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.

APPELLANT'S BRIEF

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Introduction

This case and its three companion cases (SC84210, SC84211 and SC84212) present an unusual situation in which Cole County Circuit Court Judges Byron Kinder and Thomas Brown, and four receivers appointed by them, attempt to avoid or control one previously filed suit, *State ex rel. Nixon v. Kinder, et al.* (SC84301, application for transfer pending), and another suit that they knew was coming, *Farmer v. Kinder, et al.* (SC84328). There are so many jurisdictional and procedural shortcomings in this case and its three companion cases resulting from the unusual nature of the action that the receivers brought, that the significant issues of dispute between the parties – found in the two related cases that respondents sought to avoid – run the risk of being obscured.

All six cases concern allegations made by Constitutional officers of this State that Judges Kinder and Brown and their appointed receivers have failed to conform their conduct to the requirements of law. Specifically, the Treasurer and the Attorney General, based on an audit performed by the State Auditor, allege that the judges and their receivers have held in the registry of the court four funds, totaling approximately $2.75 million, for a longer period of time than that permitted by Missouri's Uniform Disposition of Unclaimed Property Act. *See* §447.532.1, RSMo 2000[1] (providing that personal property held by a court for the property owner is presumed abandoned after five years); § 447.539.1 (requiring persons holding

[1] All statutory references are to the Revised Statutes of Missouri 2000 unless otherwise stated.

presumed abandoned property to report it to the Treasurer); and § 447.543 (requiring those filing such a report to deliver the property so held to the Treasurer with the report).

The Treasurer and the Attorney General additionally allege that the judges and their receivers violated the law by expending interest generated from these four funds. This allegation is based on § 483.310.1, limiting interest expenditures made from registry funds when the funds are invested, as here, pursuant to court order. One of the four funds has been held for over twenty years. Total interest expended from the four funds in violation of applicable legal constraints was approximately $3 million; comparatively little money has been returned to property owners. Specifically, the State Auditor, in a report for the three-year period from 1996 through 1998, found that the total payments to all claimants from the fund at issue here and the funds at issue in the three companion cases was only $4,819. During that same time period, the receivers at the Judges direction transferred in excess of $687,000 – 142 times the amount returned to consumers – to Cole County. The combined amounts spent during this time period on administrative costs alone – $48,438 in receiver fees; $20,658 on banking fees; and $7,129 in bonding fees – totaled more than fifteen times what was paid to all claimants. The State Auditor reported that the interest payments were deposited to a Cole County account designated for courthouse improvements. Appendix "App.," pp. 1-4.

The judges and receivers, having silently engaged in this unlawful conduct for many years, now assert that the statutes constraining their behavior are either unconstitutional or otherwise fail to regulate their conduct. The trial court agreed. It found, pursuant to Article IV, § 15, that the Treasurer is constitutionally prohibited from administering Missouri's

Uniform Disposition of Unclaimed Property Act because the funds to be delivered are not "state funds." Hence, the trial court found that the Treasurer lacked standing to assert any interest in the disputed funds pursuant to the Act. The trial court reached this conclusion despite the fact that the monies to be received will be deposited in a state-created fund and that they are subject to disbursal to the general revenue until their proper owners can be located. § 447.543.2. The trial court further found without explanation that the disputed interest expenditures are not limited by § 483.310.1, but instead may continue to be made pursuant to § 483.310.2. This subsection authorizes circuit clerks – not circuit judges or receivers acting upon their order – to disburse interest earned on funds invested at the clerk's discretion. It has no applicability here because these funds were invested upon orders issued by the court.

As significant as these issues are, the trial court was without authority to reach them in light of the jurisdictional and procedural irregularities present in this proceeding and its three companion cases. Again without explanation or even a response by the receivers, the trial court rejected the Treasurer's motion to vacate and her objections to this unusual proceeding. The rejected assertions included claims that Judge Brown lacked authority to enter an order directed to the Treasurer as she was not a party; that his order violated the separation of powers by directing the Treasurer to engage in specific conduct committed to her discretion at a certain time and in a certain manner; that the court lacked personal jurisdiction over her as she was not a party to this proceeding and was not served with summons; that the court lacked subject matter jurisdiction over the receiver's motion to create the ancillary proceedings in that the petition was deficient, was filed by a non-party, and was filed in a closed case; that the

judgment on the pleadings was improper as the pleadings had not yet closed; that the notice of hearing on the motion for judgment on the pleadings was untimely; and, finally, that as a result of the appearance of partiality Judge Brown was required to recuse himself prior to granting his receiver's motion to create this proceeding.

It is unfortunate that a controversy of this dimension could not have been avoided. The Treasurer and the Attorney General made independent efforts to resolve this matter short of litigation, but all such efforts proved unavailing as the judges and their appointed receivers continued in their refusal to follow the dictates of the law. It is unconscionable, and unlawful, that the judges and their appointed receivers have spent millions of dollars in interest generated on money they hold for others while undertaking no serious effort to locate the rightful owners. App., p. 3. Under these circumstances, appellant is compelled to advance the principle that no one is above the law.

Table of Contents

Table of Authorities

Cases:

Statutes and Constitutional Authority:

Other:

Jurisdictional Statement

The trial court determined that the statute giving the Treasurer the power to bring an action to collect unclaimed property (§ 447.575) from the courts (§ 447.532) 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 the constitutional provision that states: "No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States Goverment." Mo. Const. Art. IV, § 15. This case, then, 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 grants this Court exclusive jurisdiction to hear such matters.

Statement of Facts

In the litigation that created the fund at issue, *Southwestern Bell v. Public Service Commission*, CV194-0024CC, Southwestern Bell, 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, Judge Brown 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 § 483.310.1. L.F. 26. Judge Brown'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.*

Judge Brown concluded that a receiver should be appointed to perform those administrative duties which, absent the appointment of a receiver, would be performed by the 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. Although the receiver, Elaine Healey, was already a Deputy Circuit Clerk in Cole County, L.F. 27, Judge Brown ordered that she receive $500.00 per month in compensation for her duties as a receiver, L.F. 28. The Court "reserve[d] unto itself the final investment decisions"; 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, Judge Brown dismissed the relator'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, he ordered that funds held in the previously created receivership be transferred to a successor receivership, noting that $63,915,156.04 had been refunded but monies still remained that were due individual telephone customers who could not be located. L.F. 50-55. According to the Order, "these funds are being held and administered so that refunds may be made therefrom to telephone customers," L.F. 50, and "valid claims submitted and approved by the court shall be paid by the receiver," L.F. 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 receiver, relying on the same factors as it had for the appointment of the initial receiver. Although Ms. Morgan was employed as a Circuit Clerk II, Official Manual of the State of Missouri 1995-96, p. 929, Judge Brown 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.

