IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI, ex inf. JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,	)	
Appellant,	)	
v.	)	**Case No. SC84301**
COLE COUNTY CIRCUIT JUDGES BYRON L. KINDER and THOMAS J. BROWN, III,	)	
Respondents.	)	

Appeal from the Circuit Court of Osage County, Missouri
The Honorable Gael D. Wood, Judge

Appellant's Amended Brief

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JURISDICTIONAL STATEMENT

The Attorney General appeals from a judgment on the pleadings entered by the Osage County Circuit Court in an action in quo warranto filed under § 531.010, RSMo (2000)[1], and Mo.R.Civ.P. 98, seeking to oust two Cole County judges from exercising authority over four receivership funds containing approximately $2.75 million.

The judgment on the pleadings giving rise to this appeal was entered by the Circuit Court of Osage County on September 10, 2001. As appellant does not seek the removal of respondents from office, but only seeks to oust respondents from the performance of certain activities, this case does not involve the title to respondents' offices. *See State ex inf. Joyce-Hayes v. Twenty-Second Judicial Circuit,* 864 S.W.2d 396 (Mo. App. E.D. 1993) (where the appeal of a decision denying a petition for quo warranto seeking to oust circuit court judges from certain activities was taken to the Missouri Court of Appeals, Eastern District). Hence, the issues in this case do not fall within the exclusive appellate jurisdiction of the Supreme Court of Missouri as set forth in Article V, Section 3 of the Constitution of the State of Missouri. However, on May 28, 2002, this Court granted appellant's application for transfer prior to opinion. Thus, jurisdiction is proper in this Court. Mo. Const., Art. V. § 10; Mo.R.Civ.P. 83.01.

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

INTRODUCTION

A. History of Related Cases

This is an unusual case in at least two respects: (a) it is only one of a series of proceedings – including six now before this Court – that address the same set of funds long held by the same circuit judges; and (b) it addresses an unusual, though not novel, use of the writ of quo warranto. The dispute between the State of Missouri and two circuit court judges and their receivers has now generated eight different proceedings. A short review of each may prove helpful to the Court.

1. Prohibition and Mandamus.

On April 30, 2001, the Attorney General filed a petition for Writs of Prohibition and Mandamus in the Missouri Court of Appeals, Western District, Case No. WD59910. The petition alleged that Judges Kinder and Brown continued to hold unclaimed property that was required to be delivered to the State Treasurer and that the respondent judges had made prohibited expenditures from interest generated by the funds they continued to hold. The Western District determined that the petition was in the proper form and ordered respondents to file suggestions in opposition. On May 30, 2001, the petition was denied.

2. Quo Warranto.

On June 28, 2001, the Attorney General filed the instant action, a petition in quo warranto, again alleging that respondents Kinder and Brown continued to hold unclaimed property that was required by law to be delivered to the Treasurer and that respondent judges had made unlawful expenditures of interest generated by the funds they continued to hold. The trial court entered a preliminary order in quo warranto preventing further interest expenditures. Relator propounded discovery and respondent judges requested a change of judge and filed a motion for judgment on the pleadings. On September 10, 2001, respondents'

motion for judgment on the pleadings was granted. The trial court found that relator might be entitled to relief by way of a writ of prohibition or mandamus but not a writ of quo warranto.

3. Ancillary Adversary Proceedings Questions Cases.

On July 20, 2001, Julie Smith, Elaine Healey, Jackie Blackwell and Sharon Morgan, as receivers of funds held in the registry of the Circuit Court of Cole County, filed four separate motions to create the four Ancillary Adversary Proceedings Questions cases. On that same day, June 20, 2001, respondents Kinder or Brown granted each motion ex parte. After granting the motions to create the Ancillary Adversary Proceedings and limiting their scope as requested by the receivers, respondents recused themselves from the proceedings to avoid any suggestion of impropriety in light of the pending quo warranto proceeding. This Court appointed a special judge to resolve these four Ancillary Adversary Proceedings cases. On October 12, 2001, the receivers filed motions for judgment on the pleadings in their respective cases and the motions were argued on October 18, 2001. On November 27, 2001, the trial court granted each receiver a judgment on the pleadings. The Ancillary Adversary Proceedings Cases are now before this Court in Case Nos. SC84210, SC84211, SC84212 and SC84213.

