IN THE
SUPREME COURT OF MISSOURI

No. SC84211

IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS:
STATE TREASURER, NANCY FARMER,

Appellant,

v.

ELAINE HEALEY, TRUSTEE,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,

Respondents.

APPELLANT'S REPLY BRIEF

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Argument

I.

Factual Matters

Trustee adds no new relevant facts. She does not dispute that this case was commenced with the filing of an order not a petition, that money was deposited into the registry of the court, that this money was held so that claims could be paid to yet unlocated class members, that she never reported or delivered the money to the Treasurer after the expiration of the abandonment period pursuant to the provisions of the Uniform Disposition of Unclaimed Property Act (hereafter the UPA), and that over one hundred thousand dollars of interest income has been paid to Cole County and the Circuit Clerk.

Trustee does direct the Court's attention to Judge Kinder's order in an earlier case finding that income from the fund should be used for purposes consistent with the settlement agreement. Trustee's Brief (Tr.Brf.), 25-26. But a review of the settlement agreement provided by the Trustee (absent exhibits, including the Memorandum of Settlement Agreement) does not disclose an intention to remodel the Cole County Courthouse. Tr.Brf. Appendix (App.), A-41. In fact, class counsel made a specific recommendation to Judge Kinder concerning the proper administration of the undistributed settlement proceeds. He recommended that the money be held for four years so that the claimants could come forward and, following the expiration of four years, that the *cy pres* doctrine be invoked and the funds donated to the University of Missouri to establish a scholarship fund or endow a professorship. He warned that if the money were not distributed prior to the expiration of five years, that the state could claim the money pursuant to §470.270. Interest earned was to be used to pay expenses and administrative fees. Tr.Brf.App. A-59. Judge Kinder rejected class counsel's advice to dispose of the fund within five years

and decided to establish a trust. When class counsel was consulted regarding the possibility of this court-created trust, he did not object because he felt such would allow the class of claimants a longer period of time in which to claim their money. L.F.68. The Treasurer, bringing a claim to enforce her right to receive unclaimed property, seeks to hold claimant's money for them indefinitely – thus more closely effectuating the interests expressed by class counsel.

II.

Consistent with the Constitution, the Treasurer may administer the Unclaimed Property Act and may enforce her right to receive funds. The current Act was not enacted in violation of the single subject and clear title requirements of the Constitution. (Addressing Respondent's Point I.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 42. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part II of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in her Reply Brief in SC84210:

State Highway Comm'n v. Spainhower, 504 S.W.2d 121, 125 (Mo. 1973)

State ex rel. Thompson v. Regents for Northeast Missouri State Teacher's College, 264 S.W. 698 (Mo.banc 1924)

Board of Public Buildings v. Crowe, 363 S.W.2d 598, 607 (Mo.banc 1962)

Hatfield v. McCluney, 893 S.W.2d 822, 829 (Mo.banc 1995)

Art. III, § 36, Missouri Constitution

Art. IV, § 15, Missouri Constitution

Laws of Missouri 1994, S.B. 757, p. 1051 ("Ownership and Conveyance of Property: Lost and Unclaimed Property")

110 Op. Att'y Gen. 3 (January 12, 1970)

III.

The separation of powers doctrine and other doctrines posited by trustee do not invest circuit judges with the power to control or expend funds, deposited by litigants in the registry of the court, in violation of state law. (Addressing Respondent's Points II and III.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 46. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in subsections A and B of Part III of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in subsection A and B of Part III of her Reply Brief in SC84210:

Chastain v. Chastain, 932 S.W.2d 396, 398 (Mo.banc 1996)

Maryland Cas. Co. v. Huger, 728 S.W.2d 574, 581, n. 7 (Mo.App. 1987)

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228 (Mo.banc 1997)

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo.banc 1982)

State v. Snell, 950 SW.2d 108 (Tex.Ct.App. 1997)

