

IN THE MISSOURI SUPREME COURT

JAMES TROUT,)
)
 Plaintiff/Appellant,)
)
 v.) Case No. SC88476
)
 STATE OF MISSOURI, et al.,)
)
 Defendants/Respondents.)

Appeal from the Circuit Court
of Cole County

The Honorable Richard D. Callahan
Circuit Judge

Brief Of Amicus Curiae
Missouri Republican State Committee

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Interest Of The Amicus Curiae

The Missouri Republican State Committee (“MRSC”) is the governing body of the Republican Party in Missouri. See § 115.625, RSMo 2000. The MRSC exists, in part, to support Republican candidates and officeholders and help them get elected to office. As such, every election cycle, the MRSC makes substantial contributions and expenditures in support of Republican candidates.

Under the Campaign Finance Law, the MRSC is a political party committee. § 130.011(25), RSMo 2000. The law at issue in this case – House Bill 1900 – directly affects the MRSC by changing the timing for and amounts of contributions that it can make in connection with state elections.

In this case, Plaintiff has challenged § 130.032.2, RSMo, as amended by House Bill 1900, as unconstitutional in violation of the First Amendment to the United States Constitution. L.F. 5-13. The State of Missouri and members of the Missouri Ethics Commission (collectively “State Defendants”) are defendants. Attorney General Jeremiah W. (“Jay”) Nixon entered his appearance on January 5, 2007, and has represented those State Defendants at trial and on appeal. L.F. 1-2, 523. But, after engaging in this representation, the Attorney General has also accepted 770 contributions totaling \$389,979 to support his campaign for the Democratic nomination for Governor. Motion to File Amicus Curiae Brief Out of Time, Exhibit A (June 14, 2007) (hereinafter April 16 Disclosure Report).

Section 130.032.2, as amended by House Bill 1900, prohibits the acceptance of such contributions during the legislative session.

Thus, the Attorney General has been accepting contributions in violation of the law, and at the same time, defending the constitutionality of the law on behalf of the State Defendants. These competing personal and official interests constitute a prohibited conflict of interest. See Mo. Sup. Ct. R. 4-1.7, 4-1.11. As such, the Attorney General's defense of the State Defendants and of legislation enacted by the people's duly elected representatives has been compromised.

No other party has raised this issue. When this kind of conflict has arisen in the past, this Court has held that it has the "inherent power and duty to intervene" and has remanded the matter to the trial court for resolution. State v. Planned Parenthood of Kansas and Mid-Missouri, 66 S.W.3d 16, 20 (Mo. banc 2002). Similar relief is appropriate here.

Statement of Facts

The facts relevant to this amicus curiae brief have not been stated by the parties. Accordingly, they are set forth here.

A. House Bill 1900

During the 2006 legislative session, the Missouri General Assembly passed and the Governor approved House Bill 1900. L.F. 8, 226-27. In relevant part, that Bill effected two changes to § 130.032 of Missouri's revised statutes: (1) it banned statewide candidates from accepting contributions during the legislative session, and (2) it repealed the limits on contributions to state candidates, effectively allowing state candidates to accept unlimited contributions. L.F. 214-16. House Bill 1900 took effect January 1, 2007. L.F. 9, 223, 227.

B. Litigation over House Bill 1900

On January 2, 2007, Plaintiff James Trout sued the State of Missouri challenging the constitutionality of House Bill 1900. L.F. 1. Plaintiff subsequently amended his petition to add claims against the individual members of the Missouri Ethics Commission pursuant to 42 U.S.C. § 1983. L.F. 5-13.

Plaintiff challenged (1) the ban on accepting contributions during the legislative session as violating the First Amendment to the United States Constitution, and (2) House Bill 1900's compliance with the Missouri constitutional provisions concerning legislative procedure (e.g., clear title). L.F. 5-13. In his capacity as Attorney General, Jeremiah W. ("Jay") Nixon was served with a copy of the petition pursuant to Rule 87.04. L.F. 6. He entered his

appearance for the State Defendants and participated in the proceedings through a high level assistant attorney general – the Senior Chief Counsel for Special Litigation. L.F. 1-2, 523.