Judge Brown 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. Judge Brown 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 at issue in this case. L.F. 74-75. On July 20, 2001, the receiver filed 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, Judge Brown 1) considered the Motion and Petition, 2) sustained the Motion and Petition, 3) ordered a separate trial and proceedings with regard to "Ancillary Adversary Proceeding Questions," 4) determined that the "only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceeding Questions as defined in the Receiver's Motion and Petition," 5) ordered the State Treasurer added as a party to the Ancillary Adversary Proceedings, 6) ordered the State Treasurer to file a pleading asserting any claims which she as State Treasurer had under the Uniform Disposition of Unclaimed Property Act, 7) added the Cole County Circuit Clerk and Cole County as parties, 8) ordered the Cole County Circuit Clerk and Cole County to file a pleading asserting any claims they may have to the fund or the interest income from the fund, 9) authorized and directed the receiver to participate in the Ancillary Adversary Proceedings, and 10) permitted the receiver's attorney to be compensated for his services and expenses. L.F. 77-78.

After determining 1-10, above, Judge Brown recused himself on his own motion because of the "issues raised by the Attorney General in Osage County Circuit Court Case No.

01CV330548 [the quo warranto case previously filed by the Attorney General and pending against Judge Brown with regard to this fund and now before this Court on application for transfer in SC 84301] and to remove questions or suggestion of any question about [him] participating in the determination of the Ancillary Adversary Proceeding Questions." L.F. 78. Judge Brown retained jurisdiction, however, "with respect to all other issues and matters in this case, including but not limited to the investment and reinvestment of the funds herein and the determination of the holding or disposition of any funds which are determined in the Ancillary Adversary Proceedings to not be required to be disbursed to the State Treasurer by reason of the Uniform Disposition of Property Act." L.F. 78-79. Following notification of Judge Brown's recusal, this Court assigned the Honorable Ward B. Stuckey to this case. L.F. 3.

The State Treasurer was served with 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 Judge Brown 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; Judge Brown 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; Judge Brown 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; 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 Judge Brown 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." On October 5, 2001, she noticed 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 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. He determined that Judge Brown continued to have jurisdiction over Case No. CV194-24CC and that any person who has a claim against the fund 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 such a claim 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 timely appeal followed. L.F. 269.

Points Relied On

I.

The trial court erred in holding that it was beyond the constitutional authority of the Treasurer to administer the Uniform Distribution of Unclaimed Property Act because the Missouri Constitution authorizes the Treasurer to administer state funds and the Abandoned Property Fund is a state fund in that it is created by a state statute and provides for transfers of money to the state general revenue fund.

Smith v. Coffey, 37 S.W.3d 797 (Mo. banc 2001)

Board of Education v. State, 47 S.W.3d 366 (Mo. banc 2001)

Article IV, § 15, Constitution of Missouri

§ 447.543.2, RSMo 2000

II.

The trial court erred in holding that the State Treasurer had no standing to assert claims against the fund because the Uniform Distribution of Unclaimed Property Act obligates the Treasurer to bring an action to enforce delivery of unclaimed property as defined by the Act, § 447.575, and the fund in question falls within the statutory definition of unclaimed property, § 447.532.1, in that the money is intangible personal property held for its owner by the court and that has remained unclaimed by the owner for more than five years.

State ex rel. Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471 (Mo. banc 1992)

§ 447.532.1, RSMo 2000

§ 447.539.1, RSMo 2000

§ 447.543, RSMo 2000

§ 447.575, RSMo 2000

III.

The trial court erred in holding that the interest from the fund may be disbursed and used as provided by § 483.310.2, because the fund is subject to the constraints of § 483.310.1, in that the investment of the fund and expenditures from the fund were dictated by judicial order, not at the discretion of the circuit clerk as required by § 483.310.2.

§ 483.310, RSMo 2000

§ 447.517.2, RSMo 2000

§ 447.533, RSMo 2000

IV.

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.

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

Supreme Court Rule 55.27(b)

V.

The trial court erred in overruling the Treasurer's Motion to Vacate because Judge Brown did not have personal jurisdiction over the Treasurer necessary to enter any order directed toward her in that she was never a party to the original action and has never been served with summons or with a petition seeking relief.

Bruun v. Katz Drug Co., 211 S.W.2d 918 (Mo. 1948)

Kassebaum v. Kassebaum, 42 S.W.3d 685 (Mo. App. 2001)

AmWest Surety Ins. Co. v. Stamatiou, 996 S.W.2d 708 (Mo. App. 1999)

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

VI.

The trial court erred in overruling the Treasurer's Motion to Vacate and in finding that the Treasurer was required to assert any claim she had to the fund in the Ancillary Proceedings because the order violates the Constitution's separation of power amongst the various branches of government in that the Treasurer is accorded discretion as to the commencement of any proceeding to collect improperly withheld unclaimed property.

State ex. rel. Missouri Highway and Transportation Comm'n v. Pruneau, 652 S.W.2d 281 (Mo. App. 1983)

§ 447.575, RSMo 2000

VII.

The trial court erred in overruling the Treasurer's Motion to Vacate because the receiver lacked standing to file her Motion and Petition for Joinder of Additional Parties and Relief in that the receiver was not a party to the underlying action.

Munson v. Director of Revenue, 783 S.W.2d 912 (Mo. banc 1990)

Hastings v. Van Black, 831 S.W.2d 214 (Mo. App. 1992)

Alamo Credit Corp. v. Smallwood, 459 S.W.2d 731 (Mo. App. 1970)

VIII.

The trial court erred in overruling the Treasurer's Motion to Vacate because Judge Brown lacked subject-matter jurisdiction to enter the July 20 order in that a final, unappealed, judgment had long-since been entered in the case.

State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. banc 1997)

State ex rel. Southwestern Bell Telephone v. Brown, 795 S.W.2d 385 (Mo. banc 1990)

State ex rel. Division of Family Servs. v. Oatsvall, 612 S.W.2d 497 (Mo. App. 1981)

IX.

The trial court erred in overruling the Treasurer's Motion to Vacate because 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.

Jetz Serv. Co. v. Chamberlain, 812 S.W.2d 946 (Mo. App. 1991)

State v. Lovelady. 691 S.W.2d 364 (Mo. App. 1985)

State ex rel. O'Brien v. Murphy, 592 S.W.2d 194 (Mo. App. 1979)

X.

The trial court erred in failing to sustain the Treasurer's objection concerning the untimeliness of the notice of hearing on the receiver's motion for judgment on the pleadings because Rule 44.01(d) requires five days notice before the hearing on such a motion in that, as defined by Rule 44.01(a), the Treasurer only had three days notice of the hearing on the receiver's motion for judgment on the pleadings.

