IN THE
SUPREME COURT OF MISSOURI

No. SC84213

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

Appellant,

v.

SHARON MORGAN, RECEIVER,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE

Respondents.

BRIEF OF RESPONDENT COUNTY OF COLE

BLITZ, BARDGETT & DEUTSCH, L.C.

Henry T. Herschel
Missouri Bar No. 30813

308 East High Street
Suite 301
Jefferson City, Missouri 65101
Phone: (573) 634-2500
Facsimile: (573) 634-3358

ATTORNEY FOR COUNTY OF COLE

Introduction

Respondent County of Cole files this brief to address only Point III of the Brief of Appellant, Treasurer of the State of Missouri. The County of Cole joins in the arguments presented in the Respondent's Brief of the Receiver, Sharon Morgan, in her Points I, II, IV, V, VI, VII, VIII, IX and X.

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Jurisdictional Statement

The trial court determined that Sections 447.575 and 447.532, RSMo, giving the Treasurer the power to bring an action to collect unclaimed property from the courts, is an unconstitutional delegation of authority under Article IV, § 15 of the Missouri Constitution. The trial court held that such an action under the statute would exceed the limits placed on the duties of the state treasurer by Mo. Const. Art. IV, § 15. This cause therefore involves the validity of the Missouri Uniform Disposition of Unclaimed Property Act and the construction of a state constitutional provision defining the state treasurer's duties. Article V, § 3 of the Missouri State Constitution grants this Court exclusive jurisdiction to hear such matters.

Statement of Facts

The County of Cole accepts and reproduces, with minor amendments, the Statement of Facts contained in the Brief of the State Treasurer. In the litigation that created the fund at issue herein, *Southwestern Bell v. Public Service Commission*, CV194-0024CC, the Southwestern Bell Company, on January 11, 1994, petitioned for review and for stay of a decision of the Public Service Commission that required Southwestern Bell to implement lower rates. (L.F. 13-16.) On February 4, 1994, the Circuit Court entered a stay, and ordered Southwestern Bell to pay into the registry of the court that portion of telephone charges collected that would be in excess of rates that would have been collected but for the stay. (L.F. 24.) The monies were deposited into the registry of the court pursuant to § 483.310, RSMo. The Circuit Court's initial order appointing a receiver, dated February 17, 1994, specifically states that the funds were placed in interest bearing accounts, "same being required by § 483.310.1." *Id*. (L.F. 26.)

The Circuit Court concluded that a receiver should be appointed to perform those additional administrative duties which, absent the appointment of a receiver, would have to be performed by the Circuit Clerk. (L.F. 27.) His reasons for this conclusion included: 1) it would not be "fair to impose upon the Clerk of the Circuit Court, herself, the additional responsibilities that are engendered by a close monitoring of the investment in these funds as they accrue from month to month;" 2) "the responsibility for administering these funds must fall upon the undersigned judge and those of his staff who work with him the closest;" 3) the Court "intends that the investment decisions with respect to the funds be retained by the Court itself;" and 4) the Court "intends that these responsibilities be exercised by the Court with the assistance of someone in whom this Court has complete confidence and also by one who is readily available to the Court." (L.F. 26-27.) Elaine Healey was appointed receiver by the Circuit Court which ordered and she receive as compensation $500.00 per month. (L.F. 28.) The Court "reserve[d] unto itself the final investment decisions;" and the Court ordered that interest received from such investments be paid over directly to the receiver and that from such interest the receiver "shall first pay . . . the lawful expenses and fees regarding the administration of the funds as may from time to time be authorized to be paid or allowed by the Court." (L.F. 28.)

On October 7, 1994, the Circuit Court dismissed the Relator Southwestern Bell's petition for writ of review with prejudice and entered an order approving distribution of the stay funds. (L.F. 37-45.) On January 26, 1996, the Circuit Court ordered that funds held by the receiver be transferred to a successor receivership, noting that $63,915,156.04 had been refunded but that funds still remained that were due individual telephone customers who had not been located. (L.F. 50-55.) According to the Order, "these funds are being held and administered so that refunds may be made therefrom to these telephone customers," and "valid claims submitted and approved by the court shall be paid by the receiver." (L.F. 50-53.)

