

WILSON & CHASTAIN L.C.

Attorneys at Law
10th Floor, KFVS Tower
310 Broadway
P.O. Box 512
Cape Girardeau, MO 63702-0512

STEPHEN C. WILSON

March 16, 2004

Telephone (573) 651-1950

Facsimile (573) 651-3611

ELIZABETH H. CHASTAIN
Of Counsel

HONORABLE JUDGES
MISSOURI SUPREME COURT
P O BOX 150
JEFFERSON CITY MO 65102

RE: State of Missouri v. Carol Sue Smith
Case No. SC85595

DUPLICATE
OF FILING ON

APR 05 2004

IN OFFICE OF
CLERK SUPREME COURT

Honorable Judges of the Missouri Supreme Court:

The following is Carol Sue Smith's letter brief requested by this court:

ISSUE: Does RSMo Section 547.200.5 conflict with Article V, Section 10 of the Missouri Constitution?

Respondent's answer to this issue is that RSMo Section 547.200.5 does conflict with Article V, Section 10 of the Missouri Constitution if that statute is interpreted and construed as suggested by the appellant. However, the language of RSMo Section 547.200.5 can and should be interpreted and construed to be directory and not mandatory, and in construing the statute in this fashion, any constitutional conflict is avoided

Article V, Section 10 of the Missouri Constitution deals specifically with methods by which cases may be transferred from one of the appellate divisions to the Supreme Court. Supreme Court rules for transfer of cases from an appellate division to the Supreme Court are contained in Rule 83. In a criminal case, Rule 30.27 adopts the

transfer procedures set out in Rule 83. It is significant to note that Article V, Section 5 of the Missouri Constitution provides that this court “may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals which shall have the force and effect of law.” However, this authorization is limited by the following sentence in Article V, Section 5: “The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.”

Respondent suggests that if the interpretation of RSMo Section 547.200.5 urged by appellant is accepted, then the statute directs the court to adopt a rule which eliminates “motions for rehearing or transfer under Supreme Court Rules 30.26 and 30.27.” In effect, the appellant’s construction would require the court to nullify by rule what a citizen is entitled to by constitutional mandate under Article V, Section 10. Moreover, appellant’s interpretation would lead to the conclusion that the legislature is telling this court to pass a rule changing an appellate right, which Article V, Section 5 specifically prohibits.

In construing a statute, this court is entitled to assume that the legislature is familiar with the constitution of the State of Missouri. City of Kirkwood v. Allen, 399 S.W.2d 30, 36 (Mo. banc. 1966). This court may further assume that the legislature intended an enactment within constitutional standards. Hyde v. City of Columbia, 637 S.W.2d 251, 262 (Mo. App. 1982). When the words used in a statute permit “a reasonable construction consistent with the obvious legislative intent, and within constitutional limitations, a construction leading to invalidity should be avoided.” City of Kirkwood v. Allen, *supra*, at 36.

Admittedly, the statutory section in question says “the Supreme Court shall issue appropriate rules to facilitate disposition” of interlocutory appeals. While the word “shall” is generally considered to be mandatory, in this case respondent suggests that the language is merely directory. “If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory.” Hardy v. Fire Standards Commission, 992 S.W.2d 330, 336 (Mo. App. 1999); Christian Disposal v. Village of Eolia, 895 S.W.2d 632, 634 (Mo. App. 1995). Respondent suggests that subsection 5 of RSMo 547.200 is simply a directory statute and not mandatory, and thus the legislature was not dictating that Rules 30.26 and 30.27 actually should be eliminated.

Even if this court were to determine that “shall” has used in the first line of this statute is mandatory, then the action mandated of this court by the legislature is only that the court “issue appropriate rules to facilitate the disposition of such appeals.” The legislature has left it to this court to determine what rules may be appropriate or inappropriate for the purpose of facilitating the prompt disposition of interlocutory appeals, and the remainder of the statute is simply suggested changes. Moreover, it is significant to note that the legislature made reference to the “eliminations of motions for rehearing or transfer.” It is significant that the legislature used the word “eliminations,” suggesting that the court could adopt special rules dealing with rehearing or transfer in cases of interlocutory appeal, as compared to regular criminal post-trial appeals.

Since there is a construction available of RSMo Section 547.200.5 which does not conflict with the provisions of the Missouri Constitution, and which is consistent with the purpose of that statute, and which finds that the statute is merely directory to the Supreme

Court and not mandatory, that construction should be adopted by this court. As such, this court is entitled to hear this matter on transfer under Rule 30.27, and appellant's motion to set aside transfer should be denied.

Respectfully Submitted,

WILSON & CHASTAIN L.C.

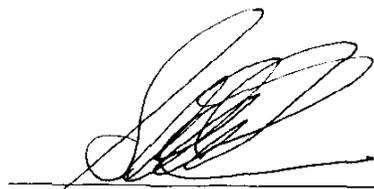


Stephen C. Wilson

SCW/cp

CERTIFICATE OF SERVICE

Undersigned counsel for respondent certifies that a true copy of this letter brief was served upon H. Morley Swingle, attorney for appellant, by sending a copy to him via United States mail, postage prepaid, to his regular business address in Jackson, Missouri, on the 1st day of April, 2004.



Stephen C. Wilson