Orion Security, Inc. v. Board of Police Commissioners of Kansas City, Missouri, 43 S.W.3d 467 (Mo. App. 1997)

Supreme Court Rule 44.01(a)

Supreme Court Rule 44.01(d)

Argument

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). Hence, the standard of review employed upon the grant of judgment on the pleadings is *de novo*, since "[n]o deference is due the trial court's judgment where resolution of the controversy is a question of law." *Legg v. Certain Underwriters at Lloyd's of London*, 18 S.W.3d 379, 383 (Mo. App. 1999). This standard of review is applicable to motions asserting a lack in personam jurisdiction, *Stavrides v. Zerjav*, 848 S.W.2d 523, 527 (Mo. App. 1993), or a lack of subject matter jurisdiction where the facts are uncontested, *B.C. Nat'l Banks v. Potts*, 30 S.W.3d 220, 221 (Mo. App. 2000), to motions requiring the construction of a state statute, *Harrison v. King*, 7 S.W.3d 558, 561 (Mo. App. 1999), and to other determinations made as a matter of law by the trial court. *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.* 854 S.W.2d 371, 376 (Mo. banc 1993).

Given the procedural posture of this case, Appellant would suggest that all rulings made by the trial court in this proceeding were determinations of law. To the extent that a different standard of review could be used to address any point below, that standard will be discussed within the point.

I.

The trial court erred in holding that it was beyond the constitutional authority of the Treasurer to administer the Uniform Distribution of Unclaimed Property Act because the Missouri Constitution authorizes the Treasurer to administer state funds and the Abandoned Property Fund is a state fund in that it is created by a state statute and provides for transfers of money to the state general revenue fund.

"When the constitutionality of a statute is attacked, constitutionality is presumed, and the burden is upon the attacker to prove the statute unconstitutional." *Consolidated School Dist. v. Jackson County*, 936 S.W.2d 102, 103 (Mo. banc 1996). The statute will be upheld "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Smith v. Coffey,* 37 S.W.3d 797, 800 (Mo. banc 2001). Further, in arriving at the intent and purpose of a constitutional provision, the construction should be broad and liberal rather than technical, and the constitutional provision should receive a broader and more liberal construction than statutes. If a statute may be so construed as to avoid conflict with the constitution, this will be done. *State Highway Comm'n v. Spainhower,* 504 S.W.2d 121, 125 (Mo. 1973). The trial court ignored these principles in the present case.

The trial court held that it is beyond the constitutional authority of the Treasurer to administer the Uniform Distribution of Unclaimed Property Act. The court premised its holding on Article IV, § 15 of the Missouri Constitution which provides that "[T]he state treasurer shall be the custodian of all state funds and funds received from the United States

government."

The term "state funds" is not specifically defined. However, the term "nonstate funds" is defined; it is limited to "taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue." Article IV, §15.[2] But the trial court amended this constitutional definition. The court effectively found non-state funds to include those the Treasurer is directed to deposit to a statutorily created account and from which transfers are made to general revenue so long as those funds are subject to the unasserted claims of others. Under this judicially-enacted constitutional amendment, monies collected by the Department of Revenue and transferred to general revenue could not be held by the Treasurer so long as they

[2] Some examples of money designated "nonstate funds" administered by the department of revenue are the U.S. Olympic Festival Trust Fund, § 143.1010, RSMo (dollars designated by tax payers from tax refunds); the Over-Dimension Permit Fund, § 226.135.3, RSMo (permit fees collected by the chief engineer of the department of transportation on behalf of other jurisdictions); and the Base State Registration Fund, § 622.095.2, RSMo (statutory registration, administration or license fees collected by the division of motor carrier and railroad safety on behalf of other jurisdictions). The Abandoned Fund Account is not a designated a "nonstate fund."

remained subject to a refund claim by the taxpayer. Such is not the law and it was not the providence of the trial court to so amend the constitution. "The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation." *Board of Education v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001) (holding that courts cannot rewrite legislation to save it from an otherwise valid constitutional attack). Surely courts enjoy no power to amend the constitution.

It follows from the limited definition of "nonstate funds" that the term "state funds" as used in Article IV, §15 is meant to be inclusive rather than exclusive. Instead of adopting an inclusive interpretation of state funds, and without citation or explanation, the court held that the funds in question are not state funds or funds received from the United States. It added that the "Attorney General in fact argues that these funds are individual assets of diverse persons." L.F. 274. Therefore, according to the trial court, the Treasurer has no standing or right to assert claims against them.

In so holding, the trial court overlooked the definition of "owner" contained in § 447.503(7). There "owner" is defined to include "any person having a legal or equitable interest in property subject to" the Act. This broad definition of owner permits a reading of the Act and the Treasurer's stewardship of the Abandoned Fund Account that is consistent with Article IV § 15. There is, after all, no suggestion in the Constitution that Missouri must have an exclusive interest in monies for them to constitute state funds. And here, where a large percentage of the funds deposited to the Abandoned Fund Account are subject to transfer to general revenue, it cannot be refuted that the state has an interest in the funds superior to all

but the actual, and unlocated, owner.[3]

The inclusive nature of "state funds" is revealed by the variety of funds received, invested, held in custody, and disbursed by the Treasurer, the sources of which are neither the state nor the United States government. Many of the accounts administered by the State Treasurer collect fees from private persons or companies to be used to administer a regulatory program affecting those persons, such as the "Natural Resources Protection Fund--Air Pollution Asbestos Fee Subaccount," § 643.245, and the "Animal Health Laboratory Fee Fund," § 267.122. Some funds administered by the State Treasurer comprise donated funds to be applied to a very narrow and specific purpose, such as the "Doctor Edmund A. Babler Memorial

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[3] Perhaps the trial court suggests that these monies cannot be state funds because of their origin. Such a suggestion, however, is not supportable. While money paid in state taxes initially belongs to individuals and corporations, by this line of reasoning, state tax revenues are not and can never become state funds and certainly would not become state funds until after the taxpayers beneficial interest in the taxes – protected by a statutory opportunity for refund – had expired.

It is a separate question whether the individual or corporation is required to pay the money to the Treasurer according to state tax laws. Likewise, it is a separate question whether the fund at issue constitutes abandoned property, requiring the Circuit Court of Cole County to pay it to the Treasurer, according to the Uniform Disposition of Unclaimed Property Law. That question is discussed in Point II, *infra*.

State Park Fund," § 253.360, the "Missouri Educational Employees' Memorial Scholarship Fund," § 173.267, and the "Children's Trust Fund," § 210.173. Other funds are created by a surcharge and the monies are earmarked for a very specific program, such as the "Deaf Relay Service and Equipment Distribution Program Fund," § 209.258. There are many more such funds administered by the State Treasurer.