In determining that a successor receivership was needed, the court stated that it was "apparent that it will be necessary to hold and administer these funds for a lengthy period of time." *Id*. The court appointed Sharon Morgan as successor receiver, relying on the same factors as it had for the appointment of the initial receiver, and ordered that she receive $250.00 per month in compensation for her duties as a receiver, (L.F. 54-55.) The court again reserved unto itself the investment decisions on the fund. (L.F. 53.) It ordered that interest received from investments be paid directly to the receiver, who "shall first pay

therefrom the lawful expenses of administration of the funds as may from time to time be authorized to be paid or allowed by the court; there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County in subsection 2 of Section 483.310, RSMo, and the remaining balance shall be paid into the general revenue fund of Cole County as provided in subsection 2 of Section 483.310, RSMo." (L.F. 54.)

The Circuit Court ordered the receiver to pay interest income from the fund to the Treasurer of Cole County on September 6, 1996, in the amount of $5,623.66, and on December 30, 1998, in the amount of $13,000. (L.F. 59-60.) The Circuit Court ordered additional distribution of interest earned on March 14, 2001. (L.F. 1.)

On July 16, 2001, the Attorney General notified the receiver that he was preparing, on behalf of the State Treasurer, a lawsuit to recover unclaimed property, namely, the fund administered by the receiver in this pending court case. (L.F. 74-75.) On July 20, 2001, the receiver filed in this pending Circuit Court case a "Motion and Petition for Joinder of Additional Parties and for Relief in an Ancillary Adversary Proceeding in the Nature of Interpleader and for Other Relief." (L.F. 61-75.) On that same date, the Circuit Court sustained the Motion and allowed filing of the Petition. (L.F. 77-78.)

The State Treasurer received both the motion and order on July 23, 2001. (L.F. 80.) By special appearance only, she filed a "Motion to Vacate and Disqualify" on August 20, 2001. (L.F. 81-118.) She alleged that the Circuit Court did not have personal jurisdiction over her necessary to enter any order directed toward her, as she was never a party to the original action and was never served with summons or with petition seeking relief; that the Circuit Court had no legal authority to order her, as a non-party, to file a lawsuit against "hand-picked" defendants and on issues chosen by the Judge; that the Circuit Court did not have subject matter jurisdiction to enter the July 20, 2001 order, in that a final, unappealed judgment had long-since been entered in this case; that the receiver, as a non-party, had no standing to file motions designed to continue the maintenance and expenditure of receivership funds for the benefit of any person or entity other than the owners of those funds; and that the Circuit Court was disqualified by Supreme Court Rule 51.07 from issuing the July 20 order because he had a substantial interest in the outcome and a close interest in or relationship with the movant. (L.F. 82.) Having not been served with summons, the State Treasurer did not file an answer in the "Ancillary Adversary Proceedings." Instead, on October 5, 2001, she noticed up her "Motion to Vacate and Disqualify" for hearing on October 18, 2001. (L.F. 142.)

On October 12, 2001, the receiver filed a motion for judgment on the pleadings. On that same date, the receiver noticed up her motion for hearing on October 18, 2001. (L.F. 151-153.) The State Treasurer filed suggestions in opposition and objections on October 18, 2001. (L.F. 154-265.)

On November 27, 2001, the trial court overruled the State Treasurer's Motion to Vacate. The Court determined that the Circuit Court continued to have jurisdiction over Case No. CV194-24CC (the original pending action) and that any person who has a claim against the fund created in that pending action must assert it, as well as any claims against the receiver, in Case No. CV194-24CC, "and not in any other case in this Court, or in any administrative proceeding." (L.F. 274.) With regard to the claim made by the Treasurer, the trial court held that the State Treasurer's duties are limited by the Missouri Constitution, Article IV, § 15, to those "related to the receipt, investment, custody and disbursement of state funds and funds received from the United States." The trial court determined that the funds in question were not state funds or funds received from the United States and, therefore, "the Treasurer has no standing or right to

assert claims against the funds in Case No. CV194-24CC or against the Receiver with respect to those funds." (L.F. 274.) The court further held that the funds "are subject to the disposal of the Circuit Court of Cole County," are "subject to disposition as determined by the Circuit Court of Cole County," and "are not required to be disbursed to the Treasurer pursuant to the provisions of the Uniform Disposition of Unclaimed Property Act." (L.F. 274-75.) Finally, the court held that interest on the funds "may be disbursed and used as provided in Section 483.310.2, RSMo, with the balance of such interest to be paid to Cole County." (L.F. 275.) This appeal followed. (L.F. 269.)

