IN THE
SUPREME COURT OF MISSOURI

No. SC84212

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

Appellant,

v.

JACKIE BLACKWELL, RECEIVER,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,

Respondents.

APPELLANT'S REPLY BRIEF

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Table of Authorities

Cases:

Error! No table of authorities entries found.

Constitutional and Statutory Authority:

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Other:

Error! No table of authorities entries found.

Argument

I.

Factual Matters

Receiver adds no new relevant facts. She does not dispute that money was deposited into the registry of the court, that this money was held so that refunds could be made to utility customers, 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 hundreds of thousands of dollars of interest income has been paid to Cole County and the Circuit Clerk.

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.)

Receiver adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. *See* Receiver's Brief (Rec.Brf.), 40. 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 receiver 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.)

Receiver adopts by reference receiver's arguments for this Point set forth in the receiver's brief in SC84210. Rec.Brf., 43. 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 SC8420:

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. Receiver 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 all sums representing credits due customers who had not been located, Southwestern Bell submitted a list of those customers under seal. L.F.396-97. Further, §386.520.3 requires such a list to be maintained "together with the names and addresses of the corporations and persons to whom overcharges will be refundable" in a case, such as this one, in which the circuit court stays a Public Service Commission decision lowering rates.

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 refunds 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

[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.

unknown, cannot be found or has given an incorrect address). Such an exclusion would reward holders of unclaimed property who fail to maintain identifying information.

D. Statutory Inapplicability. Receiver contends that, as the court has supposedly not identified any utility customers to whom money is specifically owed, no one is an "owner" under §447.503(7). Receiver continues, asserting that until the court identifies those to whom the refunds are due, no one has a legal or equitable interest in the funds. Rec,Brf., (SC84210), 90-91.[2] People possess legal and equitable interests in property long before courts recognize those interests. Courts merely recognize property rights, when disputed, that already exist.

Receiver argues that, because the UPA did not become effective until 1984, the fund is not subject to the Act. Rec.Brf., (SC84210), 91. But this fund was created on September 15, 1989 (L.F.45), *after* the effective date of the Act so this argument is inapplicable to this fund.

Receiver further argues, without citation to authority, that Judge Brown's April 26, 1993 Order

[2] This argument appears inconsistent with receiver'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.

Closing Receivership and Transferring Funds Into the General Accounts of the Circuit Court, L.F.83, somehow "'docked' all possible claims of any person or entity to the funds of this case." Rec.Brf., 44. Her broad assertion suggests that the claims of the owners of the money (the utility consumers) have been "docked," even though Judge Brown appointed a receiver on the same date to hold and administer the funds "so that refunds may be made therefrom to utility consumers." L.F.85. Her assertion also suggests that the Treasurer's claim has been "docked," even though the Treasurer was not before the court on April 26, 1993, and her claim did not even arise until after the expiration of the statutory abandonment period.

Finally, the amici argue that the Escheat Act, §470.270, "controls" over the UPA, citing various rules of statutory construction. Legal Aid of Western Missouri Amici Brief, pp. 11, 20 (specific controls over general, "expressio unius est exclusio alterius"); Legal Services of Eastern Missouri Amici Brief, p. 28 ("in pari materia"). The amici's argument overlooks a crucial analytical step: where the language of a statute is clear and unambiguous, courts will give effect to the language as written and will not resort to statutory construction. *Cantwell v. Merritt*, 988 S.W.2d 51, 55 (Mo.App. 1999). Only when the legislative intent cannot be ascertained from the language of the statute, by giving it its plain and ordinary meaning, is the statute considered ambiguous and only then will rules of statutory construction be applied. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo.banc 1996). There is no need to apply the amici's suggested rules of statutory construction here. The language of the UPA specifically applies to the situation before the Court as it relates to these funds. Furthermore, the language of §470.270 is plain, unambiguous and clear: "The provisions of this section notwithstanding, this state may elect to take custody of such unclaimed property by instituting a proceeding pursuant to section 447.575, RSMo." Either procedure may be used, the state may choose to make available to over-charged utility customers in perpetuity their money

under the terms of the UPA or, prior to the passage of SB 1248 this year, it could choose to acquire title to the property under the terms of Missouri's escheat statutes.