Likewise, the statutorily created "Abandoned Property Fund," § 447.543.2, is a "state fund" as that term is used in Art. IV, § 15. It is indistinguishable from the funds identified above in that it has a private funding source - not the state or federal government. Similarly the Abandoned Property Fund is indistinguishable based upon its purpose - these other highly specialized funds further no greater state interest than the return of unclaimed property to Missouri citizens and, failing in that primary purpose, supplementing Missouri's general revenue. Upon receipt of unclaimed property, the Treasurer places it into this fund. From this fund, the Treasurer is obligated to disburse payments of claims. "At any time when the balance of the account exceeds one-twelfth of the previous year's total disbursement from the abandoned property fund, the treasurer may, and at least every fiscal year shall, transfer to the general revenue of the State of Missouri the balance of the abandoned fund account which exceeds one-twelfth of the previous year's total disbursement from the abandoned property fund." § 447.543.2.

The trial court relied on another sentence in Article IV, § 15; "No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government." Again,

this is an inclusive sentence. The words "related to" encompass many activities including the duty set forth in § 447.575: "the treasurer shall bring an action in a court of appropriate jurisdiction to enforce delivery" of unclaimed property. The act of receiving or collecting abandoned property for deposit to the Abandoned Property Fund, holding it, delivering it to its rightful owners, and transferring any surplus to the general revenue fund, is "related to the receipt, investment, custody and disbursement of state funds," here the state's Abandoned Property Fund.

These actions do not "clearly and undoubtedly contravene the constitution" or "plainly and palpably affront fundamental law embodied in the constitution"as they must in order for this Court to affirm the trial court's ruling. *See Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001). Thus, this Court should reverse the trial court's ruling as to the un-constitutionality of the Uniform Distribution of Unclaimed Property Act.

II.

The trial court erred in holding that the State Treasurer had no standing to assert claims against the fund because the Uniform Distribution of Unclaimed Property Act obligates the Treasurer to bring an action to enforce delivery of unclaimed property as defined by the Act, § 447.575, and the fund in question falls within the statutory definition of unclaimed property, § 447.532.1, in that the money is intangible personal property held for its owner by the court and that has remained unclaimed by the owner for more than five years.

Each year, financial institutions, businesses and public agencies, *including circuit courts***,** file reports of abandoned property and deliver to the Unclaimed Property Division of the Missouri State Treasurer millions of dollars and the contents of nearly 500 safe deposit boxes. The Unclaimed Property Division currently holds more than $155 million in more than one million owner accounts. Statistically, one of every ten Missourians has unclaimed property being held by the state's Unclaimed Property Division. L.F. 156. All of this is done pursuant to the Act which requires:

> Every person holding funds or other property, tangible or intangible, presumed abandoned pursuant to sections 447.500 to 447.595 shall report to the treasurer with respect to the abandoned property as provided in this section.

§ 447.539.1. In addition to requiring self-reporting of abandoned property, the Act makes its delivery to the state treasurer self-executing:

> Every person who has filed a report pursuant to section 447.539 shall pay all

> moneys to the treasurer and deliver to the treasurer all other abandoned property specified in the report at the time of filing the report.

§ 447.543.1. But if a person required to report and deliver funds fails to do so, the Treasurer is to bring an action to recover the property: "If any person refuses to deliver property to the state as required under sections 447.500 to 447.595, the treasurer shall bring an action in a court of appropriate jurisdiction to enforce such delivery." § 447.575.

Judge Brown and the receiver have failed to comply with these laws. They did not file reports, nor did they deliver the unclaimed funds to the Treasurer, even though courts are specifically subject to the Act:

> All intangible personal property held for the owner by any *court*, public corporation, public authority, or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than seven years or five years as provided in section 447.536 is presumed abandoned.

§ 447.532.1 (emphasis added).

The monies contained in the fund in this case meet the definition of unclaimed property as set forth in 447.532.1. The monies constitute intangible personal property "held for the owner by any court." Judge Brown recognized this fact in his order appointing the receiver, when he stated that "these funds are being held and administered so that refunds may be made therefrom to telephone customers," L.F. 50, and that "valid claims submitted and approved by the court shall be paid by the receiver," L.F. 53. Thus, the monies in question are being held for the owners (telephone customers entitled to refunds) by the court. *See* § 447.503(7),

defining owner to include "any person having a legal or equitable interest in property." Further, the monies contained in the fund have "remained unclaimed by the owner for more than seven years or five years." § 447.532.1.[4] Judge Brown issued the refund order in 1994. L.F. 37-45.

In addition to the law applicable to all unclaimed property, the monies contained in this fund are also subject to specific statutes. The monies contained within the fund (which pertain to utility company overcharges) are governed by § 447.517, which provides:

> 1. The following funds held or owing by any utility are presumed abandoned:
>
> (1) * * * * *
>
> (2) Any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than seven years or five years as provided in section 447.536 after the date it became payable in accordance with the final determination or order providing for the refund.

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[4] Section 447.536 provides that, other than in certain situations not applicable here, the abandoned periods referenced in §§ 447.505 to 447.595, shall change from seven to five years beginning January 1, 2000. While the five-year period is applicable here, the issue is not material to this action as the remaining monies in the fund have remained unclaimed for more than seven years.

This case is a court-ordered utility refund case. And the funds have "remained unclaimed" for nearly eight years.

There can be no serious dispute that the Treasurer has standing to assert an interest in the funds subject to this litigation. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992) (standing to sue is an interest in the subject matter of the suit, which if valid, gives that person a right to relief). The statutory scheme set forth above establishes that standing in clear language.

III.

The trial court erred in holding that the interest from the fund may be disbursed and used as provided by § 483.310.2, because the fund is subject to the constraints of § 483.310.1, in that the investment of the fund and expenditures from the fund were dictated by judicial order, not at the discretion of the circuit clerk as required by § 483.310.2.

The abandoned property that must be delivered to the State includes not only the original principal but also interest. Abandoned property subject to the Uniform Distribution of Unclaimed Property Act includes "[a]ll intangible property, *including* but not limited to any *interest*, dividend, or other earnings thereon . . less any lawful charges." § 447.533 (emphasis added). Further, abandoned utility service refunds include "[a]ny sum which a utility has been ordered to refund and which was received for utility services rendered in this state, *together with any interest thereon*, less any lawful deductions." § 447.517.2 (emphasis added).

Despite these directives, the trial court held that interest on the fund in question "may be disbursed and used as provided in Section 483.310.2 with the balance of such interest to be paid to Cole County." L.F. 275. This holding not only frustrates the intent of the Uniform Disposition of Unclaimed Property Act, but ignores state law governing funds held by courts as applied to the facts of this case.

The applicable statute, as recognized by Judge Brown in his orders relating to the fund, is § 483.310. This statute contains two subsections. Under § 483.310.1, whenever funds other than court costs are paid into the registry of the court and the "court determines, upon its own

finding or after application by one of the parties, that such funds can reasonably be expected to remain on deposit for a period of time to provide income through investment, the court may make an order directing" the deposit and investment of the funds. § 483.310.1. "Necessary costs, including reasonable costs for administering the investment, may be paid from the income received from the investment of the trust fund. *The net income so derived shall be added to and become part of the principal*." *Id.* (emphasis added).