§447.532, RSMo

§447.539, RSMo

§447.543, RSMo

§§447.500-.595, RSMo

§483.310.2, RSMo

Art. IV, § 13, Missouri Constitution

C. Supposed Doctrine of Beneficial Ignorance. Trustee argues that the judicial department "has

not yet made an adjudication of who is entitled to the funds" and that "one will search the record in vain in trying to find a determination that any particular person or entity has a legal or equitable ownership in any discrete portion of the funds held in this case." Rec. Brf. (SC84210), 80. But, upon payment into the registry of the court the money from the class settlement award representing claims of yet unlocated class members, Class Attorneys submitted a list of those class members to the court. Tr.Brf., A-61. Further, receiver/trustee on rare occasions published notice in the paper, listing the names of the unlocated class members. L.F.32-37, 39, 41-42, 45, 97-104. In notifying by publication those individuals or entities entitled to share in this fund, respondent stated that they had been "awarded a portion of the class action settlement in the above-styled matter." L.F.30, 39, 41, 45 and 97. Thus, it is inaccurate to suggest, in this proceeding, that the identity of those due the funds has not yet been determined.

Whether the names of the individuals due these refunds appear in "the record" is of no consequence – the UPA applies more broadly. After the expiration of the statutory abandonment period, the funds are presumed abandoned[1] and, pursuant to the UPA, are to be reported and delivered to the Treasurer. The report is to include, "the name, *if known*, and the last known address, *if any*" for property valued over $50.00; property valued under that amount can be reported in the aggregate. §447.539.2(3) (emphasis added). That the court's records may not identify the individuals entitled to funds

[1] The "presumed abandoned" designation is not a rebuttable presumption. Rec.Brf., 87. Property is presumed abandoned after a statutorily designated time period, presumed abandoned property must be reported to the Treasurer at that time, and all property specified in the report shall be delivered to the Treasurer at the time of filing the report. §§447.532, 447.539, 447.543.

does not exclude the funds from the Act. §§447.532, 447.539, 447.543. *See Citronelle-Mobile Gathering Inc. v. Boswell*, 341 So.2d 933, 936 (Ala. 1977)(Act applies where owner is unknown, cannot be found or has given an incorrect address). Any such exclusion would improperly reward holders of unclaimed property who fail to maintain identifying information.

D. Statutory Inapplicability. Trustee contends that, as the court has supposedly not identified anyone to whom money is specifically owed, no one is an "owner" under §447.503(7). She asserts that until the court identifies those to whom the funds are due, no one has a legal or equitable interest in the funds. Rec.Brf. (SC84210), 90-91.[2] As indicated above, this argument has no applicability to this proceeding because the identity of the claimants is in the court file. Nevertheless, even if the contrary were true, people possess legal and equitable interests in property long before courts recognize those interests. Courts merely recognize property rights, when disputed, that already exist.

Trustee argues that, because the UPA did not become effective until 1984, the fund is not subject

[2] This argument appears inconsistent with trustee's earlier argument that the moneys in dispute cannot be "state funds" because under the UPA such moneys must be held for an owner. Rec.Brf., (SC84210), 40. One's interest in property need be no more than an equitable interest for that person to be considered an owner under the UPA.

to the Act. Rec.Brf. (SC84210), 91. But this fund was created *after* the effective date of the Act so this argument is inapplicable to this fund.

Trustee further argues that Judge Kinder has continuing jurisdiction over the trust in this case and the Treasurer is not entitled to any relief. Tr.Brf.,48.[3] The trustee cites to §456.210 in support, as if Judge Kinder acquired jurisdiction over this trust incident to a proceeding related to the trust (i.e. proceeding for removal of trustee or construction of terms of the trust, as in §456.210), instead of Judge Kinder having created the trust in a matter commenced without a petition apparently opened for the purpose of holding or distributing the fund at issue. In any event, funds held in a fiduciary capacity are subject to the UPA. §447.530. The exception is "a trust defined in section 456.500, RSMo." §447.530. This exception does not apply because "trust," as defined in that section, excludes "a trust created by the judgment or decree of a court." §456.500. The trust here was created by Judge Kinder's January 18, 1991 Order Establishing Trust., L.F.72-80, or created by law (§483.310.1) as a consequence of Judge Kinder's December 31, 1986 order determining that it would be necessary to hold the fund for a lengthy period of time and directing that the fund be invested. In short, these funds deposited in the registry of the court, initially held by a receiver and then a trustee, are subject to the terms of the UPA and §483.310.1.