The trial court entered a temporary restraining order on January 8, 2007, and entered its judgment on March 28, 2007. L.F. 2, 4. Ultimately, the trial court sustained plaintiff’s First Amendment challenge to the ban on accepting contributions during the legislative session and invalidated parts of the law for failure to comply with the state constitution. L.F. 499. The trial court also awarded attorney’s fees to Plaintiff in connection with his § 1983 claim. L.F. 499.

Plaintiff appealed to this Court and the State Defendants cross-appealed. L.F. 501-36. In the civil case information sheet filed with his notice of appeal, the Attorney General stated that the issue was “[w]hether the trial court erred in granting the plaintiff any relief.” L.F. 535 (emphasis added). His jurisdictional statement included the challenge to the substantive validity of § 130.032.2, RSMo, as a basis for this Court’s jurisdiction. L.F. 536. However, in his brief, Attorney General Nixon did not defend the constitutionality of the ban on accepting contributions during the legislative session. Resp. First Br. 61-68 & n.7; see also App. Second Br. 36 n.7 (“The State does not appeal the trial court’s decision that H.B.1900’s black out period violated the First Amendment to the United States Constitution.”).

C. Contributions Accepted During the Legislative Session

Jay Nixon has designated a candidate committee to finance his candidacy for the Democratic nomination for governor in 2008. April 16 Disclosure Report. The purpose of a candidate committee is to “receive contributions or make expenditures in behalf of the person’s candidacy.” § 130.011(9), RSMo 2000. That committee “is presumed to be under the control and direction of the candidate unless the candidate files an affidavit with the appropriate officer stating that the committee is acting without control or direction on the candidate’s part.” Id.¹ As a candidate, Jay Nixon “is ultimately responsible for all reporting requirements pursuant to” chapter 130, RSMo. § 130.058, RSMo 2000.

The 2007 legislative session began on Wednesday, January 3, 2007. Mo. Const. art. III, § 20; § 130.032.2, RSMo Supp. 2006. Jay Nixon electronically filed a campaign finance report disclosing his financial activity during the beginning of the 2007 legislative session with the Missouri Ethics Commission on April 16, 2007.² April 16 Disclosure Report. He certified that the report was

¹ No such affidavit is posted on the Ethics Commission’s website for the Nixon for Governor committee.

² This report was filed after the trial court entered its judgment on March 28, 2007, and three days before Plaintiff filed his notice of appeal. L.F. 499, 501. Thus, little or no practical opportunity existed to present this information to the trial court.

complete, true, and accurate. Id. From January 3, 2007 through March 31, 2007, the report reflects that Jay Nixon accepted 770 itemized contributions totaling \$389,979. Id.

As a candidate for statewide office, Jay Nixon's acceptance of contributions during the legislative session violated § 130.032.2 as amended by House Bill 1900. Restitution, civil money penalties, and criminal penalties (if the violations were purposeful) are potential sanctions for such violations. §§ 105.961.4, 105.961.5, 130.072, 130.081, RSMo 2000.

Argument

I. This Court Should Exercise Its Inherent Authority To Remand This Case To The Trial Court Because The State Defendants Are Not Represented By Unconflicted Counsel In That The Attorney General’s Personal And Official Interests Conflict.

In the adversarial litigation system, attorneys zealously advocate for the interests of their clients and neutral decisionmakers – the courts – determine the merits of those contentions. Mo. Sup. Ct. R. 4, Preamble: A Lawyer’s Responsibilities. This system of justice depends on the parties being represented by attorneys with undivided loyalties. Mo. Sup. Ct. R. 4-1.7 cmt. (“Loyalty is an essential element in the lawyer’s relationship to a client.”). Attorneys with divided loyalties may not zealously represent their clients and may – subconsciously or overtly – allow their competing interests to affect their trial strategy decisions.

Missouri Supreme Court Rules 4-1.7 – 4-1.12 regulate attorney conflicts of interest. In the first instance, attorneys must police themselves. See Mo. Sup. Ct. Rule 4-1.7 cmt. But, when a conflict is apparent on appeal, this Court has inherent authority to take remedial action to protect the adversarial process. Planned Parenthood, 66 S.W.3d at 20.

In Planned Parenthood, the Attorney General represented two parties with inconsistent positions in the trial court: the State of Missouri (through a special assistant attorney general) and the Director of the Department of Health (through an assistant attorney general). Id. at 19. The Court first noted that the Attorney

General directed his assistants in their representation of those parties and their actions are therefore his actions. Id. (quoting § 27.020.1, RSMo 2000). The Court then held that Rule 4-1.7 applied to the Attorney General. Id.

