appeal).

¶18 The trial court erred in finding the possibility of irreparable harm. Injunctive relief is available only when the injury is "not remediable by damages[.]" *Shoen*, 167 Ariz. at 63. An award of monetary damages generally is an adequate remedy when damages are calculable with reasonable certainty and "address the full harm suffered." *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 65 ¶¶ 10–11 (App. 2011) (citation omitted). Here, even though the trial court found that Flagstaff retained a $23 million surplus after budgeting for the roughly $1.1 million assessment, it still found the possibility of irreparable harm because

"remitting the assessment puts it much closer to mandatory recessionary spending protocols, which could hinder city programs."

¶19 That finding was error for three reasons. First, the purported harm was not irreparable. *See id.* at 65 ¶ 10. Even if the amount of the assessment were critical to Flagstaff's budget, any harm is monetary and calculable; it can be addressed by replenishing the funds into Flagstaff's coffers. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

¶20 Flagstaff relies on *City of Kankakee v. Dep't of Revenue*, 988 N.E.2d 723, 733 ¶ 25 (Ill. App. 2013), arguing that monetary harms can qualify as irreparable if they prevent cities from funding crucial infrastructures. This decision from another jurisdiction does not help Flagstaff, however, because the facts there differ from the facts here. In *City of Kankakee*, Illinois sought an adjustment of sales tax revenue that the city had allegedly misappropriated in previous years, and the city obtained a preliminary injunction of the adjustment. *Id.* at 726 ¶ 1. The Illinois Court of Appeals affirmed the injunction because the adjustment would "create an imminently dangerous condition in the [c]ity[,]" the city "would be left with a shortfall in its funds[,]" and it would "be unable to replace this income from any other source[.]" *Id.* at 726 ¶ 4, 733 ¶ 25. The court also noted that the city would be "unable to retroactively balance its budget for the prior tax periods in question." *Id.* at 733 ¶ 25.

¶21 By contrast, Flagstaff has already finalized its budget for the coming fiscal year. And rather than suffer a "shortfall" in funds, it will retain a $23 million balance. On this record, Flagstaff has not shown that the assessment's monetary impact would conjure an "imminently dangerous condition" justifying a departure from Arizona law on irreparable harm.

¶22 Second, with or without the temporary injunction, Flagstaff would not be able to reliably include the amount of the assessment in its operating budget. As the trial court noted, Flagstaff "could not feasibly distribute money that it might later remit to the State if the State prevails in the end." The trial court also noted that "it does not seem possible for the city" to fund additional requests with monies reserved to pay the assessment because "the city already finalized the budget."

¶23 Third, the court could not find that the funds would trigger recessionary spending or hinder city programs because those are factual questions that have yet to be resolved. At oral argument on appeal, the State contended that the funds were "expenditures," not "revenue," which it argues would mean that the assessment would not affect Flagstaff's recessionary spending protocols. The trial court erred in finding that Flagstaff would be irreparably harmed without an injunction.

¶24 Flagstaff argues that it need not prove irreparable harm because the assessment was unlawful. A plaintiff need not show irreparable injury or balance of hardship "when the acts sought to be enjoined *have been declared unlawful*[.]" *Burton v. Celentano*, 134 Ariz. 594, 596 (App. 1982) (emphasis added). Here, the assessment has not yet been "declared unlawful," except by the trial court itself, and only in the context of its tentative ruling on the preliminary injunction. Under Flagstaff's interpretation, the trial court relied on its own declaration to decide the case at the preliminary injunction stage, effectively ruling on the merits before the parties had the opportunity to fully develop the record. But the court assured the parties it was not issuing a ruling on the merits, merely resolving the preliminary injunction. Doing otherwise would be error because a preliminary injunction ruling does not constitute law of the case. *See Powell-Cerkoney*, 176 Ariz. at 280 (preliminary injunction order is interlocutory by nature and "only a prediction about the merits"). Flagstaff's failure to show irreparable harm is dispositive here. Accordingly, deciding whether Flagstaff was likely to succeed on the merits is both unnecessary and premature. *See Sw. Barricades*, 240 Ariz. at 142 ¶ 17 n.3.