E. *Cy Pres*. The Trustee includes a lengthy discussion regarding the availability of the *cy pres* doctrine to dispose of this fund. Here the underlying case once removed was an insurance company

[3] This argument overlooks, as does the entirety of the trustee's brief, that no order entered in this case is valid because this matter was commenced by court order instead of a petition as required by this Court's rules. As such, every order entered in this proceeding is void.

receivership and the claimants are all identified. Thus, "the issues that are peculiar to class action proceedings, such as fluid class recoveries and the applicability of *cy pres* distribution, are not present here where the State statutes govern entirely and the identity of the missing owners is known and the amount due is certain." Brief of Amicus Curiae, National Association of Unclaimed Property Administrators, in Support of Appellant, State Treasurer of Missouri, SC84328, at 29.

Furthermore, in Missouri the *cy pres* doctrine is a limited one. *See State ex rel. Nixon v. Am. Tobacco Co.*, No. ED76054 (2000 Mo.App. Lexis 90) (slip op. at 10, January 18, 2000) (Reply Appendix (Rep.App.), (SC84210), 16), *aff'd on other grounds,* 34 S.W.3d 122 (Mo.banc 2000) ("In Missouri, the *cy pres* doctrine allows a court of equity the power to alter a written trust instrument creating a charitable gift to reflect the donor's intention, so the charitable gift does not fail. To this Court's knowledge, the *cy pres* doctrine has never applied in any other situation in Missouri."). Before a court can exercise the "awesome power" of *cy pres*, three requirements must be met:

> *First,* the trust in question must be a valid charitable trust; *second,* it must appear impracticable or impossible to carry out the specific terms of the trust; and *third,* the intent of the settlor must be a general charitable intent.

Levings v. Danforth, 512 S.W.2d 207, 211 (Mo.App. 1974).

In this case, these requirements have not been met. Initially, it must be noted that there is no charitable trust. While this fund, subject as it is to the strictures of §483.310.1 was held by the court in trust, that trust was statutory – not charitable. The statute mandates that the entity holding the funds holds them "as trustee" and requires that "[n]ecessary costs, including reasonable costs for administering the investment, may be paid from the income received from the investment of the *trust* fund." §483.310.1,

emphasis added. As the funds are held in trust for their proper owner, they are not held in a charitable trust subject to alteration by the *cy pres* doctrine. The doctrine simply has no applicability under these circumstances and certainly could not have been determined on the basis of a motion for judgment on the pleadings in this proceeding.

But even if the *cy pres* doctrine could be engrafted onto this situation, it would not save trustee or her judge from defeat because any such trust has failed "for the reason that the expiration of more than a reasonable time has elapsed without any substantial step toward fulfillment of its purposes." *Comfort v. Higgins*, 576 S.W.2d 331, 336 (Mo. 1978). Assuming despite all evidence to the contrary, that there is a charitable trust, its purpose is clear – to pay claims to class members not previously located. The return of "very few payments to claimants" (Appellant's Brief at Appendix 3) over many years demonstrates a failure of the trust. Indeed the docket sheet reflects the last application for payments was made October 23, 1989 (prior to Judge Kinder's Order Establishing Trust). L.F.1, 72-80. As the purpose of the trust was specific – to hold the fund so that class member's claims could be paid – the trust should revert to the settlor. As the insurance company cannot be considered the settlor, the only possible settlor is the state. The state created the law under which the insurance company was placed in receivership.[4] The purpose

[4] The law was clear when Judge Kinder appointed his special receiver in this matter (L.F.13) that the Director of Insurance was to act as the receiver of the insurance company in liquidation. *State ex rel. ISC Financial Corp. v. Kinder*, 684 S.W.2d 910, 912 (Mo.App. 1985). Under the applicable statutes, the Director was required to "hold any moneys which are unpaid for one year after final settlement,

of the state/settlor so creating the fund was to see claims paid – something the state sought to accomplish by statute in the UPA and through litigation seeking relief in quo warranto (SC84301) and elsewhere seeking the delivery of unclaimed property (SC84328). This is consistent with the expressed desire of class counsel. L.F.68. If either the state's or class counsel's expression of intent is given effect, the money goes to the same place – the Abandoned Property Fund administered by the State Treasurer. In Missouri, the doctrine of *cy pres* is limited, its requirements have not been met in this case and it cannot be employed to achieve a result contrary to that which the Treasurer seeks based on relevant statutes.