As this fund was invested pursuant to court order, L.F. 53, it is § 483.310.1 that controls expenditures from that fund. There is no question the monies that comprise the fund were invested pursuant to § 483.310.1. Judge Brown's initial order appointing a receiver specifically stated that the funds were placed in interest bearing accounts pursuant to § 483.310.1. L.F. 26. And regardless of this reference, it is clear from the status of the case that the deposits were made pursuant to subparagraph 1. In both his initial order appointing receiver and his order creating a successor receivership, Judge Brown specifically referenced the fact that the monies received were anticipated to be held for a lengthy period of time and the fact that interest would be earned on the monies. L.F. 26, 53. The court's finding that such funds can reasonably be expected to remain on deposit for a period of time to provide income through investment, is a finding under subparagraph 1. Further, the funds were not invested at the discretion of the court clerk as required by § 483.310.2; instead, Judge Brown reserved unto himself the final investment decisions. L.F. 53. A judicial direction to invest the fund is the *sine qua non* for subparagraph 1 status of registry funds.

In contrast, § 483.310.2 applies to funds invested at the discretion of the circuit clerk

rather than directed by judicial order:

> In the absence of such an application by one of the parties within sixty days from the payment of such funds into the registry of the court, the clerk of the court *may* invest the funds . . . and *income derived therefrom may be used by the clerk for paying [certain enumerated expenditures of the circuit clerk's office], and the balance, if any, shall be paid into the general revenue fund of the county* . . . .

Section 483.310.2 (emphasis added). Despite the trial court's finding, this section has no applicability in the current dispute because the clerk did not elect to invest the monies in this fund and the clerk did not elect to make expenditures from the fund (nor did the receiver make such elections). The clerk was never given an opportunity to make such an election. Rather, the funds were invested and expended upon order of the court. The trial court's finding that interest on the fund may continue to be expended by the *court* as provided by § 483.310.2 simply ignores the clear language of the statute and is erroneous.

IV.

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.

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed." Rule 55.27(b). The State Treasurer did not file an answer[5] to the Receiver's Motion and Petition, instead she filed a Motion to Vacate. L.F. 81. Similarly, the other added "defendants" did not file answers to the Receiver's Motion and Petition, but instead filed position statements as to their rights to the fund. L.F. 119, 124. The pleadings, therefore, were not closed and a motion for judgment on the pleadings was not ripe for adjudication. *Bramon v. U-Haul, Inc.* 945 S.W.2d 676, 679 (Mo. App. 1997). The trial court erred in ruling on the receiver's Motion for Judgment on the Pleadings and this Court should reverse that ruling.

[5] As discussed below, no answer was due because no summons had been served.

V.

The trial court erred in overruling the Treasurer's Motion to Vacate because Judge Brown did not have personal jurisdiction over the Treasurer necessary to enter any order directed toward her in that she was never a party to the original action and has never been served with summons or with a petition seeking relief.

Judge Brown's July 20, 2001 order was not effective to make the Treasurer a party or to compel her to act in any fashion because the court lacked personal jurisdiction over the Treasurer. Although the order purported to compel the Treasurer to become a "party" and to obligate her to file "a pleading," L.F. 77, Judge Brown had no legal authority to add a party to a closed case, upon the motion of a non-party, without the benefit of service of process and without requiring that a petition containing a prayer for relief be served upon the Treasurer. To date, no such service has occurred.

"[A]bsent a general appearance or other waiver of process, there must be service of process in authorized manner for a court to acquire personal jurisdiction." *Johnson v. Johnson*, 948 S.W.2d 148, 151 (Mo. App. 1997). The Treasurer only specially appeared in this proceeding (L.F. 81, 155, 258) and has not been served with process issued and signed by the clerk pursuant to Rules 54.01 and 54.02, and duly served pursuant to Rules 54.03 to 54.22.

Judge Brown apparently attempted to accomplish by judicial fiat what the law requires be done by formal process. Similar attempts to evade regular rules of procedure have been rejected by this Court:

> The plaintiff's motion alleges that the trustees and the new corporation "*are defendants*" and "in order that they have full notice that said cause is now listed for trial, plaintiff requests that they *be formally made defendants.*" In short, without first substituting or adding new parties and without service of process, the plaintiff proposes, upon his mere motion and by court order, that they are in fact defendants. Obviously, the court could not, in this manner, upon the plaintiff's mere motion and the court's order, summarily make and declare that the named individuals and corporation "are defendants." [T]he court could not by its ipse dixit, and the plaintiff's mere motion, declare and thereby make, without further ado, the named persons and corporation defendants.

Bruun v. Katz Drug Co., 211 S.W.2d 918, 921 (Mo. 1948) (citations omitted, emphasis in original).

"It is axiomatic that a court must have jurisdiction over the person before it can require performance under its order or decree." *Chamberlin v. Chamberlin*, 256 N.E.2d 159, 160 (Ill. App. 1969). "Missouri courts consistently hold that orders affecting non-parties are invalid." *State ex rel. American Family Mutual Ins. Co. v. Scott*, 988 S.W.2d 45, 49 (Mo. App. 1998); *see also Schneider v. Sunset Pools of St. Louis, Inc.*, 700 S.W.2d 137, 138 (Mo. App. 1985) (applying the "well-recognized principle" that a court must have jurisdiction before it adjudicates, the court found it had no authority to grant relief against one who was not a party).

The Missouri Court of Appeals espoused this well-recognized principle of jurisdiction in its most recent declaration on the subject:

> In its judgment, the trial court ordered Downard [a non-party] to prepare a new general warranty deed . . . and a new quit claim deed . . . . *Because Downard was not a party to the action, the trial court was without jurisdiction to order Downard to prepare new deeds*.

Kassebaum v. Kassebaum, 42 S.W.3d 685, 698 (Mo. App. 2001) (emphasis added). Similar to *Kassebaum*, the Treasurer was not a party to this case – and never has been.[6] As such, she was not subject to the order of the court.

Furthermore, the "motion and petition" ordered to be served on the Treasurer did not meet the requirements of Rule 55.05 and Rule 55.11. The "motion and petition" 1) did not contain a short and plain statement of the facts showing that the pleader is entitled to relief, 2) did not contain a demand for judgment (it merely asked for a hearing), and 3) was not comprised of the required numbered paragraphs containing concise statements of fact (it was made up almost exclusively of legal argument). Furthermore, while the motion and petition was styled "in the nature of interpleader," the document did not comport with the requirements

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[6] "A party to an action is a person whose name is designated on record as plaintiff or defendant." *Maurer v. Clark*, 727 S.W.2d 210, 211 (Mo. App. 1987). The Treasurer nowhere appears as a designated plaintiff or defendant in the case of *Southwestern Bell v. Public Service Commission*. L.F. 7-12.

for a pleading creating an interpleader cause of action.