Point Relied On
III.

The trial court did not err when it determined that the Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.02 to administer funds, in that Section 483.310, RSMo does not require that the Circuit Court appoint the Circuit Clerk as custodian of funds in the Circuit Court's registry because Section 483.310, RSMo, is not mandatory as to who may invest such funds and the Circuit Court did not interfere with the Circuit Clerk's discretion under Section 483.310, RSMo to make purchases for the public good under Section 483.310, RSMo.

§ 483.310, RSMo 2000

Christian Disposal, Inc. v. Village of Eolia, 895 S.W.2d 632 (Mo. App. E.D. 1995)

State ex rel. Taylor v. Wade, 231 S.W.2d 179 (Mo. 1950)

Standard of Review

"The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *State ex rel. Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122, 134 (Mo. banc 2000). A motion for judgment on the pleadings should be sustained where no issue of material fact exists. *Angelo v. City of Hazelwood*, 810 S.W.2d 706 (Mo. App. E.D. 1991). A motion for judgment on the pleadings should be sustained if, on the basis of the pleading, the moving party is entitled to judgment in his favor as a matter of law. *Id.* at 707. Therefore, the review of the question of law by this Court is de novo and no deference to the judgment of the trial court is necessary. *Id*. at 707.

Argument
III.

The trial court did not err when it determined that the Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.02 to administer funds, in that Section 483.310, RSMo does not require that the Circuit Court appoint the Circuit Clerk as custodian of funds in the Circuit Court's registry because Section 483.310, RSMo, is not mandatory as to who may invest such funds and the Circuit Court did not interfere with the Circuit Clerk's discretion under Section 483.310, RSMo to make purchases for the public good under Section 483.310, RSMo.

The State argues under Section 483.310, RSMo, that the Circuit Clerk, and the Circuit Clerk alone, is vested with the authority to make investment decisions with regard to money deposited in the Circuit Court's registry. Under the Treasurer's reasoning, Section 483.310, RSMo, limits a Circuit Court's jurisdiction and discretion in the investment and/or disposition of funds that the same Circuit Court has ordered paid into its registry. The Treasurer's argument is factually and legally incorrect. Section 483.310, RSMo, does not limit the Circuit Court's jurisdiction, since the requirements of the section are not mandatory by its terms and the Circuit Court's order does not limit the discretion, duties or privileges given the Circuit Clerk under Section 438.310.2, RSMo

In the underlying case[1], the Circuit Court appointed a receiver, rather than the Circuit Clerk, to oversee the administrative details of maintaining and investing the money that was deposited in the Circuit Court's registry. Such appointment was based upon an unusual need determined to exist by the Court after its considered judgment. In its Order, the Circuit Court determined that a receiver was necessary in light of the large amounts of money that were to be deposited repeatedly and regularly, and because the money deposited was to be held in the registry for a possibly "lengthy" period of time. (L.F. 52.)

The Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.01(a) under the following circumstances:

> Whenever in a pending legal or equitable proceeding it appears to the court that a receiver is necessary to keep, preserve and protect any business, business interest or property, including money or other thing deposited in court or the subject of a tender, the court, or any judge thereof in vacation, may appoint a receiver whose duty shall be to keep, preserve and protect, to the extent and in a manner that the court may direct, that which the receiver is ordered to take into receiver's charge. (Emphasis added.)

In accordance with Section 483.310, RSMo, the Court made a finding that an unusually large

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[1] *Southwestern Bell v. Public Service Com'n*, Case No. CV194-0024CC.

amount of money, $63,915,156.04, would be deposited and held in the Court's registry for a "lengthy" period of time. (L.F. 51). The Court also prudently found that:

> The court further does not believe that it is fair to impose upon the circuit clerk herself the additional responsibilities that are engendered by a close monitoring of investment of those funds, these responsibilities being over and above what would ordinarily be expected of the circuit clerk personally in the investment of funds." (L.F. 51.)