F. Laches and Estoppel. Trustee argues that doctrine of laches and the principle of estoppel bar the Treasurer from asserting a claim for this fund under the UPA. Rec.Brf., (SC84210), 92. But the Treasurer's action to enforce delivery of unclaimed property is an action at law and the doctrine of laches cannot apply as a defense to an action at law. *UAW-CIO #31 Credit Union v. Royal Ins. Co.*, 594 S.W.2d 276, 281 (Mo.banc. 1980). Further, a party seeking to invoke the doctrine of laches must establish that: (1) a party with knowledge of the facts giving rise to his rights, (2) delays assertion of them for an excessive time, and (3) the other party suffers legal detriment therefrom. *Mackey v. Griggs*, 61

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and at the expiration of such year, he shall pay all unclaimed sums into the state treasury to be held and disposed of as provided by laws for escheats." §375.760.4, RSMo 1986. Judge Kinder's establishment of a special receiver and then a trustee should not be permitted to avoid the clear meaning of Missouri law.

S.W.3d 312, 318 (Mo.App. 2001). Because the court did not report the existence of the funds to the Treasurer, as required by the Act, the Treasurer did not have knowledge of the facts giving rise to her cause of action. And once she became aware of the funds, she did not delay for an excessive time in asserting her claim. Finally, trustee identifies no legal detriment suffered as a result of any delay.

As to estoppel, except in exceptional circumstances not present here, estoppel does not lie against governmental entities. *City of Washington v. Warren County*, 899 S.W.2d 863 (Mo.banc 1995). Regardless, the essential elements of estoppel are not present here: (1) there is no admission, statement or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon (the Treasurer has made no such admission, statement or act properly in evidence and trustee has identified none); (2) there is no action taken by the second party on the faith of such admission, statement or act (trustee has identified no action taken on the faith of the non-existent admission, statement or act); and (3) there is no injury to the second party which would result if the first party is permitted to contradict or repudiate his admission, statement or act (trustee has identified no injury). *Missouri Highway and Transp. Comm'n v. Meyers*, 785 S.W.2d 70, 73 (Mo.banc 1990). Although trustee asserts that "[t]here has come to be a reliance upon the interest from those funds by Cole County," Rec.Brf., (SC84210), 92, this is a problem of the trustee's and the judge's own making and hardly establishes the need for laches or estoppel to be applied against the Treasurer.

Finally, pursuant to §447.549, no statute of limitations can run on any action brought by the Treasurer for the delivery of unclaimed property held by a governmental entity at any time after August 28, 1990, "regardless of when such property became presumptively abandoned." Trustee's laches and estoppel claims must be rejected. If any claim should be barred by laches, it is trustee's stale claim that the

UPA is unconstitutional.

IV.

Circuit judges may not expend interest generated by money deposited to the court's registry when it was invested by judicial order pursuant to §483.310.1, not at the discretion of the circuit clerk as required by §483.310.2. (Addressing Respondent's Point IV.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 51. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part IV of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in Part IV of her Reply Brief in SC84210:

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 165 (1980)

Phillips v. Washington Legal Foundation, 524 U.S. 156, 172 (1998)

§483.310, RSMo

91 Op. Att'y Gen. 32 (May 15, 1991)

V.

The trial court erred in granting the Motion for Judgment on the Pleadings because the case was not ripe for such adjudication in that the Treasurer had not filed an answer and the pleadings were not closed. (Addressing Respondent's Point V.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 51–52. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part V of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in Part V of her Reply Brief in SC84210:

Bramon v. U-Haul, Inc., 945 S.W.2d 676 (Mo.App. 1997)

VI.

The trial court lacked personal jurisdiction over the Treasurer necessary to enter any order directed toward her because she was never a party to the proceeding and has never been served with summons or with a petition seeking relief and, thus, no order could be directed to her or judgment entered against her. (Partially Addressing Respondent's Point VI.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 52-53. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part VI of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth Part VI of her Reply Brief in SC84210:

Roosevelt Federal Savings & Loan Assoc. v. First National Bank of Clayton, 614 S.W.2d 289, 291 (Mo.App. 1981)

State ex rel. American Family Mutual Ins. Co. v. Scott, 988 S.W.2d 45, 49 (Mo.App. 1998)

Yankee v. Franke, 665 S.W.2d 78, 79 (Mo.App. 1984)

§447.532, RSMo

§447.539, RSMo

§447.543, RSMo

§447.545, RSMo

Supreme Court Rule 52.07

Supreme Court Rule 54.01

Supreme Court Rule 54.02

Supreme Court Rules 54.03-54.22

VII.