"[T]he purpose of an interpleader action is to adjudicate the distribution of funds held by a *disinterested stakeholder* who is faced with *conflicting and competing claims* regarding disbursement of the fund." *Amwest Surety Ins. Co. v. Stamatiou*, 996 S.W.2d 708, 711 (Mo. App. 1999) (emphasis added). In her "motion and petition," the receiver does not claim to be a disinterested stakeholder. In fact, "the receiver ... states that the Court is not required to pay over the funds ... to the State Treasurer pursuant to the Uniform Disposition of Unclaimed Property Act," (L.F. 70, ¶15) and requests that Judge Brown order them to continue in these proceedings so that the ancillary questions can be "fully and fairly litigated." L.F. 72, ¶19. The theory of an interpleader is "that the conflicting claimants should litigate the matter among themselves without involving the stakeholder in their dispute." *Amwest*, 996 S.W.2d at 711.

Because Judge Brown's July 20 order was on its face contrary to the laws of Missouri, the trial court should have vacated it and this Court should reverse the trial court's holding otherwise.

VI.

The trial court erred in overruling the Treasurer's Motion to Vacate and in finding that the Treasurer was required to assert any claim she had to the fund in the Ancillary Proceedings because the order violates the Constitution's separation of power amongst the various branches of government in that the Treasurer is accorded discretion as to the commencement of any proceeding to collect improperly withheld unclaimed property.

Even if Judge Brown had the authority to bring the Treasurer into an action without the benefit of a petition for relief or proper service under the rules (which authority he did not have), the court still lacked authority to force the Treasurer to file a lawsuit against hand-picked defendants and respond to issues chosen solely by the court.[7]

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[7] The impropriety of allowing Judge Brown to articulate the issues for the parties is demonstrated by the July 20 order. The order expressly grants Cole County and the Circuit Clerk of Cole County broader authority to raise issues than the Treasurer is permitted. Specifically, the Treasurer is ordered to file "a pleading asserting any claims she ... has under the Uniform Disposition of Unclaimed Property Act to the funds in this case," apparently excluding the Treasurer's right to pursue interest inappropriately expended by the Court. In stark contrast, Cole County and the Circuit Clerk are permitted to file pleadings "asserting any claims they may have to the funds in this case *or* the interest income from said funds." L.F. 77-78 (emphasis added) (compare paragraphs 4 and 5 of the order).

This judicial attempt to deny the Treasurer the right to seek full relief constitutes yet another fatal deficiency to the present action. Judge Brown prevented full relief by setting artificial restrictions on what the Treasurer may – and may not – address in the ancillary proceedings. In his July 20 order, Judge Brown attempted to limit the issues solely to those suggested by a deputy circuit clerk acting as a receiver, stating: "the only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceedings Questions as defined in the Receivers' Motion and Petition." L.F. 77. Missouri Supreme Court Rule 55.06, however, expressly authorizes and requires a party to join "as many claims, legal or equitable, as the party has against an opposing party." The July 20 orders are, therefore, contrary to the law and should have been vacated.

Furthermore, pursuant to § 447.575, the Treasurer has a statutory right to bring a cause of action against those wrongfully holding unclaimed property. The timing of her initial determination to bring such an action and the scope of any such proceeding is committed to the sound discretion of the Treasurer and is not the proper subject of a court order directing or limiting the filing. The finding that the Treasurer must assert any claim she has to this disputed fund in this ancillary proceeding violates the separation of powers in that it placed the judicial branch in the position of exercising discretion granted to a member of the executive branch. *See State ex rel. Missouri Highway and Transportation Comm'n v. Pruneau*, 652 S.W.2d 281, 289 (Mo. App. 1983) ("the courts may not interfere with, or attempt to control, the exercise of discretion by the executive department where . . . the law vests such right to exercise judgment in a discretionary manner with executive branch of government . . . . These

limitations on the judicial branch become particularly sensitive where . . . the law places discretion at the highest levels of the executive department.").

Because a review of the law in Missouri reveals no authority for the Judge Brown's extraordinary and irregular action in ordering the Treasurer, as a non-party, to file court-designated claims against court-designated defendants in a particular proceeding and not at a time of her choosing, the Treasurer is entitled to vacation of the July 20 order.

VII.

The trial court erred in overruling the Treasurer's Motion to Vacate because the receiver lacked standing to file her Motion and Petition for Joinder of Additional Parties and Relief in that the receiver was not a party to the underlying action.

The receiver is not and never was a party to the action of *Southwestern Bell v. Public Service Commission*. Lacking the status of a party, the receiver also lacked standing to file or prosecute her Motion and Petition:

> Persons who are not parties of record to a suit have no standing herein which will enable them to take part in or control the proceedings. If they have occasion to ask relief in relation to the matters involved, they must either contrive to obtain the status of parties in the suit or they must institute an independent suit. One who is not a party to the record is not a party to the cause, although he or she may be interested, and in deciding who are parties to the record, the courts will not look beyond the record.

Munson v. Director of Revenue, 783 S.W.2d 912, 915 (Mo. banc 1990).

The receiver could only file motions in this case if she had first been made a party. She could have become a party if she had filed a motion to intervene pursuant to Rule 52.12, but she filed no such motion, and the court ruled on no such motion. Further, if the receiver wished to intervene and participate in the case, she was obligated by Rule 52.12(c) to serve copies of any such motion on the pre-existing parties. No such service has occurred.

Even if the receiver had attempted to file such a motion, she would not have had the

authority to do so under Missouri law. This is so because intervention is allowed only in an action "pending between others" and a suit "cannot . . . be said to be pending when the issues have been judicially determined, or, in short, a judgment has been rendered therein." *Alamo Credit Corp. v. Smallwood*, 459 S.W.2d 731, 732 (Mo. App. 1970); *see also Hastings v. Van Black***,** 831 S.W.2d 214, 216 (Mo. App. 1992). As discussed in Point VIII, *infra*, final judgment was rendered in this case years ago.

Because Judge Brown had no authority to grant the motion filed by his receiver who was not a party to the action, because the receiver failed to follow proper procedures in attempting to intervene in the case, and because one cannot intervene in a closed case, this Court should vacate the July 20 order and order that the receiver's motion be denied.

VIII.

The trial court erred in overruling the Treasurer's Motion to Vacate because Judge Brown lacked subject-matter jurisdiction to enter the July 20 order in that a final, unappealed, judgment had long-since been entered in the case.