The Court emphasized that “[a]n attorney owes a duty of undivided loyalty to the client.” Id. (emphasis added). When the Attorney General represents two opposing sides in a lawsuit, it is confusing to the public at best and an unacceptable contortion of the adversarial system at worst. Id. at 19-20. The Court explained that the Attorney General has substantial discretion in deciding how and when to represent state agencies. Id. at 20. But, he must still act with undivided loyalty after choosing a side. Id. By representing opposing parties in a lawsuit, the Attorney General had a clear conflict of interest.

In fashioning a remedy, the Court noted that the parties had only implicitly raised the issue. Id. Even so, when “a conflict of interest exists that threatens a breakdown of the adversarial process, courts have the inherent power and duty to intervene.” Id. (emphasis added). Accordingly, the Court reversed, remanded, and directed the Attorney General to remedy his conflict. Id. In closing, the Court warned that the perceived need to expedite an important case could not justify procedural shortcuts that undermine the entire process. Id.

The Planned Parenthood case involved conflicts between two clients represented by the Attorney General. In this case, the conflict exists between the interests of the Attorney General’s clients – the State Defendants – and his own personal interests. The Rules of Professional Conduct expressly recognize that

competing personal interests create the same divided loyalties as interests of other clients. Mo. Sup. Ct. R. 4-1.7(b) , 4-1.11(d) . Accordingly, both types of conflicts are treated the same. Id. Since the Attorney General has conflicting personal and official interests in this case, this Court should remand this case to the trial court for resolution of the conflict. Planned Parenthood, 66 S.W.3d at 20.

A. Rules 4-1.7 and 4-1.11 Prohibit Government Attorneys From Entering Or Continuing In Representations When Their Personal And Official Interests Conflict Or Foreseeably Could Conflict.

Rule 4-1.11 specifically addresses government attorneys. A lawyer holding public office “shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties and responsibilities.” Mo. Sup. Ct. R. 4-1.11(d)(1) (emphasis added). Thus, an attorney elected to represent the public must abstain from activities where his personal and official interests conflict or foreseeably could conflict.

Rule 4-1.7 is the general conflict of interest provision for attorneys. This rule also applies to government attorneys and to the Attorney General specifically. Mo. Sup. Ct. R. 4-1.11 cmt; Planned Parenthood, 66 S.W.3d at 19. Under that rule, an attorney cannot represent a client when he has a conflicting personal interest that will adversely affect the representation of a client:

A lawyer shall not represent a client if the representation of that client may be materially limited

by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected;
- (2) the client consents after consultation.

Mo. Sup. Ct. R. 4-1.7(b) (emphasis added). The comments emphasize that a lawyer's personal interests can create a conflict: "The lawyer's own interests should not be permitted to have adverse effect on representation of a client." Mo. Sup. Ct. R. 4-1.7 cmt.

At the outset of the representation, an attorney must assess whether a conflict exists and throughout the litigation the attorney must re-assess whether a conflict has arisen. Mo. Sup. Ct. R. 4-1.7 cmt. Under Rule 4-1.7, a conflict cannot be waived unless the lawyer reasonably believes the representation will not be affected. Certain conflicts are simply unwaivable. State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 737 (Mo. banc 2004). Even if the conflict is waivable, the attorney must consult his or her clients concerning the conflict and obtain their informed consent to the representation. Id.

B. The Attorney General's Personal Interests And The Interests of His Clients Conflict.

In this matter, the Attorney General's personal interests and the interests of his clients conflict. As a candidate, the Attorney General has an interest in accepting contributions during the legislative session. In fact, Jay Nixon has

accepted 770 contributions totaling \$389,979 since January 3, 2007. April 16 Disclosure Report. Since he has accepted contributions during the legislative session, he has an interest in § 130.032.2 of House Bill 1900 being determined to be unconstitutional. Otherwise, he is in violation of the law, and could be subjected to regulatory sanctions, monetary penalties, or a restitution obligation. §§ 105.961.4, 105.961.5, 130.072, RSMo 2000.