Trustee's brief fails to respond to the Treasurer's point and argument asserting that the trial court violated the separation of powers by directing the Treasurer to appear and participate in a lawsuit against hand picked defendants on issues chosen by the court (Appellant's Point VI) and failed to respond to the Treasurer's argument that trustee, as a non-party, could not file the motion and petition she presented to the court (Appellant's Point VII).

The Treasurer adopts by reference her reply Point VII set forth in her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in Part VII of her Reply Brief in SC84210:

Boyer v. Grandview Manor Care Center, 793 S.W.2d 346, 347 (Mo.banc 1990)

VIII.

The circuit judge lacked subject-matter jurisdiction to enter the July 20 order in that a final, unappealed, judgment had long-since been entered in the case. (Partially Addressing Respondent's Point VI.)

Trustee adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Tr.Brf., 52-53. Thus, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part VIII of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in Part VIII of her Reply Brief in SC84210:

State ex rel. Sullivan v. Reynolds, 107 S.W. 487, 492 (Mo.banc 1908)

Neun v. Blackstone Building & Loan Assoc., 50 S.W. 436 (Mo. 1899)

§386.510, RSMo

§386.520, RSMo

§447.539, RSMo

Supreme Court Rule 66.02

IX.

Judge Kinder was disqualified by Rule 51.07 from issuing the July 20 order in that he had a substantial interest in the outcome and a close interest in or relationship with the movant. (Partially Addressing Trustee's Point VI.)

Trustee argues that Judge Kinder, who disqualified himself immediately after entering the ex parte order creating these proceedings, had no reason to disqualify himself before entering that order. But the reasons for his disqualification were the same before and after his entry of the order.

Trustee argues that Judge Kinder had no financial interest in this proceeding. At the same time, trustee incongruously argues that Judge Kinder has judicial immunity from any monetary claims made by the Attorney General or the Treasurer.[5] The fact that Judge Kinder has asserted judicial immunity to the Attorney General's and Treasurer's claims in other cases undermines the assertion that he has no financial interest in this proceeding. Obviously, if Judge Kinder is subject to financial liability based on his alleged misbehavior he is financially interested in the structure of all cases, including this one, that seek to assess his behavior.

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[5] Trustee also argues that the Attorney General's quo warranto proceeding against Judge Kinder is "fatally flawed" and that Judge Kinder has immunity from this claim. The merits of the quo warranto proceedings and of Judge Kinder's defense to it are not issues in this case. These issues will be decided in the quo warranto proceedings. In any event, Judge Kinder apparently believed the quo warranto proceeding was sufficiently problematic that he recused himself from these proceedings *after* he had entered the ex parte order creating them.

Trustee next argues that Judge Kinder is not related to trustee, a party to these proceedings. But Judge Kinder begat receiver/trustee and, in his order appointing her, described her as "someone in who this court has complete confidence" and who is readily available to the court. L.F.14. Trustee was represented by the very counsel who represented Judge Kinder in the related Writ of Prohibition case. Such persons would undoubtedly exercise "undue" influence over him pursuant to §508.090.

Finally, trustee argues that Judge Kinder's order was procedural and made no determination as to the merits of this case. But Judge Kinder's order created this case, limited the scope of these proceedings to three specific questions identified by trustee, directed against whom the Treasurer could assert her claim (not Judge Kinder) and determined that he could continue to hold and invest the funds during the pendency of the case. In so structuring the case, Judge Kinder's order was far more than a mere procedural exercise – it had significant substantive implications.

Perhaps not surprisingly, trustee fails to respond to the Treasurer's assertion that Judge Kinder in the present instance had a dramatic "appearance" of impropriety, whether or not he was actually prejudiced. Because of this undisputed appearance of impropriety, Judge Kinder had a duty to recuse himself. *Robin Farms v. Bartholome*, 989 S.W.2d 238, 247-250 (Mo.App. 1999)(appearance of impropriety is separate issue from actual bias and prejudice and if the record demonstrates a reasonable person would find an appearance of impropriety, the canon compels recusal). The order he entered should have been vacated and the trial court's holding otherwise should be reversed.

X.