4. Treasurer's suit to enforce receipt of unclaimed property.

Meanwhile, on July 25, 2001, the State Treasurer filed an action against Judges Kinder and Brown and their receivers seeking to enforce her statutory right to receive unclaimed property as authorized by § 447.575. All defendants filed motions to dismiss and separate motions for judgment on the pleadings. The motions for judgment on the pleadings were noticed for and heard on October 18, 2001. On December 17, 2001, the trial court granted Judges Kinder and Brown judgment on the pleadings or in the alternative dismissal with prejudice. On February 11, 2002, the receivers were granted judgment on the

pleadings or in the alternative dismissal with prejudice. This matter is now before this Court in Case No. SC84328.

5. Judges' suit challenging assessments.

On October 1, 2001, Judges Kinder and Brown and receivers Smith, Healey, Blackwell and Morgan file suit against the State Treasurer, the Assistant State Treasurer and the Director of Unclaimed Property contesting assessments for unclaimed property made by the State Treasurer's Office on July 25, 2001. On October 11, 2001, the judges moved to stay the assessments and on October 12, 2001, the receivers moved for judgment on the pleadings. These motions were noticed for and heard on October 18, 2001. On November 16, 2001, the defendants filed a motion to dismiss the proceedings. On November 21, 2001, the court granted the receivers' motion to withdraw the motion for judgment on the pleadings. This case challenging the Treasurer's assessments remains pending in the Circuit Court of Cole County.

B. Legal Theory of Quo Warranto Proceedings

While this case has generated considerable controversy, it is not particularly complex. Simply put, respondents continue to hold monies that the law requires them to deliver to the State Treasurer. Section 447.532 provides that monies held by a court or any public officer for their owner are presumed abandoned after five years.[2] Because respondents have held these funds in excess of five years, the funds are

[2] Section 447.532.1. "All intangible personal property held for the owner by any court . . . or public officer of this state, that has remained unclaimed by the owner for more than . . . five years . . . is presumed abandoned." Appendix (App.) A19. Section 447.532 is amended by SB 1248, reducing the

presumed abandoned and respondents were and are required to relinquish control of and deliver the funds to the State Treasurer. §§ 447.539 and 447.543.[3] Following the expiration of five years, respondents intruded upon the office of the state official lawfully vested with control over the funds – the State Treasurer – with each check that they directed to their county, their court, or their staff, and by merely continuing to hold onto the funds. Even prior to the expiration of the five-year holding period, respondents acted contrary to law by making expenditures from interest generated by the funds that were beyond what § 483.310.1 permitted.[4] Rather, respondents purported to expend funds pursuant to § 483.310.2[5] and, if they did so,

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period of time before the funds are considered abandoned to three years. The bill contains an emergency clause but as of this brief's preparation has not been approved by the Governor. SB 1258 is contained in the appendix at A28.

[3] Section 447.539.1. "Every person holding funds . . . presumed abandoned . . . shall report to the treasurer with respect to the abandoned property." App. A20.

Section 447.543.1. "Every person who has filed a report pursuant to section 447.539 shall pay all moneys to the treasurer . . . at the time of filing the report." App. A23.

[4] Section 483.310.1. "Whenever any funds other than court costs . . . are paid into the registry of any circuit court and the court determines, upon its own finding . . ., that such funds can be reasonably expected to remain on deposit for a period sufficient to provide income through investment, the court may make an order directing the clerk to deposit such funds . . .. Necessary costs, including reasonable costs for administering the investment, may be paid from the income received from the investment of the trust

intruded upon the office of the circuit clerk. Inappropriate expenditures from earned interest total approximately $3,000,000.

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fund. The net income so derived shall be added to and become a part of the principal." App. A25.

[5] LF 276.

The Court adopted Rule 98 and the General Assembly enacted § 531.010, RSMo, to provide a mechanism to address this very type of abuse of power. These provisions authorize the filing of quo warranto actions by the Attorney General against those who usurp, intrude upon, or unlawfully hold or execute their office or the office of another.[6] Quo warranto is the proper vehicle to oust a circuit judge, not from holding his office, but from performing certain activities undertaken without any jurisdiction. *See State ex rel. Allen v. Dawson*, 284 Mo. 427, 224 S.W. 824, 826 (1920) (en banc).