At the same time, as Attorney General of the State of Missouri, Jay Nixon is defending the constitutionality of House Bill 1900 on behalf of the State of Missouri and the Ethics Commissioners charged with enforcing that law. By statute, the Attorney General is permitted, but not required to defend the state in such lawsuits. § 27.060, RSMo 2000 (Attorney General “may” defend where the state’s interests are implicated). The General Assembly has provided for cases in which the Attorney General will not or cannot defend the Ethics Commission. § 105.977, RSMo 2000 (authorizing Ethics Commission to retain its own counsel). Having elected to defend the law, he had an undivided duty of loyalty which he could not compromise.³

The existence of a temporary restraining order did not affect the Attorney General’s official interest. The TRO was entered against the State Defendants (the

³ Even if the Attorney General was required to defend the law, Rule 4-1.11(d)(1) expressly prohibited him from engaging in other activities that conflict or foreseeably could conflict with that official duty.

Attorney General's clients), and was an interim, non-final order. The fact that the Attorney General's clients may have been temporarily enjoined from enforcing the law against him did not eliminate or change his official interest in defending that law.

By putting himself in a position where his personal interests conflict with and have potentially limited his obligations as the attorney for the State and the Ethics Commissioners, the Attorney General has created a prohibited conflict of interest for himself. Rule 4-1.11(d) prohibits a lawyer who holds public office from engaging in activities that conflict or "foreseeably could" conflict with his official duties. Here, the Attorney General's acceptance of 770 contributions totaling \$389,979 in violation of House Bill 1900 "foreseeably could" and actually did conflict with his official duties in defending the constitutionality of that law.

Rule 4-1.7(b) also prohibits an attorney from representing a client when the lawyer's own interests may materially limit his responsibilities to the client, unless (1) he has a reasonable belief that the representation will not be affected and (2) the client consents after consultation. Here, any belief that the representation would not be affected could not be "reasonable." The Attorney General's interest pertains to \$389,979 in contributions and the liability that could attach if such contributions were determined to be unlawful. Any belief by the Attorney General that an interest of that magnitude would not affect the representation was not reasonable.

Second, even if the Attorney General asserts that he had a reasonable belief

that the representation of the clients would not be affected, his clients must still consent to the representation. Accordingly, Rule 4-1.7(b) required the Attorney General to consult the defendant Ethics Commissioners concerning his conflict and to obtain their consent to his representation of them. In addition, the Attorney General needed the General Assembly – the people of the State of Missouri’s duly elected representatives – to waive the conflict. The General Assembly has not provided that authorization. Compare Planned Parenthood, 66 S.W.3d at 19 (holding that Rule 4-1.7 applied and that the Attorney General had a prohibited conflict of interest), with State ex rel. Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 135-36 (Mo. banc 2000) (holding that the Attorney General was authorized to enter into certain fee arrangements by his common law power and § 27.020, RSMo, subject to the General Assembly’s authority to revoke consent).

In sum, the Attorney General’s loyalties are divided in contravention of the Rules of Professional Conduct, and his representation of the State Defendants and defense of the constitutionality of House Bill 1900 has been compromised.

**C. The Attorney General Failed To Appeal The
Constitutionality Of The Ban.**

The threat of divided loyalties is not a mere abstract concern in this case. The Attorney General’s trial strategy decisions have made the issue a concrete and practical one. In the trial court, the Attorney General defended the constitutionality of the ban on accepting contributions during the legislative session. L.F. 228. When he appealed to this Court, his civil case information

sheet indicated the issue was whether “any relief” should be afforded plaintiff. L.F. 535. His jurisdictional statement invoked the constitutional challenge to § 130.032.2 as a basis for this Court’s jurisdiction. L.F. 536. But, when he filed his brief, the Attorney General changed his position, and did not contest the trial court’s finding that § 130.032.2 violated the First Amendment. Resp. First Br. 61-69. His failure to preserve this issue in a point relied on or in the argument section of his brief means that the State has effectively conceded that § 130.032.2 violates the First Amendment. By doing so, he has prevented the issue from being presented to this Court for its review.

Ordinarily, of course, such trial strategy decisions are committed to the Attorney General’s discretion. However, in this case, where the Attorney General has a concrete and very substantial interest in § 130.032.2 not being determined to be constitutional, members of the public could reasonably question the motivation for that decision. This Court should be legitimately concerned whether the case – as presented for this Court’s decision – reflects the positions of the parties, or has been affected by the contrary interests of the attorney for one of the litigants.