The Court further found, based upon the existing and anticipated circumstances, that the Court should retain the investment decision making authority over these funds. (L.F. 51.) The Court correctly determined that under Supreme Court Rule 68.02 a receiver may administer these funds "in lieu of the circuit clerk." (L.F. 52.) In its Order, the Circuit Court was also careful to note that even though the Circuit Clerk would not be personally administering the account, that the account would be administered in accordance with Section 483.310, RSMo. (L.F. 53.) Specifically, the receiver was directed to perform those administrative duties in relation to these funds which, absent the appointment of the receiver, would have been performed by the Circuit Clerk under the provisions of Section 483.310, RSMo. The receiver was given authority "to govern the investment of the funds and the application of the interest received from the fund." (L.F. 53.) Finally, the Court's Order indicates that the Circuit Clerk will have the authority to disburse the interest earned from the corpus on those items permitted under Section 483.310, RSMo. (L.F. 54).

The incorrect hyper-technical misinterpretation of Section 483.310, RSMo, proposed by the Treasurer contradicts the clear purpose of the legislature in enacting this statute. Section 483.310, RSMo was enacted to relieve the Circuit Court of some of the burden of administration of sums of money deposited into the Circuit Court's registry. Section 483.310, RSMo, provides for an alternative agent (the Circuit Clerk) to protect, and by investment even to increase, the funds or property deposited in the Circuit Court registry. This statute was not intended to reduce the Circuit Court's jurisdiction, authority or discretion in the receipt, control, maintenance or disposition of funds in the Circuit Court's registry.[2] It is obvious from the language of the statute and subsequent amendments that the legislature intends only to increase the safe administration/investment alternatives that a circuit court has in the protection and investment of money. While it is evident that the legislature did not intend that the judge, circuit clerk or receiver have unlimited discretion to invest such funds, the legislature, through this statute, has established a legislative framework that permits the continued and appropriate exercise of discretion by the Circuit Court after a finding that funds will be deposited in the registry in unusual amounts, at frequent intervals and for a lengthy period of time. See Section 483.310.1, RSMo.

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[2] It should be noted that the legislature did not specifically change the title of the depository where the money was to be placed. The money and/or property still must be deposited into the Circuit Court registry, and not into a "Circuit Clerk" registry.

It is important to note that the legislature could have required certain mandatory steps to be taken in regard to all property deposited into the Circuit Court registry. The legislature chose not to do so in Section 483.310, RSMo, by using language which is directory and not mandatory. In determining whether the requirements of a statute are mandatory (that one must do what it requires or suffer a punishment) rather than directory, the language and context of the statute must be evaluated. See *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632 (Mo. App. E.D. 1995).

> To determine whether a statute is mandatory or directory, the general rule is when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. However, if the statute merely requires certain things to be done and, yet, does not prescribe what results will follow if those requirements are not met, such a statute is merely directory.

Id. at 634, citing *State ex rel. 401 N. Lindbergh Assoc. v. Ciarleglio*, 807 S.W.2d 100, 104 (Mo. App. E.D. 1990).

To determine whether a statute's requirements are mandatory or directory, the intent of the legislature should be determined by the context of the statute and the terms and remedies that the legislature provided. See *School District of Mexico, Mo. v. Maple Grove School District*, 359 S.W.2d 743, 746 (Mo. 1962). The failure of the legislature to include a penalty for the failure to comply with the terms of the statute is evidence that the statute is directory rather than mandatory. See *Garzee v. Sauro*, 639 S.W.2d 830, 832 (Mo. 1982). Further, the use of terms by the drafters in the statute is considered important in determining the legislative intent. If the legislature employed the term "shall" instead of "may" this may be considered evidence that the legislature intended the statute to be mandatory. *State ex rel. Taylor v. Wade*, 231 S.W.2d 179, 181 (Mo. 1950).

