

FILED JUL 15 2013

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED99936

ARTHUR L. LeBEAU, Jr
ERIC R. REICHERT

Appellants

vs.

COMMISSIONERS OF FRANKLIN COUNTY

Respondents

Appeal from the Circuit Court of Franklin County
State of Missouri
Honorable Judge Robert D. Schollmeyer
12AB-CC00269

APPELLANTS AMENDED BRIEF

ARTHUR L LeBEAU, Jr.
Appellant, Pro-Se
326 Valleyview Drive
Villa Ridge, MO 63089
636-742-4931
lemier@earthlink.net

ERIC R. REICHERT
Appellant, Pro-Se
2417 Brinkman Road
Villa Ridge, MO 63089
636-388-6679
stillgineric@yahoo.com

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LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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INTRODUCTION

Appellants present this introduction to give a much greater insight to the matter at bar, and how HB 1171 violated the Missouri Constitution at Art III, Sections 21, & 23. Also the fact that the trial court did not address any of the merits of the matter so presented; whether HB 1171 was constitutional and, if Counsel representing the Respondents had standing to so represent them.

In Plaintiffs/Appellants original Petition there were ten citizens who were plaintiffs. However due to problems of many of them not being able to make various hearings and thus were absent, the Plaintiffs decided to have two, namely Arthur LeBeau and Eric Reichert pursue the appeal, as this would also save the court the expense of extra mailings of various filings to the other plaintiffs.

The introduction of the initial proceedings for passage of HB 1171 is further developed in Appellants Argument as to it being unconstitutional.

The trial court's order of 1/25/2013 (LF 48) at point 1: Dismissed petition for lack of standing. And at point 4: the trial court denied a judgment on the pleadings. No explanation as to why Plaintiffs did not have standing. This is also further developed in Appellants Argument. Without the trial court's ruling on the pleadings the result is: no answer on the constitutionality of HB 1171

Again the trial court's order of 3/28/2013 (LF 76,77) dismissing the Amended

Petition again of not having standing is a most unfair and a "not wanting" to rule on the merits, the trial court merely avoided the issue and took the easy way out. Yes these are somewhat harsh words but the truth. If the trial court would have ruled that counsel for the Respondents was the one, not having standing to represent the Respondents (being the correct decision) then matter would have been ruled in Appellants favor or, Respondents would have been directed to follow the proper application of 56.631 RSMo as to appointment of a duly embodied county counselor to represent said Respondents.

TABLE OF AUTHORITIES

Edoho v. Bd of Curators of Lincoln University

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Carmack V. Director of Dept. of Agri.

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JURISDICTIONAL STATEMENT

This court has complete jurisdiction of the appeal from the Frankli County Circuit Court. The Appellants challenged the constitutionality of HB1171 on multiple grounds, specifically that in its passage it violated Article III, Sections 21 and 23 of the Missouri Constitution.

Appelants Brief involves a challenge to the validity and constitutionality of a Missouri Statute and because of such, this court has exclusive jurisdiction of this appeal. Missouri Constitution Article V, Section 3, *National Solid Waste Management Association v. Director of the Department of Natural Resources*, 964 A,W,2d 819 (Mo banc 1998)

STATEMENT OF FACTS

The genesis of this appeal is HB 1171 has two different subject matters and is therefore unconstitutional by the senate amendment/rider (LF51) that added an entirely different subject. To more fully understand the background of how political forces wanted to amended 67.320 RSMo to allow for the county municipal court by changing population enumeration Appellants here-with present a short history of the following facts.

This Statement of Facts consist primarily of three facets:

1. Was House Bill 1171 passed in violation of the Missouri Constitution Article III, sections 21 & 23.? (LF 17,18,35 *Hammerschmidt v. Boone* 877 S.W. 2d 98 Id 102, 51 *Legends Bank. State* 361 S.W.3d 383 I389)
2. Do the Appellants as citizens and taxpayers of Franklin County have the right and duty to challenge and question an unconstitutional amendment? (LF 25 *Hammerschmidt* Id 101 --Hammershmidt is a citizen and taxpayer)
3. Does counsel representing Franklin County Respondents, have the standing of statutory appointment to represent them, or is he acting in a interloper manner? (LF 13,14, 71, 72, 74)

It is widely known in Franklin County that certain individuals in political office want a charter government and determined that the establishment of a county municipal court would be a threshold to charter government.