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[6] Section 531.010. "In case any person shall unsurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state . . . shall exhibit to the circuit court . . . an information in the nature of a quo warranto. . .. If such information be filed or exhibited against any person who has unsurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney general of the state . . . to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the judge so offending shall reside." App. A27.

STATEMENT OF FACTS

The facts set forth below are as alleged in relator's petition unless otherwise indicated. For many years, and in one instance for two decades, Cole County Circuit Judges Byron L. Kinder and Thomas J. Brown, III have held, kept and directed expenditures from four funds that are in the registry of the Cole County Circuit Court.[7] In January 2000, the State Auditor issued a report that questioned respondents' continued retention and control of these funds.[8] On February 8, 2001, representatives of the Attorney General met with respondents and suggested relinquishing the funds to the State of Missouri.[9] Respondent Kinder refused, vowing that before he would relinquish control of the funds to the State he would transfer the entire fund to Cole County.[10] In fact, respondent Kinder said before he would ever deliver the funds to the State he would "call a press conference" and hand a "large cardboard check" to the Cole County Commission.[11] At this meeting respondents requested that the Attorney General's Office prepare a

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[7] LF 13-14.

[8] LF 14, 246-49.

[9] LF 14, 251.

[10] *Id*.

[11] Appellant's verified Suggestions in Opposition to Respondent's Motion to Dissolve Emergency order, p. 2, filed in the Missouri Court of Appeals Eastern District on January 7, 2002 (hereafter Verified Suggestions in Opposition).

memorandum explaining the conclusion that respondents' retention of the funds was improper.[12] This memorandum was prepared and delivered to respondents' on March 8, 2001.[13] On March 12, 2001, counsel received a telephone call from respondent Brown indicating that the memorandum presented for the first time to his understanding a suggestion that the expenditures of interest generated by the four funds were inappropriate and requested that the Attorney General file no action concerning the four funds until respondents had additional time to consider the matter.[14] But on March 14, 2001, without notice to the Attorney General, respondents signed orders to transfer $74,000 in additional interest earned on the four funds to the Cole County Commission.[15]

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[12] LF 15, 253-255.

[13] LF 15.

[14] Verified Suggestions in Opposition, p. 3.

[15] LF 15, 115, 157, 176 and 177.

On June 28, 2001, the State of Missouri through its Attorney General filed an action in quo warranto in the Circuit Court of Osage County seeking an order "ousting the Respondents from spending the principal or interest of certain unclaimed receivership funds . . . or from taking any other action concerning these funds not authorized under the law."[16] Specifically, relator challenged respondents' authority to continue to hold or expend interest generated by these four funds – three of which were

[16] LF 2 and 14-15, ¶¶ 1, 58-62; App. A2 and A14-A15, ¶¶ 1, 58-62.

established to repay overcharged utility customers[17] and one of which was established to pay claims generated by the liquidation of a life insurance company.[18]

[17] The utility cases in which the receiverships were created had been assigned docket numbers: 28594 and 28604 ("Fund 1"); CV189-0808CC and CV189-0809CC ("Fund 2"); CV194-24CC, CV194-136CC, CV194-157CC, and CV194-163CC ("Fund 3").

[18] The insurance fund was created from the proceeds of the liquidation of the Old Security Life Insurance Company and was assigned docket number CV186-1282CC ("Fund 4").

Fund 1 was established in 1981 by respondent Kinder, in two consolidated cases.[19] These cases involved challenges to the Public Service Commission's (PSC) approval of a fuel cost surcharge on utility customers.[20] This Court ultimately invalidated the surcharge, remanding the cases to the Cole County Circuit Court to determine "the amounts due as a result of the surcharge and to whom, and the proper method of restitution."[21] On August 5, 1981, respondent Kinder appointed a receiver to administer the fund and required the receiver to invest the funds.[22] As this fund was invested pursuant to court order, § 483.310.1 limits spending of the income to necessary costs including the costs of administration with the remainder of the income to become part of the principal – but respondent Kinder failed to so limit his spending.[23] Rather, since 1982, respondent Kinder has ordered in excess of $2.3 million in interest transferred out of the fund into the accounts of the Cole County Circuit Court and the Cole County

[19] LF 98.