In Section 483.310, RSMo, it is evident that the legislature did not intend this statute to be mandatory, nor was it intended to reduce the equitable powers of the Circuit Court.[3] It should be noted that the statutory term directing the circuit clerk to invest money is by the adjective "may," as opposed to "shall." In fact, Section 483.310.2, RSMo, was specifically amended in 1989 to replace the word "shall"

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[3] Another primary rule of statutory construction is that a statute should not be construed to render it unconstitutional or to require an otherwise absurd result. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258-259 (Mo. banc 1998). The legislature should not be presumed through misconstruction to be violating the constitutional prohibition against improperly reducing a Circuit Court's judicial powers in equity under the doctrine of the separation of powers. See Article II, Section 1, Missouri State Constitution; *State ex rel. York v. Locker*, 181 S.W. 1001 (Mo. 1916).

with the word "may" regarding how the Clerk may spend the money. See Historic and Statutory Notes for Section 483.310, V.A.M.S. This amendment is evidence that the legislature does not intend to impose any mandatory requirements on the clerk or on the circuit court in the exercise of their discretion. *Hagler v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998). Further, the Court had discretion to order, or not order, the Circuit Clerk to deposit such funds in various "safe investments" under Section 483.310.1, RSMo. (... "The court may make an order directing the clerk to deposit such funds...".) There is no mandatory language in Section 483.310, RSMo that the Circuit Court must appoint the Circuit Clerk to deposit and invest the funds under Section 483.310.2, RSMo, nor is there any prohibitory language preventing appointment of a receiver. In sharp contrast to the Treasurer's view that the Circuit Clerk is indispensable under this statute, the plain language used by the legislature instead reveals that while potentially increasing the Circuit Clerk's role in handling funds in the Circuit Court's registry, Section 483.310, RSMo is in no way reducing the Circuit Court's jurisdiction, powers, duties and discretion in regard to that fund. There is simply no requirement that the Circuit Court must appoint the circuit clerk, and only the circuit clerk, to manage Court Registry funds; instead, that is only an available option that the Circuit Court may (and does) use in the ordinary course of business.

The Treasurer suggests that the Circuit Court's own Order some how deprives the Circuit Clerk of the "election" to make investment decisions. However, as previously explained the Circuit Court is under no compulsion to surrender its jurisdiction to supervise the property in its own registry, and the Treasurer offers no plausible argument for why it should. The Treasurer's argument that the Clerk is deprived of some "right" to manage the Court Registry is similarly without basis. The Circuit Clerk's only real "authority" under the statute is her right to use some of the interest generated to purchase items for the use of the public. See Section 483.310.2, RSMo. In the Circuit Court's Order, however, it specifically left that discretion and authority with the Circuit Clerk and ordered that it be funded and performed.

> From such interest which is received the receiver shall first pay therefrom the lawful expenses of the administration of the fund as may from time to time be authorized to be paid or be allowed by the court; there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purpose specified and allowed for such clerk in subsection 2 of Section 483.310, RSMo..."

(L.F. 54.)

In summary, there is nothing in the Order of the Circuit Court in this case which would deprive the clerk of any discretion or authority belonging to the Circuit Clerk under Section 483.310, RSMo. The clerk has duties, authority and discretion to deposit and invest funds in the registry only if the Circuit Court "may make an order" to that effect (Section 483.310.1, RSMo), and the Clerk's authority to access the interest on such funds to make authorized purchases is fully protected. (Section 483.310.2, RSMo). Further, nothing in Section 483.310, RSMo, or any other provision of law requires the Circuit Court of Cole County to appoint only the Cole County Circuit Clerk to control and invest funds in the Court's registry; nor does any provision of law otherwise limit the Circuit Court's jurisdiction and discretion to appoint an appropriate receiver to administer funds held in the Court's registry, particularly in the unusual and peculiar circumstances of this case.

Conclusion

The trial court did not err when it found the Circuit Court properly appointed a receiver and was not required to appoint the Circuit Clerk to make the investment decisions.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

Henry T. Herschel, #30813
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Special Rule No. 1(b), and that:

(A) It contains 4, 501words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent County of Cole's Brief and a 3 1/2" disk containing this Brief were sent U.S. Mail, postage prepaid to the following parties of record on this 26th day of April, 2002:

Alex Bartlett
Husch & Eppenberger
P.O. Box 1251
Jefferson City, MO 65102-1251

J. Kent Lowry
Armstrong Teasdale, LLP
3405 West Truman Boulevard
Jefferson City, MO 65109

James McAdams
Chief Counsel
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65101

_____
Henry T. Herschel

(KW5383.WPD;1)