This was attempted by the introduction of various bills. In 2006 SB 83 was introduced by Senator Grieshemier to add a new section (statute) 479.275 which had 8 subsections, in providing for a county court. Ultimately SB 83 died and there is no such extant statute 479.275. Also in 2006 HB 193 was introduced by Representative Threlkald et al, to amend 67.320 and also to amend various other sections, this too died.

In 2012 activity intensified: SB 888 introduced by Senator Ridgeway was to allow for county courts in Franklin and Clay counties. This SB 888 also died in a committee. About the same time HB 1211 was introduced by Representative Dieckhaus et al amending 67.320 and this bill also died. Another SB 636 by Senator Kervaney introduced in 2012 again died in committee.

There was much activity in 2012 to pass some type of legislation to allow Franklin County to provide for a county municipal court, yet every bill died. In the house HB 1171 was introduced by Representative Franz a most innocuous bill amending 211.031 in the juvenile court, and did conform to Article III sections 21 and 23. The constitutional problem arises by senate amendment #1 proposed by Senator Nieves on May 15, 2012, passed and adopted the same day of May 15 2012. It was also read the 3rd time on the same date by motion of Senator Dixon, Ref: *Senate Journal* Tuesday May 15, 2012, pages 1585, 1586. Appellants did not raise issue of proposal, passage and reading the third time on the same date,

as perhaps not being proper by statute in trial court, and is thus only referenced.

The arguments of Appellants appeal is that HB 1171 is unconstitutional and unfortunately they were never heard, adjudicated or ruled by the trial court. The only matter the trial court ruled on in its order of 3/28/13 (LF 76.77) was " that plaintiffs did not have standing". Plaintiffs declaratory motion on the original pleading was denied after a hearing by trial court with no ruling being made on the merits (LF48). Surely this is not justice as the substance and merits in both trials were never addressed. In the trial court's second ruling on 3/28/13 (LF 76) the matter of "not having standing" was again stated by the trial court to avoid ruling on the merits but utilize an easy way of not having to properly, lawfully adjudicate the merits and facts (LF77). The appellants have every right and duty to challenge an unconstitutional law.

Another fact, though not in the record because Judge Schollmeyer would not allow a recording of the final hearing proceedings, that questioned counsel for Respondents not having statutory standing. The trial judge reprimanded Appellant LeBeau, saying the request for the recording was not timely even though it was made right at the beginning of the hearing. Consequently some informative data was not recorded as pertaining to standing of counsel for the Respondents, The oral argument was that none other than the duly appointed county counselor, Mark Vincent could so represent the County Accordingly

nothing was preserved for review, of the basic oral argument that subscribed to the facts entered in the court (LF 71,72,74,75) Respondents failed to answer the charge that Matthew Becker could not represent the Respondents, as he had no authority. Ref: 56.631.1, RSMO 2012, 56.640 RSMo 2012 (LF 13, 14, 39, 68, 69)

As mentioned on the first page of this Statement of Facts as to various political maneuvering in this matter, and though not part of the appeal, it is of note as to all of the five Judges of Franklin County and also the Judge of Gasconade County recusing themselves (they are all in the 20th Judicial Circuit) leaving only Judge Schollmer to preside. (LF 2,3) An interesting question is as to why none wished to hear this petition on a constitutional question?

POINTS RELIED ON

The trial court erred in its ruling of March 28, 2013 in three specific areas:

Those being line items 4, 5 & 6 of Judge Schollmeyer's Order (LF 77)

POINT 1

Trial court erred in ruling that Plaintiff's Amended Petition failed to state a claim upon which relief can be granted because said petition does not allege facts which indicate Plaintiffs have standing to bring said action. Item 4 (LF 77)

Plaintiffs adequately presented facts that the Missouri Constitution, Article III, Sec 21 & Sec 23 were violated by the unconstitutional passage of HB 1171, (LF 20-23) The trial court declined to rule on the merits. This review court should remand to trial court to rule on the issues presented.