E. *Cy Pres*. Receiver and the amici include lengthy discussions regarding the availability of the *cy pres* doctrine to dispose of this fund. Here the underlying case was a statutory proceeding to review a Public Service Commission order. 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, none of these requirements have 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, the trust was statutory – not charitable. The statute mandates that the entity holding the funds hold 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. In the absence of a trust instrument, it is impossible to carry out its terms and there is no settlor whose interest can be assessed. 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 receiver 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 return to rate payers money improperly collected from them. The return of "very few payments to claimants" (Appellant's Brief at Appendix 3) over many years demonstrates a failure of the trust. As the purpose of the trust was specific – to repay the rate payers – the trust should revert to the settlor. As the utility companies that improperly collected the rates cannot be considered the settlor, the only possible settlor is the state. It created the law under which the rate was challenged and ultimately set aside and, thus, it was the state that created the res. The purpose of the state/settlor so creating the fund was to reunite over-charged rate payers with their money – 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). In Missouri, the doctrine of *cy pres* is limited and none of its requirements have been met in this case.

F. Laches and Estoppel. Receiver 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 Local #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 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, receiver 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 receiver has identified none); (2) there is no action taken by the second party on the faith of such admission, statement or act (receiver 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 (receiver has identified no injury). *Missouri Highway and Transp. Comm'n v. Meyers*, 785 S.W.2d 70, 73 (Mo.banc 1990). Although receiver 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 receiver'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." Receiver's laches and estoppel claims must be rejected. If any claim should be barred by laches, it is receiver'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.)

As receiver cited to an Attorney General's Opinion, Rec.Brf., (SC84210), 72, it seems appropriate to direct the Court to an opinion directly relating to this point issued more than a decade ago by the previous Attorney General. Question: "Who controls the expenditure of such funds [funds generated under the authority of §483.310.2]; the Presiding Circuit Court Judge under the general superintending authority of the Court, or the Circuit Clerk under the provisions of the Statute?" 91 Op. Att'y Gen. 32 (May 15, 1991) at 1, Rep.App. 19. The answer was clear. "Section 483.310.2 provides that 'the income derived therefrom may be *used by the clerks*' for the enumerated purposes. Based on the plain meaning of this provision, we conclude that the Circuit Clerk controls the expenditure of such income." 91 Op. Att'y Gen. 32, at 4, Rep.App., (SC84210), 22 (emphasis in original).

Ignoring the plain language of §483.310, receiver argues that expending hundreds of thousands of dollars in interest generated by money that is being "held and administered so that refunds may be made therefrom to utility customers," L.F.85, does not violate the statute because the judge's Order permits it. Rec.Brf., (SC84210), 93. Appellant's argument is that the order violates the statute. But, receiver asserts that the Treasurer cannot attack the provisions of this Order because "[a]ny action to modify the provisions of the Orders Appointing Receiver must be done by a proper party in the proceedings below who has standing to seek modifications of those Orders." Rec.Brf., (SC84210), 94. This argument ignores that

the proceedings below are closed, receiver is not a party, and the other parties have secured final relief. It also ignores receiver's assertions that the Treasurer has no claim to the funds, the utility companies have no right or interest in the funds (Rec.Brf., (SC84210), 82), and there are no "owners" who have a legal or equitable interest in the funds (Rec.Brf., (SC84210), 91). In short, receiver suggests there is no one who can right the wrong here committed. Thus, receiver's argument seems to support the need for quo warranto relief sought elsewhere.

Respondents Cole County and the Circuit Clerk misconstrue the Treasurer's argument regarding interest on the funds. The Treasurer is not arguing that the court cannot appoint a receiver or that the circuit clerk and only the clerk can manage funds paid into the registry of the court. The Treasurer is also not arguing that §483.310 requires the court to make an order directing funds paid into the registry of the court to be invested. *See* §483.310.1("court *may* make an order directing [investment]").

What the Treasurer *is* arguing is that, once the court makes an order directing the investment of funds, the court must follow the dictates of 483.310.1, including the mandatory language that income from investment, excluding necessary costs, "shall be added to and become a part of the principal." §483.310.1 applies here because (1) the court entered an order (2) based upon the court's own finding (3) that the funds could reasonably be expected to remain on deposit for a period sufficient to provide income through investment and (4) the court directed the funds to be invested. None of these factors apply to §483.310.2, on which receiver relies to justify the expenditure of the interest.