This case, *Southwestern Bell v. Public Service Commission,* CV194-24CC, is closed.[8]

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[8] The lawsuit in which the court created the receivership was filed in 1994. L.F. 1. The issues raised by the parties in that case concerned proper utility rate charges. All the issues raised by the parties in that original lawsuit have long since been litigated and settled to full and final resolution. On October 7, 1994, Judge Brown dismissed the relator's petition for writ of review with prejudice and entered an order approving distribution of the stay funds. L.F. 37-45. The docket sheet reflects as its disposition that this case was dismissed by the parties. L.F. 7. Additionally, the official records of the Office of State Courts Administrator, submitted to the trial court at the October 18 hearing, reflect that this case was disposed of. App., p. 6.

Under the law applicable at the time this case was finally resolved, a decision resolving all issues was a final judgment irrespective of its title. *See, e.g., Cozart v. Mazda Distributors, Inc.*, 861 S.W.2d 347, 351 (Mo. App. 1993); *cf.* current Rule 74.01(a) (now requiring a writing denominated judgment). The decision of the court resolving the issues between the relator and respondent in this case was a final judgment. The "orders" subsequently entered by Judge Brown were simply documentation of the administrative actions

The receiver, in her motion, implicitly acknowledged that fact by making no attempt to serve the motion on the parties to that case. Final judgment in the case had long-since been entered on October 7, 1994, and the court had long-since lost any jurisdiction. Although the court retained jurisdiction of its judgment for an additional 30 days past the date of entry of judgment pursuant to Rule 75.01, at the conclusion of the thirty days, the court was without jurisdiction to take any further action in this case.[9] *See State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928, 931 (Mo. banc 1997).

In fact, in an earlier filed writ in the related case of *Southwestern Bell Telephone v. Public Service Comm'n*, CV189-808CC, Circuit Court of Cole County (a case now before this Court, Case No. SC84212), this Court clearly stated the rule and its converse. There, Judge Brown initially entered an order dismissing this case with prejudice. Twenty-nine days later he entered a new order resolving remaining issues in the case and specifically requiring Southwestern Bell to pay into the court registry interest earned on the now illegal charges it had collected pursuant to the Court's stay order. Southwestern Bell sought prohibition

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taken with regard to the fund.

[9] To the extent that the receiver or Judge Brown may argue that the motion requesting an ancillary proceeding falls within Rule 74.06 "Relief from Judgment or Order," such arguments are unavailing because that rule may be activated only by a party. *See State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928 (Mo. banc 1997). Since the receiver was not a party to the action, Rule 74.06 was not available to her to provide the relief requested.

challenging Judge Brown's authority to issue the second order. This Court first restated the rule; the trial court retains "control over judgments during the thirty-day period after entry of judgment." *State ex rel. Southwestern Bell Telephone v. Brown,* 795 S.W.2d 385, 389 (Mo. banc 1990). However, because Judge Brown issued a new order "29 days after entry of the order dismissing the writ with prejudice and within the time which the trial court retains control over its judgments," the new order was effective and prohibition would not lie. *Id.*

The action of Judge Brown in the present case is similar to the actions of the respondent judge in *State ex rel. Division of Family Servs. v. Oatsvall,* 612 S.W.2d 447, 451-52 (Mo. App. 1981). In that case, the respondent judge had similarly issued untimely modification orders in closed cases and without benefit of any motion filed by any party. The Missouri Court of Appeals noted that in none of the closed cases did any of "the purported modified entries of judgment relate to any motion of parties for such relief, nor do they occur within the time, the 30 day period, permitted under Rule 75.01, V.A.M.S., for the court to act on its own initiative." The court further noted that "[t]he records of the proceedings below thus clearly reflect that the trial court's action in these proceedings was entirely unilateral, insofar as any modification of underlying judgments, or final orders related to child support, is concerned." *Id.* at 451. The Court of Appeals unambiguously rejected such unilateral action:

> Jurisdiction to decide concrete issues in a particular case is limited to those presented by parties and their pleadings and anything beyond is coram non judice and void. Moreover, lacking jurisdiction in the case, the trial court had no jurisdiction to entertain any further motions or pleadings which might otherwise

> have affected the proceedings. The records of these proceedings reflect the existence of valid judgments, entered prior to any purported modification thereof by the trial court and, with respect to which, under Rule 75.01, it had lost jurisdiction to amend or modify either on its own motion or the motion of any party, the court's purported amendments and modifications, nunc pro tunc or otherwise, were therefore void and subject to collateral attack. The modified entries of the trial court related to child support were invalid attempts to extend its statutory jurisdiction by judicial fiat. Therefore, all of the entries made by the trial court, in each proceeding below, purporting to modify the provisions for child support, inclusive of any purported further modification thereof, are void and without affect.

Id. at 452 (citations and footnote omitted); *see also Neustaedter v. Neustaedter*, 305 S.W.2d 40, 43 (Mo. App.1957) (only original parties to those decrees may initiate modification proceedings); *accord State ex rel. Dubinsky v. Weinstein*, 413 S.W.2d 178, 181 (Mo. banc 1967).

As in *Oatsvall*, Judge Brown attempted to enter an order in a case that had long-since been closed and, similarly, did so in the absence of any party requesting such order. Following the logic of *Oatsvall*, this unlawful order was "void and without affect." The finality of the precursor case may not be set aside by an order creating an Ancillary Adversary Proceeding. The trial court's holding otherwise must be reversed.

IX.

The trial court erred in overruling the Treasurer's Motion to Vacate because 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.

Standard of Review

In Missouri the right to a change of judge is "highly prized" and "liberally construed." *Atterberry v. Hannibal Regional Hosp.*, 926 S.W.2d 58, 60 (Mo. App. 1996). Because the receiver's Motion and Petition was filed, heard *ex parte* and granted all on the same day, the Treasurer did not have an opportunity to request a change of judge. Rule 51.01. Because the circumstances suggest that Judge Brown could be perceived as partial with regard to this Motion and Petition, the Treasurer requested that his order granting the same be vacated. Judge Stuckey denied the request.

The Treasurer suggests that both Judge Brown and Judge Stuckey's rulings involve only questions of law (whether there was evidence of or an appearance of impropriety or partiality) and, hence, subject to *de novo* review. Nevertheless, the denial of a motion for change of judge, in far different circumstances, has been reviewed on an abuse of discretion standard. *See Williams v. Reed*, 6 S.W.3d 916, 920 (Mo. App. 1999) (reversing a judgment entered by Judge Brown following his failure to recuse himself). An abuse of discretion occurs if the trial court's ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful

consideration." *Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 276 (Mo. App. 1995).