[20] LF 62-94.

[21] LF 92.

[22] LF 98.

[23] LF 5, ¶ 16; App. A5, ¶ 16.

Commission.[24] Since 1982 "only nominal sums" have been paid to utility claimants.[25] Relator also alleged that Respondent Kinder had held the fund beyond the relevant statutory time limitation and, hence, was required to deliver the fund to the State Treasurer.[26]

[24] LF 5, 26-37 and 111-15.

[25] LF 5-6, ¶¶ 16, 17; App. A5-A6, ¶¶ 16, 17.

[26] LF 6, ¶ 19; App. A6, ¶ 19.

Fund 2 was established in 1993, by respondent Brown, from two consolidated cases[27] that challenged a PSC order reducing Southwestern Bell telephone rates.[28] Respondent Brown stayed the PSC order, allowing Southwestern Bell to continue to collect the challenged amount, provided it paid those funds, plus interest, into the registry of the Court pending resolution of the case.[29] In his first order appointing a receiver, respondent Brown acknowledged that the fund was created pursuant to § 483.310.1, and required the receiver to invest the funds.[30] In a later order, respondent Brown acknowledged that the "funds are being held and administered so that refunds may be made therefrom to utility customers" and determined "that the investment decisions with respect to those funds should be retained by the Court itself."[31] From 1993 to the date the quo warranto action was filed, however, respondent Brown has caused in excess of $372,201 to be transferred to either the Cole County Circuit Court or the Cole County Commission.[32] This amount was not limited, as required by § 483.310.1, to the necessary cost of

[27] LF 116.

[28] LF 133-34.

[29] LF 130-31.

[30] LF 122.

[31] LF 141-42.

[32] LF 7, 147-57.

administering the fund.[33] Moreover, during this same time period, respondent Brown transferred only nominal sums to claimants.[34] Relator also alleged that Respondent Brown had held the fund beyond the relevant statutory time limitation and, hence, was required to deliver the fund to the State Treasurer.[35]

[33] LF 7, ¶ 26; App. A7, ¶ 26.

[34] LF 7-8, ¶ 27; App. A7-A8, ¶ 27.

[35] LF 8, ¶ 29; App. A8, ¶ 29.

The consolidated cases establishing Fund 3 also involved a challenge to a PSC order that reduced Southwestern Bell's rates.[36] Respondent Brown granted Southwestern Bell a temporary restraining order, and a stay of the PSC order.[37] As with fund 2, these orders allowed Southwestern Bell to continue to collect the challenged amount, provided that Bell paid the monies collected into the registry of the Court pending resolution of the case.[38] In his February 17, 1994 order appointing a receiver, respondent Brown acknowledged that the funds were created pursuant to § 483.310.1, and required the receiver to invest the funds.[39] In a later order, respondent Brown acknowledged that "these funds are being held and administered so that refunds may be made therefrom to telephone customers," and determined "that the investment decisions with respect to those funds should be retained by the court itself."[40] From September 6, 1996, to the date of the filing of the action, respondent Brown has caused in excess of $61,623 to be transferred to either the Cole County Circuit Court or the Cole County Commission, in violation of § 483.310.1, in that the transfers exceeded the necessary costs of administration.[41] Moreover, during this

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[36] LF 158-159, 167.

[37] LF 164.

[38] *Id*.

[39] *Id*.

[40] LF 169-70.

[41] LF 162, 175-177; LF 9 at ¶ 36; App. A9, ¶ 36.

same time period, respondent Brown transferred only nominal sums to claimants.[42] Relator also alleged that Respondent Brown had held the fund beyond the relevant statutory time limitation and, hence, was required to deliver the fund to the State Treasurer.[43]

[42] LF 10, ¶ 37; App. A10, ¶ 37.

[43] LF 10, ¶ 39; App. A10, ¶ 39.

On December 31, 1986, respondent Kinder issued an order appointing a receiver to administer Fund 4, consisting of monies derived from the liquidation of the Old Security Life Insurance Company.[44] In another order issued that same day, the court found that checks totaling $146,023.28 were issued to claimants but were either returned or uncashed, and that another $208,877.70 in checks were never issued for the reason that the intended recipients could not be located.[45] Furthermore, respondent Kinder directed that the receiver "shall hold said sums for the benefit of unlocated class members indefinitely."[46] In the order appointing the receiver, the receiver was directed to hold the funds "so that they may be available to yet unlocated class members," but respondent Kinder retained the power to make "investment

[44] LF 10, ¶ 41; App. A10, ¶ 41.