Cole County argues that the legislative intent of 483.310 is to "use the interest generated to achieve a public good." Cole County Brief, 24. This cannot be the intent of subsection 1 because it does not allow the interest to be "used" at all, but requires that the interest "be added to and become a part of the

principal." §483.310.1.

The orders expending interest income also violated federal law. Years before the first (of many) withdrawal orders, the Supreme Court issued *Webb's Fabulous Pharmacies v. Beckwith*, which held that a county had no right to take the interest from moneys deposited into the registry of a court. 449 U.S. 155, 165 (1980). The Supreme Court held that such behavior violates the Fifth and Fourteenth amendments to the Constitution. *Id*. at 164-65.

In explaining its holding, the Court identified the disincentive created for a court to give up control over funds generating substantial interest income:

> Indeed, if the county were entitled to the interest [on funds deposited to the registry of the court], its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

Id. at 162. Unfortunately, the very concern expressed by the Supreme Court in *Webb's* has manifested here. *See also, Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998)(Court invalidated taking interest generated by attorney IOLTA accounts, where interest earned was statutorily directed to public-benefit legal foundation. As "interest follows principal," it necessarily follows that "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal.").

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.)

Receiver adopts by reference receiver's arguments for this Point set forth in receiver's brief in SC84210. Rec.Brf., 48. 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.)

Receiver adopts by reference receiver's arguments for this Point set forth in receiver's brief in SC84210. Rec.Brf., 49. 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.

Receiver'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 receiver, 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 to Point VII set forth in Part VII of 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.)

Receiver adopts by reference receiver's arguments for this Point set forth in receiver's brief in SC84210. Rec.Brf., 49. 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 Brown 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 Receiver's Point VI.)

Receiver argues that Judge Brown, who disqualified himself from resolving this matter 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.

Receiver argues that Judge Brown had no financial interest in the proceedings. At the same time, receiver incongruously argues that Judge Brown has judicial immunity from any monetary claims made by the Attorney General or the Treasurer.[3] The fact that Judge Brown 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 Brown is subject to financial liability based on his alleged misbehavior he is financially interested in all cases that will assess his behavior.

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[3] Receiver also argues that the Attorney General's quo warranto proceeding against Judge Brown is "fatally flawed" and that Judge Brown has immunity from this claim. The merits of the quo warranto proceedings and of Judge Brown's defense to it are not issues in this case. These issues will be decided in the quo warranto proceedings. In any event, Judge Brown 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.

Receiver next argues that Judge Brown is not related to receiver, a party to these proceedings. But Judge Brown begat receiver and, in his order appointing receiver, described receiver as "someone in who this court has complete confidence" and who is readily available to the court. L.F.86. Receiver was represented by the very counsel who represented Judge Brown in the related Writ of Prohibition case. Such persons would undoubtedly exercise "undue" influence over him pursuant to §508.090.

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

Perhaps not surprisingly, receiver fails to respond to the Treasurer's assertion that Judge Brown 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 Brown 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 receiver's notice of hearing on her motion for judgment on the pleadings was untimely and insufficient. (Partially addressing Respondent's Point VI.)

The receiver 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 receiver.

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 receiver 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.10 and Case No. SC84328, L.F.4-5. It seems apparent under these circumstances that the judges and the receivers 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 receiver's motion for judgment on the pleadings did not "traverse" the Treasurer's long-pending motion to vacate and disqualify, as the receiver suggests. *Compare* L.F.124-161 with L.F.185-91. In almost no respect is the motion for judgment on the pleadings responsive to the issues raised in the Treasurer's motion. The receiver 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 receiver's violation of Rule 44.01 and is the product of the receiver's own untimeliness. The receiver 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 receiver 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 receiver argues that counsel for the Treasurer was "fully conversant" with the issues presented in the receiver's motion. But the receiver points to no separate set of rules applicable to experienced and knowledgeable adversaries. The rules apply to all counsel. The receiver'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)

The undersigned hereby certifies that on this _____ day of August, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 6,218 words.

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_____
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