Standard of Review

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. A court reviews the petition in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted to that case. The court treats the plaintiff's averments as true and liberally grants the plaintiff all reasonable inferences. The credibility or persuasiveness of the facts alleged are not weighed. Appellate review of a trial court's grant of a motion to dismiss is *de novo*.

*Edoho v Bd. of Curators of Lincoln Univ, 344 S.W.3d 794, 797,
(Mo App WD 2011)*

As stated in Hammerschmidt "Bob Hammerschmidt is a resident and taxpayer of Boone County. He challenges the constitutionality of the county

commission order ..." Id 101. Appellants are residents and taxpayers of Franklin County and also challenge the Constitutionality of HB 1171 which provided for County Order 2012-260 to allow a county municipal court.(LF 7) The facts are properly and sufficiently alleged therefore giving appellants standing.

Hammerschmidt v. Boone County 877 S.W.2d 98 (Mo banc 1994)

Homebuilders Association of Great St. Louis v. State of Missouri 75

S.W.3d 267, (Mo banc 2002)

POINT 2

Again trial court erred in its ruling @ item 5 (LF 77) "More particularly , the Plaintiff's fail to establish standing because petition does not allege facts that indicate a "justiciable controversy" exists in regard to HB 1171, including but not limited to the requirement that the controversy be "ripe" for judicial determination."

The justiciable controversy using the trial courts verbiage and also that used by Respondents (LF 59,60,61) is totally misguided. A legislative act when passed and signed by the governor then becomes a constitutional issue or it is an unconstitutional issue. At that moment it becomes "ripe" for judicial dermination and should be challenged, by any observant citizen and taxpayer, otherwise the legislature could sureptitiously insert unrelated amendements into the body of a pending bill. *Hammerschmidt*, Id 102, quoting *State ex rel. Normandy School*

District v. Small 356 S.W.2d 864,868 (Mo banc 1962) (LF 26

If the title of a bill such as HB1171 is amorphous that the title renders its subject uncertain and the court has to examine the contents of the bill as originally filed to determine its subject. *Carmack v. Director Mo Dept of Agr.*. HB1171 makes changes to a juvenile court (original intent) and then to a county court (by an amendment) and as such it acquires an amorphous title with two different subjects and is properly challenged. The court may determine the subject and the contents of the bill and thus it would be ripe for justiciability.

Carmack v. Director Mo. Dept. of Agr., 945 S.W.2d 956,960 (Mo banc 1997)

POINT 3

The trial court at item 6 (LF 77) ruled that Appellants Motion (and the oral arguments that weren't recorded) regarding the standing of Respondents Counsel became a "moot" issue as Appellants were ruled against by Item 4 & 5. The court did not weigh the facts that Respondent's Counsel did not comply with the law: 56.631.1RSMo 2012, 56.640 RSMo 2012 (LF 69,71,72,74,75)

The question of Matthew Becker having authority (standing) to be counsel for Respondents has been challenged from the start of this proceeding and the court has never required Mr. Becker to prove he was hired or has authority to represent Respondents. (LF 14,39,68,69) Nor has any member of the Franklin County Commission (Respondents) ever been in any of the court hearings to testify that

Mr Becker has authority to represent and by what legislative act.

If the trial court would have properly ruled on counsel not having standing then the Appellants would have prevailed on the merits or in the minimum the court would have required the Respondents to comply with the Statutes. This court in reviewing this matter *de novo* Per *Edoho v. Bd of Curators* (Standard of Review) would have authority to rule on the merits of Plaintiffs Amended Petition (LF 49, 50,51,52) without a remand to the trial court to rule on the merits. If trial court had so done, this entire matter could have been mitigated in the lower court.

The court in oral argument on January 11, 2013 attempted to justify the eligibility of Respondents counsel by quoting an unapplicable statute of 56.250 which trial court stated: gave authority for Matthew Becker to represent the Respondents. This statute applied only to second class counties. (LF 50) The trial court did not acknowledge this error, nor rule on Matthew Becker's eligibility to represent Respondents.