[45] LF 184.

[46] LF 190.

decisions with respect to the funds."[47] In May 1988, respondent Kinder entered an order terminating the annual publication of names of persons who could not be located because "such expenditure of the class funds would not be appropriate or financially feasible due to the lack of response."[48] Thereafter, many docket entries reflect payment from this fund, without describing amounts, to the Cole County Circuit Court and the Cole County Commission.[49]

[47] LF 191-92.

[48] LF 224.

[49] LF179-82.

The State Auditor, in a detailed report for the three-year period from 1996 through 1998, found that the total payments to all claimants from all four funds was only $4,819.[50] During that same time period, respondents transferred in excess of $687,000 to Cole County.[51] The combined amounts spent during this time period by respondents on administrative costs alone – $48,438 in receiver funds; $20,658 on banking fees; and $7,129 in bonding fees – totaled more than fifteen times what was paid to all claimants.[52]

[50] LF 247.

[51] *Id.*

[52] *Id.*

Relator filed the Petition in Quo Warranto against respondents on June 28, 2001, based on the foregoing facts and relying on Missouri's unclaimed property law, § 447.500, *et seq*. Missouri's unclaimed property law directs that monies held by a court or any public officer of this state[53] for another person who has a legal or equitable interest in the property[54] for a period of five years are presumed abandoned and must be turned over to the Treasurer.[55] After the statutory abandonment period had expired, respondents "lost all authority to retain, collect, or transfer" any of the funds, even those related to the administration costs.[56] And, because respondents refused to voluntarily terminate their control of the funds as requested, relator, as required by law, sought to oust the judges from that possession and control.[57]

On July 19, 2001, respondents filed an answer.[58] Respondents claimed that the quo warranto statute was unconstitutional, that its application here violated the separation of powers doctrine and raised

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[53] § 447.532.1.

[54] § 447.503(7).

[55] § 447.539 and § 447.543, LF 2, 6, 8, 10 and 12-13, ¶¶ 2, 19, 29, 39, 48, 49-51; App. A2, A6, A8, A10 and A12-A13, ¶¶ 2, 19, 29, 39, 48, 49-51.

[56] LF 13-14, ¶ 55; App. A13-A14, ¶ 55.

[57] LF 1, 14, 16, ¶¶ 1, 57; App. A1, A14, 16, ¶¶ 1, 57.

[58] LF 275.

constitutional due process concerns, that the quo warranto action violated the pending case doctrine, and that their actions were lawful.[59] Ignoring the previous orders referencing § 483.310.1,[60] respondents' answer contended that they were authorized to make the challenged expenditures by § 483.310.2.[61] This subsection authorizes circuit clerks – not circuit judges – to invest funds deposited in the registry of the court and to expend interest generated by those funds. Subsection 2 directs clerks to make a different distribution of the interest generated from registry funds than that directed by subsection 1. Subsection 1 is applicable to funds 1-4 because these funds were invested pursuant to Court order.[62]

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[59] *See* Answer, *passim*. LF 275-292.

[60] LF 122; LF 164.

[61] LF 276, ¶ 2.

[62] LF 5, 7, 9 and 12, ¶¶ 6, 26, 36, 47; App. A5, A7, A9 and A12, ¶¶ 6, 26, 36, 47.

On August 22, 2001, respondents moved for judgment on the pleadings.[63] On September 10, 2001, the trial court entered a written judgment granting the motion.[64] The judgment did not review the factual allegations contained in the pleadings. Instead, it referenced a legal conclusion in one sentence of the petition and characterized the case as possibly presenting a claim for prohibition and/or mandamus, but not quo warranto.[65] The Court said: "the basis of Relator's petition is that Respondents' actions are 'outside the Court's jurisdiction' and 'contrary to law' (Paragraph 64 of Petition). It is therefore this

[63] LF 309.

[64] LF 333.

[65] LF 334; App. A18.