B. Second Conjunctive Pairing

¶25 Flagstaff failed to meet the first conjunctive pairing, but it nevertheless could have prevailed if it had proved the second: "the presence of serious questions and the balance of hardships tipping sharply in [its] favor[.]" *Fann*, 251 Ariz. at 432 ¶ 16. While this case certainly raises "the presence of serious questions[,]" *see Ariz. Ass'n of Providers for Persons with Disabilities*, 223 Ariz. at 12 ¶ 13, it does not satisfy the second prong—"the balance of hardships." The court found that the balance of hardships tips "modestly"—not *sharply*—in Flagstaff's favor, reasoning that the "[f]iscal consequences to Flagstaff are more severe than fiscal consequences to the State." Accordingly, this "critical factor" in the second conjunctive pairing is not met. *See TP Racing*, 232 Ariz. at 495 ¶ 21. Because the necessary factors were not present, the court erred in granting the preliminary injunction.

II. Remaining Issues on Appeal

¶26 The parties urge us to decide the substantive legal issues—whether the statute's July 31 deadline is mandatory or directory, whether the word "costs" includes indirect costs, and whether Section 12 of the Bill and its authorizing statute impliedly amend the VPA, violating Arizona's constitution. But "a court of appeals sits as a court of review, not of first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (citation omitted) ("As a court for review of errors, we do not . . . decide facts or make legal conclusions in the first instance[.]"). Although the nature of the legal issues presented on appeal may not change much after a trial on the merits, the relationship between the legal issues and the applicable facts might be better understood after a full trial. *See E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the [lower] courts[.]").

¶27 While the parties are understandably eager to resolve this case as quickly as possible, quickness must not eclipse thoroughness. *See Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency."). The State originally asked the trial court to "limit its forthcoming ruling to [Flagstaff]'s request for a preliminary injunction[,]" arguing it was "entitled to a regular discovery process . . . to ensure . . . there are no disputed material facts that need to be resolved." Nevertheless, on appeal the State has changed course, arguing it had fully briefed all legal and factual arguments at the preliminary injunction hearing. It asks for a final decision on all pending issues for the sake of "comity" and "judicial economy." Having told the trial court that it had not fully briefed or argued the issues, the State is judicially estopped from adopting an opposing position here. *See State v. Towery*, 186 Ariz. 168, 182 (1996) ("[A] party who has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent proceeding involving the same parties and questions.") (citation omitted).

¶28 In any case, the State's original position is correct. The record is incomplete because the trial court did not consolidate the preliminary injunction hearing with a trial on the merits. *Cf. Piner v. Superior Ct. In & For Cnty. of Maricopa*, 192 Ariz. 182, 184 ¶ 8 (1998) ("We do not favor accepting special action jurisdiction to review the propriety of interlocutory orders and pretrial rulings[.]"). We respect the role of the trial court and trust in its competence to resolve all legal and factual matters before it in the first instance. *See Q Int'l Courier Inc. v. Smoak*, 441 F.3d 214, 220 (4th Cir. 2006) ("Although we are not precluded from addressing these arguments, we

deem it more appropriate to allow the district court to consider them, if necessary, in the first instance on remand.").

¶29 Accordingly, we decline to decide the merits without the benefit of having a fully developed record. To echo the truth Justice Robert H. Jackson recognized three quarters of a century ago,

> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948).

III. Considerations on Remand

¶30 Because in granting the injunction the trial court ruled that the State's assessment was untimely, we note that on remand, the trial court may wish to consider whether its ruling is affected by *Ariz. Free Enter. Club v. Hobbs,* 253 Ariz. 478, 485 ¶ 20 (2022) (revenue laws that provide "for the support and maintenance" of "*existing* state departments or state institutions" are valid upon enactment and exempt from referendum).

CONCLUSION

¶31 For the foregoing reasons, we vacate the preliminary injunction and remand for a trial on the merits. We decline to grant attorneys' fees and costs.

AMY M. WOOD • Clerk of the Court
FILED: AA