56.631.1 and 56.640 RSMo, Appointment of County Counselor

ARGUMENT

In Point 1, it is stated and argued that Appellants definitely have stated a claim upon which relief can be granted. However we need to analyse exactly what is the relief to be granted? This becomes somewhat of oxymoron as there is no specific relief for Appellants, in that it is a constitutional issue not some matter of Appellants allegedly violating a law and need it adjudicated in the trial court as to innocence or guilt. The constitutional issue is the only issue that the trial court elected not to rule upon and that is the entire matter at bar.

Even unattended consequences that Appellants brought forth in Count II of the original petition (LF 7,8,9) should have been addressed because of the problems that will arise because of the statutory prosecution requirements that are written into HB1171 (LF 8,20,21) not being applicable to Franklin County. Once it becomes public knowledge there could be a multitude of cases against the county that it could not prosecute the violations and what was done could result in damages for Franklin County. This matter should have been addressed by the court, Appellants did not include this Count II in their Amended Petition, however the problem still exists. (LF 7,8,9)

The merits of the Petition should have been addressed, however the court used the supercilious statements of Respondent and ruled Appellants did not state a claim, did not have standing and the matter was not "ripe" for justiciability.

(LF 58,59,60) Appellants answered the many cites Respondent gave and Appellants showed where the cites were not applicable to the matter at bar.

(LF 65,66,67)

This review court should remand to trial court to rule on the issues of Petition.

Standard of Review

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiffs petition. A court reviews the petition in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted to that case. The court treats the plaintiff's averments as true and liberally grants the plaintiff all reasonable inferences. The credibility or persuasiveness of the facts alleged are not weighed. Appellate review of a trial court's grant of a motion to dismiss is *de novo*.

Edoho v. Bd. of Curators of Lincol Univ. 344 S.W.3d 794,797 (Mo App WD 2011)

A standard of review for court tried cases is long established:

In a court-tried case the court will affirm the trial courts judgment unless no substantial evidence supports it, it is against the weight of the evidence or it erroneously declares or applies the law. *Murphy v. Carron, 536 S.W.2d 30, 32 (Mo banc 1976)* There is no substantial evidence that supports the ruling that a cause was not made -- surely such cause was made by Appellants Amended Petition (LF 50,51,52). and also in the original petition (LF 5,6,7,8) The court gave no compelling argument as to why the cause was not sufficient, and erroneously failed to apply the law in its ruling.

It is quite obvious in *Hammerschmidt v. Boone County 877 S.W. 2d 98\ (Mo banc 1994)* that Hammerschmidt had standing by the statement "Bob

Hammerschmidt is a resident and taxpayer of Boone County. He challenges the constitutionality of the county commission order, ..." Id 101 (LF25). Appellants are residents and taxpayers of Franklin County and have standing to challenge the same type of constitutionality of a county commission order. (LF 49,50,68)

At Point 2, we considered the error of the trial court judgment @ item 5, (LF 77) which stated: "More particularly, the Plaintiffs fail to establish standing because petition does not allege facts that indicate a "justiciable controversy" exists in regard to HB1171 including but not limited to the requirement that the controversy be "ripe" for judicial determination."

The court did not define a justiciable controversy and Appellants believe that is an incorrect application of the verbiage. If a house bill is passed and challenged as to its constitutionality is it a justiciable controversy, or merely a question: Does it conform to Art III Sec 21 & 23. At that moment of signing into law it is justiciable if one wishes to use that terminology, it does not have to remain for years until a citizen challenges it. It is "ripe" for judicial determination at the time it is signed into law and not the misguided verbiage used by the Respondents (LF 59,60,61) Do Appellants have to willingly and knowingly violate a county law to have standing? (LF 60) Would that not be a most foolish action? Would Appellants want a record or mar on their reputation by trying to get arrested? Would wise and prudent men approve of such action?

The title of a bill such as HB1171 is amorphous if the title renders its subject uncertain and the court has to examine its contents as originally filed to determine the subject *Carmack v. Director Mo Dept of Agr. 945 S.W.2d 956, 960 (Mo banc 1997)* HB1171 is such as it refers to the juvenile court system and to a municipal county court.