Court's opinion that Relator may be entitled to relief by prohibition and/or mandamus, not by quo warranto."[66] This timely appeal followed on October 5, 2001.[67]

[66] *Id*. The Circuit Court of Osage County was aware that the Attorney General's earlier request for a Writ of Prohibition had been denied by the Western District Court of Appeals. LF 315.

[67] LF 335.

POINT RELIED ON

The trial court erred in granting judgment on the pleadings because the pleading met the requirements to present a claim in quo warranto in that the petition alleges facts, presumed true for the purposes of the motion, demonstrating that respondents behaved unlawfully, acted wholly without authority and intruded upon the office of another.

State ex inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. 1941)

State ex rel. Allen v. Dawson, 284 Mo. 427, 224 S.W. 824 (1920) (en banc)

Armstrong v. Cape Girardeau Physician Assocs., 49 S.W.3d 821 (Mo. App. E.D. 2001)

Section 531.010, RSMo

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. 2000) (en banc) (quoting *Madison Block Pharmacy v. U.S. Fidelity*, 620 S.W.2d 343, 345 (Mo. 1981) (en banc)). 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." *MFA Mut. Ins. Co. v. Home Mut. Ins. Co.*, 629 S.W.2d 447, 450 (Mo. App. W.D. 1981); *Legg v. Certain Underwriters at Lloyd's of London*, 18 S.W.3d 379, 383 (Mo. App. W.D. 1999).

The trial court erred in granting judgment on the pleadings because the pleading met the requirements to present a claim in quo warranto in that the petition alleges facts, presumed true for the purposes of the motion, demonstrating that respondents behaved unlawfully, acted wholly without authority and intruded upon the office of another.

When reviewing a motion for judgment on the pleadings filed by a defendant, "allegations of the petition are considered true for the purposes of the motion." *Main v. Skaggs Community Hosp.*, 812 S.W.2d 185, 186 (Mo. App. S.D. 1991). Further, the pleadings are to be "liberally construed and all alleged facts are accepted as true and construed in a light most favorable to the pleader." *Armstrong v. Cape Girardeau Physician Assocs.*, 49 S.W.3d 821, 824 (Mo. App. E.D. 2001) (citing *Behrenhausen v. All About Travel, Inc.*, 967 S.W.2d 213, 216 (Mo. App. W.D. 1998)). The appellate court "review[s] the allegations of Appellant's petition to determine whether the facts pleaded therein are insufficient as a matter of law." *State ex rel. Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122, 134 (Mo. 2000) (en banc). A judgment on the pleadings should be affirmed "only where under the conceded facts, a judgment different from that pronounced could not be rendered notwithstanding any evidence which might be produced." *McIntosh v. Foulke*, 228 S.W.2d 757, 761 (Mo. 1950).

The trial court erred in granting respondents' motion for judgment on the pleadings and demonstrated a basic misunderstanding of the nature of the quo warranto. Despite repeated allegations that respondents were acting wholly outside their authority and were, thus, intruding on the authority of other state officials, the trial court focused on a single sentence, indeed an isolated legal conclusion in the petition,

to find that the petition did not assert a cognizable claim.[68] By focusing exclusively on this single (and misinterpreted) conclusion of law, the trial court not only ignored the abundance of well-pled facts, but violated the legal standard that pleadings be liberally construed and judgment entered only if no facts could be demonstrated that would entitle the pleader to relief. The trial court never suggested that the facts, as alleged, failed to support the assertion that respondents had intruded upon the office of another or exercised authority wholly beyond their jurisdiction. In fact, the trial court's order never mentioned the facts pled.

These omissions, and the trial court's failure to follow the proper legal standard on a motion for judgment on the pleadings, require reversal of the trial court's order.

1. The trial court improperly focused on a legal conclusion.

[68] The trial court's order focused exclusively on paragraph 64 of the Petition. *See* LF 334; App. A17-A18. This paragraph asserted, "Respondents' continued retention and control of these funds and their transfer of the monies held in the Four Funds to entities other than the State Treasurer, constitute action outside the Court's jurisdiction and authority and are contrary to law." LF 15, ¶ 64; App. A15, ¶ 64.