In fact, a reasonable legal argument does support the constitutionality of § 130.032.2, RSMo, as amended by House Bill 1900. State statutes are presumed to be constitutional. Missouri State Medical Ass’n v. Mo. Dept. of Health, 39 S.W.3d 837, 840 (Mo. banc 2001). The United States Supreme Court has stated that legislation limiting contributions is not subject to strict scrutiny and is required only to meet a less rigorous standard of reasonableness: The limit must

be closely drawn to match a sufficiently important government interest. See, e.g., McConnell v. Fed. Election Comm’n, 540 U.S. 93, 136 (2003). Other federal and state courts have held that bans on contributions are not per se unconstitutional and that their validity depends on the bans being appropriately tailored. See Institute of Governmental Advocates v. Fair Political Practices Comm’n, 164 F. Supp. 2d 1183, 1191 (E.D. Cal. 2001) (“Section 85702 is not unconstitutional simply because it *bans*, rather than limits, contributions by certain lobbyists.”); Kimbell v. Hooper, 665 A.2d 44, 51 (Vt. 1995). These decisions – though not identified in the Attorney General’s research, see Resp. First Br. 66 n.7 – upheld closely drawn contribution bans. Institute of Governmental Advocates, 164 F. Supp. 2d at 1190-94 (upholding a year-round ban on contributions to state officeholders and candidates by persons registered to lobby that officeholder or candidate’s government agency); Kimbell, 665 A.2d at 50-51 (upholding a ban on legislators soliciting contributions from lobbyists and on lobbyists making contributions to legislators during the legislative session).

The Attorney General could have argued that the State has an interest in protecting legislators and statewide officeholders from corruption and the appearance of corruption that may result from attempts to “buy” influence and access during the legislative session. The legislative session is a unique and discrete period of time when the most significant public business (law-making) is conducted. Though they are not directly involved in the legislative process by casting votes, statewide officers may lobby for legislation and on behalf of

constituents. Because of their expertise and place of public trust, their support or opposition to legislation is highly prized.

Concerning the tailoring of the law, the Attorney General could have argued that § 130.032.2, RSMo, only proscribes one type of fundraising activity: candidates accepting contributions during the legislative session. The law does not prohibit other fundraising activities that candidates could undertake. For example, candidates remain free to solicit contributions for political parties and continuing committees. Moreover, § 130.032.2 only imposes a temporal ban. Candidates are free to accept unlimited contributions after the end of the legislative session. Since candidates may accept unlimited contributions at other times, candidates' overall fundraising ability is not necessarily diminished. The ban only limits the time when they can accept contributions.

Unfortunately, Jay Nixon declined to present these arguments to this Court for its resolution. In these circumstances, it is reasonable to question whether the decision to stop defending the constitutionality of § 130.032.2 as amended by House Bill 1900 was affected by the Attorney General's contrary personal interests.

D. The Attorney General's Conflicting Interests Require A Remand To The Trial Court To Allow The Conflict To Be Resolved.

This case should be remanded to the trial court for resolution of the conflict of interest issues. Planned Parenthood, 66 S.W.3d at 20. While government

attorneys such as the Attorney General are unique in some respects and must have discretion to execute their duties, they are still bound by the Rules of Professional Conduct. Id. This case does not involve an abstract or theoretical issue conflict between a public policy position of the Attorney General and his litigation duties. Rather, it involves a direct and substantial pecuniary interest of the Attorney General that would be adversely affected if § 130.032.2, as amended by House Bill 1900, was actually upheld. By accepting the duty to defend that statute and then accepting contributions in violation of it, the Attorney General impermissibly divided his loyalties.

In such a case, the public and this Court cannot have confidence that the state's laws have been vigorously and adequately defended. The Court should exercise its inherent authority to remand for resolution of the conflict issue by the trial court.

Conclusion

For these reasons, the MRSC respectfully requests that this Court remand this proceeding to the trial court to address the conflict of interest issues. The MRSC expresses no opinion on the ultimate disposition of this case.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,242 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by hand delivery or placement in the United States Mail, postage paid, on June 14, 2007:

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