* * *

"Missouri courts are very protective of the notion that parties are entitled to an impartial arbiter." *Jetz Serv. Co. v. Chamberlain*, 812 S.W.2d 946, 948 (Mo. App. 1991); *see also State v. Lovelady*, 691 S.W.2d 364, 365 (Mo. App. 1985). Where bias and prejudice are actually present, it is error for a trial judge not to recuse himself, even if the request is not timely made. *See State ex rel. O'Brien v. Murphy*, 592 S.W.2d 194, 195 (Mo. App. 1979). "If the judge is interested or related to any party . . . or is recused for any reason, the judge *promptly* shall transfer the case to the presiding judge of the circuit for reassignment in accordance with the procedures of Rule 51.05(e)." Rule 51.07 (emphasis added); § 508.090. A judge also becomes disqualified when "the opposite party has an undue influence over the mind of the judge." § 508.090; *see also* § 476.180, ("No judge of any court of record, who is interested in any suit or related to either party, or who shall have been of counsel in any suit or proceeding pending before him, shall, without the express consent of the parties thereto, sit on the trial or determination thereof").

And "the law is concerned not only with the judge's actual impartiality but also the public's perception of the judge's impartiality." *Jetz*, 812 S.W.2d at 948. "Where a judge's freedom from bias or his prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he was so." *Id.*

Because of partiality or the appearance of partiality, Judge Brown should have recused

himself *prior* to ruling the motion filed by his appointed receiver – an employee of the circuit clerk's office in whom he had the utmost confidence. His recusal after granting the receiver's motion was not "prompt." Judge Brown had an "interest" in the outcome of the case and the receiver, to the extent she was at all independent of the judge, had undue influence over his mind. Judge Brown is involved in multi-faceted litigation seeking to retain control of a large fund of money and the interest it generates, and to avoid a finding that he wrongfully held and expended the same. At the time Judge Brown ruled this motion, he was the respondent in a quo warranto action[10], L.F. 78, and had asserted that the same was an attempt to interfere with his judicial immunity. Thus, Judge Brown had a considerable interest in having substantive findings made in a dispute the nature of which he controlled through granting his receiver's motion.

The interest generated by the fund at issue, together with the interest on the funds at issue in SC84210, SC84211 and SC84212, have reportedly allowed Judges Brown and Kinder luxuries that other judges across the state have not enjoyed, including the remodeling of their courtrooms and judicial chambers, new furnishings for the same, and extra compensation for their current and former employees. Thus, Judge Brown has benefitted from his continued control of these funds. Further, Judge Brown cannot reasonably assert that the receiver, a circuit court employee, did not exercise "undue" influence over him when she requested court

[10] An appeal concerning this quo warranto action is currently before this Court on an application for transfer. *See* SC84301.

action that left Judge Brown in control of the very funds in dispute. As Judge Brown himself stated when appointing the receiver in this case: "The Court also intends that the responsibilities be exercised only *by someone in who[m] this court has complete confidence*...." L.F. 51.

At the very least, Judge Brown in the present instance has a dramatic "appearance" of impropriety.[11] He not only ruled on a motion received from his receiver and a deputy circuit clerk, but he did so in a case in which he had a substantial interest in the outcome. He not only carefully crafted the scope of the "ancillary proceeding" as narrowly as possible to avoid any resolution of claims for interest by the Treasurer,[12] but he expressly retained full and final control over the fund so that even if some relief were obtained in the ancillary proceedings, any such relief ordered would not be final, but subject to his further action. The Treasurer is aware of no legal basis for a judge to disqualify himself in this limited manner where the judge has such an obvious interest in the final outcome.

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[11] There can be no serious dispute that Judge Brown recognized that his impartiality might be questioned; he recused himself from deciding the ancillary proceeding he created by the very order the Treasurer sought to vacate. L.F. 78, ¶ 8.

[12] Judge Brown issued a very restrictive order about what could – and what could not – be addressed in the ancillary proceeding. He ordered: "The only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceedings Questions as defined in the Receiver's Motion and Petition." L.F. 77, ¶ 3. *See also* footnote 7, *supra.*

To the extent that the motion filed by the receiver had any validity whatsoever, Judge Brown was obligated to recuse himself and request the appointment of another judge to rule on the receiver's motion. Because Judge Brown had a duty to recuse himself, but failed to do so, the order that he entered should have been vacated. The trial court's holding otherwise should be reversed.

X.

The trial court erred in failing to sustain the Treasurer's objection concerning the untimeliness of the notice of hearing on the receiver's motion for judgment on the pleadings because Rule 44.01(d) requires five days notice before the hearing on such a motion in that, as defined by Rule 44.01(a), the Treasurer only had three days notice of the hearing on the receiver's motion for judgment on the pleadings.

The timeliness of a notice for hearing appears, at first blush, to be of minor significance. But here the Treasurer faced a hearing on a dispositive motion asserting the unconstitutionality of one of her statutorily- assigned duties. The matters properly before the trial court, while significant in terms of this matter, were not of such a magnitude. In such circumstances it seems particularly appropriate to enforce the rules concerning the receipt of adequate notice. The failure to impose that requirement on the receiver, in response to a proper objection, L.F. 261, suggests an inexplicable rush to judgment. The failure to sustain the objection prejudiced the Treasurer's ability to respond to both the late-filed dispositive motion and to prepare for argument on those matters properly noticed for hearing.

The receiver did not provide the Treasurer with timely notice of her motion for judgment on the pleadings in that the motion was served and noticed for hearing on October 12, 2001 – less than five full days before the scheduled hearing date of October 18, 2001,[13] as that

[13] The date was likely chosen because other motions in this case were already noticed for hearing on that date. And, if these were "housekeeping" motions, it would likely have been

time period is calculated under the Rule 44.01(a). "A written motion. . . and notice of the hearing thereof shall be served *not later than* five days *before* the time specified for the hearing. . . ." 44.01(d) (emphasis added). As October 18, the day of the hearing itself, does not count as a day "before the time specified for hearing," Rule 44.01(d); as October 12, the day the motion and notice were served does not count in the computation, Rule 44.01(a); and, as Saturdays and Sundays are excluded from the computation, *id.*, only three days, October 15, 16, and 17, count toward the required days of notice before the scheduled hearing date.

"Notice is an integral part of our system of justice, even without legislation or specific court rule." *Orion Security, Inc. v. Board of Police Commissioners of Kansas City, Missouri*, 43 S.W.3d 467, 470 (Mo. App. 1997) (reversing Judge Kinder's order in another case, entered without adequate notice to the parties). Part of the reason notice is important is that a party entitled to be heard is entitled to be heard in a meaningful manner. *Id.* A party facing a dispositive motion deserves time to research, reflect, and respond. Here that opportunity was denied in violation of the applicable rule. Hence, this Court should vacate the Judgment entered by the trial court.

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both agreeable and convenient to clear them up all at once at the previously scheduled hearing. But the receiver's motion was not of that variety.

Conclusion

For the reasons set forth above, 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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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 13,625 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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APPENDIX