The tests for an **Article III Section 21** would be, does an amendment changing and adding a new subject matter violate the Constitution? In matter at bar HB1171 was properly introduced in the House by Representative Franz to amend Sec 211.031 relating to juvenile court under **Title Xii - Public Health & Welfare. Chapter 211--Juvenile Courts. Section 211.031 Juvenile Court to have exclusive jurisdiction-when-exceptions-home-schooling-attendance-violations-how treated. (LF 6,21,22,23)**

Then in the Senate an amendment/rider was added by Senator Nieves, that changed the original subject of 211.031 from Juvenile Court exclusively to the addition of County Courts by amending HB1171 with Section 67.320 under **Title VI--County, Township & Political Subdivision Government. Chapter 67--Political Subdivision--Miscellaneous Powers (LF 6,20,21)**. This made HB1171 an unconstitutional law by an amendment that changed the subject.

We now test for **Article III Section 23** compliance. Section 23 requires that no bill shall contain more than one subject which shall be clearly expressed in

ts title. HB 1171 now has two subjects: Juvenile Courts Title XII, Sec 211.031 and a second subject, Title VI County Government Sec 67.320

In Westin Crown Plaza Hotel Co. v King 664, S.W.2d 2,6 (Mo banc 1984)

The test to determine if the title of a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose, If a bill fails any one of the tests it would result in the determination of unconstitutionality.

HB1171 fails the test. A Juvenile Court has no natural connection with a County Municipal Court.

The Missouri Supreme Court in *Hammerschmidt v. Boone County*, 877 S.W. 2d, 98 (Mo ban 1994) stated that, "The test to determine if a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose? Id 102 (LF 26)

In Point 2 Trial Court's Order at item 5 reads "More particularly, the Plaintiffs fail to establish standing because said petition does not allege facts that indicate a "justiciable controversy" exists in regard to HB1171, including but not limited to, the requirement be "ripe" for judicial determination."

Trial Court never did analyze this matter and merely used Respondents tired and worn arguments that have no merit, in that the matter was not "ripe" or

that of not having standing. Again Appellants pose the question when does the matter become "ripe"? Surely Respondents have not answered -- Appellants state at the time of signing into law it is "ripe" for constitutional determination.

Let Appellants present a scenerio: If Franklin County Commission did not issue an order for a County Municipal Court, would that make HB1171 any more constitutional or not? Does that make it any more "ripe" or not for justiciability? Of course not, as any intelligent person would state -- therefore by logical deduction, Appellants have standing, facts are presented and HB1171 is "ripe" (if we use that word) to be deemed unconstitutional.

The justiciable controversy, using the trial courts verbiage and also that used by Respondents (LF 59,60,61 is totally misguided. A legislative act when passed and signed by the governor then becomes a constitutional issue or is it an unconstitutional law. At that moment it becomes "ripe" for judicial determination and should be challenged by any observant citizen and taxpayer, otherwise the legislature could sureptitiously insert unrelated amendments into the body of a pending bill. *Hammerschmidt* Id 102, quoting *State ex rel. Normandy School of St. Louis County v Small* 366 S.W.864,868 (Mo banc 1962)

POINT 3 Again we will quote the Order at item 6: "Having dismissed Plaintiffs' Amended Petition, Plaintiffs' "Motion to Dismiss Defendants Alleged Representative" is rendered moot. The question remains: Does Counsel have

standing? By rendering it moot, the trial court again does not have to rule on the merits so presented that Counsel Matthew Becker has no standing to represent the Respondents. As stated in Points Relied On, Appellants have challenged the standing of Matthew Becker to represent Respondents LF 69,71,72,74,75)

Why would the trial court not require such proof? Especially in view of the fact that not one member of the Franklin County Commission attended either hearing and thus they could not be questioned (yes Appellants should have subpoenaed them). Though not part of this appeal and perhaps not appropriate in this brief but is of note: The duly appointed County Counselor, Mark Vincent in various emails, conversations and articles in the Missouriian Newspaper firmly stated: he would defend the County in all lawsuits, however he has not entered any appearance in this matter

Appellants would ask this review court to rule on the constitutionality of HB1171, as the trial court refused to do so. As stated in the Standard of Review on second page of Argument, this review court considers this matter *de novo*.