The trustee's notice of hearing on her motion for judgment on the pleadings was untimely and insufficient. (Partially addressing Respondent's Point VI.)

The trustee does not argue that her notice of hearing on her motion for judgment on the pleadings was timely under Rule 44.01. Instead, she attempts to justify her untimeliness. She explains that, because the Treasurer set her motion to vacate for hearing on October 18, 2001, she noticed her motion for judgment on the pleadings, filed on October 12, 2001, for the previously established date. But the facts, put in context, establish the impropriety of the notice given by the trustee.

The Treasurer filed her motion to vacate on August 20, 2001. Thereafter, on October 5, 2001, Judge Brown filed a motion to consolidate in the trial court the four ancillary proceedings cases (SC84210, SC84211, SC84212 and SC84213) with the Treasurer's petition for delivery of unclaimed property (SC84328) and the case challenging the Treasurer's administrative authority, 01CV325509, still pending in Cole County. On that same day, Judge Brown noticed the motion to consolidate for hearing on October 18, 2001. Case No. SC84328, L.F.220. Later that same day, October 5, the Treasurer noticed for hearing on October 18, 2001, her motion to vacate, which had been filed six weeks earlier. The motion to consolidate was apparently a ruse to secure a hearing date, as the motion to consolidate was not presented to the court on October 18. Case No. SC84328, L.F.5. Instead, the judges presented motions for judgment on the pleadings in SC84328, filed and noticed on October 11, and the trustee presented her motions for judgment on the pleadings in this case and in Case No. SC84328, both filed and noticed on October 12. *See* L.F.11 and Case No. SC84328, L.F.4-5. It seems apparent under these circumstances that the judges and the trustee gave the Treasurer as little time as they thought they could get away with to

file and notice for hearing their motions for judgments on the pleadings.

Further, the trustee's motion for judgment on the pleadings did not "traverse" the Treasurer's long-pending motion to vacate and disqualify, as the trustee suggests. *Compare* L.F.177-214 with L.F.240-46. In almost no respect is the motion for judgment on the pleadings responsive to the issues raised in the Treasurer's motion. The trustee also argues that the Treasurer did not object to the untimeliness of notice until the date of the hearing. This argument provides no excuse for the trustee's violation of Rule 44.01 and is the product of the trustee's own untimeliness. The trustee also argues that the judge allowed counsel to submit further written materials after the hearing, but this does not remedy having insufficient time to prepare for a hearing and is not a cure for failing to provide proper notice.

The trustee cites two cases in which the court of appeals upheld the trial court's proceeding with a hearing on less than five days notice. Neither case involved a hearing on a dispositive motion, as in this case. Further, both cases involved exigent circumstances not present in this case. *See State ex rel. Gleason v. Rickhoff*, 541 S.W.2d 47 (Mo.App. 1976)(prohibition denied to overturn shortened notice for hearing on receiver's petition to take custody of house and car purchased by insolvent company's president and secretary from company funds as trial court had discretion under the circumstances to shorten notice); *Jenkins v. Jenkins*, 784 S.W.2d 640 (Mo.App. 1990)(hearing on wife's motion to extend a full order of protection against her husband under the Adult Abuse Act). Here there was no threat of the Treasurer wrongfully disposing of assets or inflicting physical harm on anyone. And in both *Gleason* and *Jenkins*, the court of appeals explained that "[r]easonable notice is a prerequisite to a [trial] court's power to order a period of time different than that prescribed by the rule." *Jenkins*, 784 S.W.2d at 644; *Gleason*, 541 S.W.2d at 50. There was no reasonable notice here.

Finally, the trustee argues that counsel for the Treasurer was "fully conversant" with the issues presented in the trustee's motion. But the trustee points to no separate set of rules applicable to experienced and knowledgeable adversaries. The rules apply to all counsel. The trustee's counsel failed to follow them. As a result, the Treasurer was denied the time to research, reflect, and respond in order to be heard in a meaningful manner. Therefore, this Court should vacate the Judgment of the trial court.

Conclusion

For the reasons set forth above and those expressed in Appellant's Brief, the Treasurer requests that the Court reverse the judgment entered by the trial court and dismiss this proceeding or grant Appellant such other relief to which she has shown herself entitled.

Respectfully submitted,

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Certificate of Service and of Compliance with Rule 84.06(b) and (c)

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