The trial court's order does not liberally construe the pleading viewing the facts in the light most favorable to the pleader. The trial court instead based its opinion, that quo warranto would not lie against respondents, on a legal conclusion in relator's petition, ignoring the well-pled factual assertions. Specifically, because relator contended that respondents' actions were "contrary to law" and "outside the Court's jurisdiction," the trial court concluded that quo warranto was unavailable and that relator must seek a writ of prohibition to secure any relief.[69] Focusing solely on this legal conclusion, however, ignores the factual allegations (established as true and liberally construed for purposes of the motion) that respondents continued to exercise control over the four funds long after the funds were statutorily presumed abandoned and the legal authority to control the funds had shifted to the Treasurer,[70] that respondents had made prohibited unnecessary, non-administrative expenditures of the interest earned by the funds,[71] and that respondents admitted spending the funds pursuant to § 483.310.2, which provides expenditure authority only to circuit clerks.[72] These facts are sufficient to support a petition in quo warranto and defeat a motion for judgment on the pleadings. *See State ex inf. McKittrick v. Murphy*, 148 S.W.2d 527, 531 (Mo.

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[69] *See* LF 334, App. 18 (quoting LF 15, ¶ 64; App. A15, ¶ 64).

[70] LF 6, 8, 10, 12-14, ¶¶ 19, 29, 39, 48, 50, 53-55; App. A6, A8, A10, A12-A14, ¶¶ 19, 29, 39, 48, 50, 53-55.

[71] LF 5, 7, 9, 12, ¶¶ 16, 26, 36, 47; App. A5, A7, A9, A12, ¶¶ 16, 26, 36, 47.

[72] LF 276, ¶ 2.

1941) ("where the officer steps entirely outside the scope of his authority to exercise a function which neither the constitution nor the statute has intrusted to him, the remedy of quo warranto is available").

Assuming, *arguendo*, that relator's legal conclusion was a proper ground upon which to base a judgment on the pleadings, the trial court erred by not examining the entirety of relator's conclusions. The petition throughout alleged that respondents acted entirely beyond their scope of authority.[73] For example, paragraph 55 asserts that respondents "lost all authority to retain, collect or transfer any such administration costs after the monies were deemed abandoned." Additionally, paragraph 52 alleges that respondents "lost any authority over the funds after such funds became abandoned." These allegations are sufficient to support a writ of quo warranto. *See, e.g., Murphy*, 148 S.W.2d at 530 (quo warranto "oust the wrongdoer from enjoying the privileges of a franchise which he has ceased to possess."); *State ex inf. Dalton v. Eckley*, 347 S.W.2d 704, 710 (Mo. 1961) (because respondents "failed to show any legal authority to exercise jurisdiction," they were ousted from exercising authority as a school board over areas that had been annexed by a different school district); § 531.010, RSMo. If the trial court was at all confused concerning relator's legal theory, the court needed only to consult the suggestions in support of the petition that were required by Rule 98.03 to accompany the petition:

[73] LF 2-16, ¶¶ 1, 19, 29, 39, 48, 52, 55, 57, 64, 65; App. A2-16; ¶¶ 1, 19, 29, 39, 48, 52, 55, 57, 64, 65.

> The gravamen of this action is not that the Respondent Judges have improperly exercised any power lawfully granted them, but rather that the Respondent Judges' past and continuing actions were and will be "entirely outside the scope" of their authority.

LF 257. But the trial court failed to examine the entirety of relator's pleadings and instead focused on only one of relator's legal conclusions. Thus, even if ignoring the facts alleged and focusing on the pleader's legal conclusions were a proper basis for judgment on the pleadings – which it is not – the trial court's judgment must be reversed.

Even a full examination of the legal conclusion found in the single paragraph referenced by the trial court compels a different result. This paragraph alleges that the judges' actions were "contrary to law" and "outside the Court's jurisdiction." All the statute requires to support the issuance of a writ of quo warranto is a finding that a judge has unlawfully executed that office or intruded upon the office of another. *See* § 531.010, App. A27. Alleging that a judge's actions are contrary to law is the legal equivalent of alleging that a judge has unlawfully executed his office. An allegation that respondents acted outside of their jurisdiction and failed to deliver the funds to the care of the Treasurer as required by law, particularly when coupled with an admission by respondents that they acted pursuant to a statute that only authorizes spending by a different officeholder, is sufficient to allege that respondents intruded upon the office of another.