Appellants believe that is just and proper. Or in the alternative remand the matter back to trial court with instructions to rule on the averments.

CONCLUSION

Appellants pray that this review court will rule that HB1171 is an unconstitutional act, that being the correct judgment.

The trial court erred in not ruling on the merits and merely saying Appellants did not have standing with no logical reasoning for such ruling. Standing is a legal principal or stake where a party is entitled to have a court decide the merits of the case. A party is entitled to obtain judicial resolution. This has not been done.

Appellants believe ruling that HB1171 is an unconstitutional violation of the Missouri Constion, Sections 21 & 23 is a correct and proper decision as allowed by *de novo* provision. Or in the alternative that matter is remanded back to trial court for ruling on the merits.

Appellants, being Pro-Se have attempted to the best of their capabilities to comply with the Order of the Appeals Court of 6/24/13 and pray each of the items ordered to be corrected have been done or at least in an acceptable manner for this court to consider.

Respectfully submitted by Appellants Pro-Se



Arthur L. LeBeau, Jr.
Appellant, Pro-Se
326 Valleyview Drive
Villa Ridge, MO 63089
636-742-4931



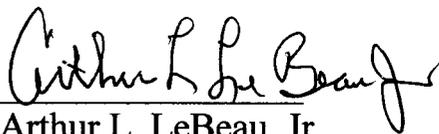
Eric R. Reichert
Appellant, Pro-Se
2417 Brinkman Road
Villa Ridge, MO 63089
636-388-6679

CERTIFICATE OF COMPLIANCE

Appellants hereby certify that this brief complies with Rue 84.06. It is typed in Times New Roman, 14 point type, Microsoft word, and contains approximately no more than 5,320 words.

CERTIFICATION OF SERVICE

Appellants hereby certify that a true and exact copy of the foregoing brief was hand delivered to office of counsel of record, Matthew C. Becker at Purschke, White, Robinson, Becker and Briegel, LLC, 4A South Church Street Union, Missouri 63084 on this 15TH day of July 2013



Arthur L. LeBeau, Jr.
Appellant, Pro-Se
326 Valleyview Drive
Villa Ridge, MO 63089
636-742-4931



Eric R. Reichert
Appellant, Pro-Se
2417 Brinkman Road
Villa Ridge MO 63089
636-388-6679

APPENDIX

Judgment and Order (in Legal File)76,77

Exhibit "A"- House Bill 1171 (in Legal File) 20-23

Exhibit "B"- Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo banc
1994) (in Legal File) 24-30

Exhibit "C"- Legends Bank v. State of Missouri, 361 S.W.3d 383 (Mo banc
2012) (in Legal File 31-38

MISSOURI CONSTITUTION -- ARTICLE III

Section 21: Style of laws-bills-limitation on amendments-power of each house to originate and amend bills-reading of bills. The style of the laws of this state shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows."

No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or or rejected by the other. Every bill shall be read by title on three different days in each house.

Section 23: Limitation of Scope of bills-contents of titles-exceptions. No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in Section 37 of this article, and general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated.

MISSOURI REVISED STATUTES

Section 56.631.1 *The county commission or governing body of any county, except for any county with a charter form of government and with more than two hundred fifty thousand but fewer than three hundred fifty thousand inhabitants, may by order of the commission or governing body appoint some suitable person to the position of county counselor. If a county counselor is appointed, the county counselor shall be commissioned as other officers are commissioned. The county counselor shall serve at the pleasure of the county commission or governing body.*

Section 56.640.1 *If a county counselor is appointed, the county counselor and the county counselor's assistants under the county counselor's direction shall represent the county and all departments, officers, institutions and agencies thereof, except as otherwise provided by law and shall upon request of any county department, officer commission or governing body, represent such department, officer, institution or agency. The county counselor shall commence, prosecute or defend, as case may require, and exercise exclusive authority in all civil suits or actions in which the county or any county officer, commission, governing body, or agency is a party, in the county counselor's or its official capacity, the county counselor shall draw all contracts relating to the business of the county, the county counselor shall represent the county generally in all matters of civil law, and the county counselor shall upon request furnish written opinions to any county officer or*
(emphasis added)
department.