2. The well-pled facts properly allege a quo warranto claim.

The trial court's reading of quo warranto precedent and relator's pleading, as a basis for granting respondents' motion for judgment on the pleadings, is erroneous. Relator's factual allegations – that respondents continued to hold funds after losing all authority over them (thereby usurping the power of the Treasurer to hold the funds) and that they exercised authority denied them under law by expending monies in violation of the law – fit squarely within the textual requirements of the controlling statute, § 531.010, RSMo, a statute that the trial court order does not even reference.

Second, the trial court reads *State ex inf. McKittrick v. Murphy*, 148 S.W.2d 527, 531 (Mo. 1941), as dictating that quo warranto will not lie "if the constitution or a statute in conformity therewith entrusts an officer with the performance of a certain governmental function and he proceeds to perform that function in a manner contrary to law." (Emphasis added.) Relator did not contend that respondents acted in an improper manner with regard to funds over which they had some power to control. Rather, relator asserted that respondents had "lost any authority over the funds" and that respondents' actions were "beyond the scope of powers conferred on them by Missouri law."[74] These allegations are consistent with the standard for quo warranto set forth in *Murphy*: quo warranto is proper when "the question is . . . whether they [respondents] are attempting to exercise a power which has not been given them." *Id*. at 532.

[74] LF 13, 16, ¶¶ 52, 65; App. A13-A16, ¶¶ 52, 65.

In *Murphy*, the relator alleged that by attempting to move its headquarters outside of Jefferson City, the Unemployment Compensation Commission of Missouri had "usurped a franchise not given to them by law." *Id*. at 529. The *Murphy* relator alleged that the commission's actions were "outside of and beyond the powers conferred upon the commission by [the Unemployment Compensation Act]." *Id.* The Supreme Court of Missouri agreed, noting the purpose of quo warranto "is solely to prevent an officer or a corporation or persons purporting to act as such from usurping a power *which they do not have*." *Id*. at 530 (emphasis added). The Court granted the quo warranto petition and respondents were "ousted from locating or attempting to locate or maintain the central office of the Commission outside the City of Jefferson," but not from serving on the Commission. *Id*. at 532.

Similar to the *Murphy* relator's request, relator here asked the trial court for an order "ousting Respondent Judges Byron Kinder and Thomas Brown, III, from exercising authority that is beyond the scope of powers conferred upon them by law."[75] Relator claimed that respondents were without authority to control and expend the interest generated by the four funds.[76] Like the Commission in *Murphy*, respondents here have stepped wholly beyond their authority, holding and controlling long-abandoned funds that only the Treasurer may now lawfully hold.

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[75] LF 2, ¶ 1; App. A2, ¶ 1.

[76] *See* LF 5, 7-10, 12-15, ¶¶ 16, 26, 29, 36, 39, 47, 48, 50-53, 55, 62; App. A5, A7-A10, A12-A15, ¶¶ 16, 26, 29, 36, 39, 47, 48, 50-53, 55, 62.

Murphy and the explicit statutory language of § 531.010, do not stand alone. Missouri precedent demonstrates the viability of quo warranto to effect a partial ouster of judges from behaviors over which they have no authority. In *State ex rel. Allen v. Dawson*, 284 Mo. 427, 224 S.W. 824, 826 (1920) (en banc), a circuit court judge brought an action to prevent his fellow circuit court judges from appointing deputies for various county officials pursuant to a statute conferring that power. He did not assert that the judges were using a power that they had. Instead, he asserted that this particular function was completely beyond their power as judges. This Court agreed that quo warranto was the proper vehicle to address the complaining judge's claim concerning the right of circuit judges to behave in a particular fashion. 224 S.W. at 826. This is precisely what relator asserted before the trial court here. Quo warranto is the proper mechanism to challenge respondents' authority to engage in certain behaviors.

Respondents attempted below to justify their improper expenditures from the interest the funds generated by claiming that authority for their behavior springs from § 483.310.2, which allows broader interest expenditures than does § 483.310.1.[77] But even if the trial court were permitted to assume this to be true in the face of contrary allegations in the petition, this claim would support and strengthen the relator's argument that respondents were acting wholly beyond their authority and usurping the office of another. This is because § 483.310.2 provides the authority for a *clerk* (and only a clerk) to perform specifically delineated functions regarding funds paid into the court registry. Respondents are not clerks and their actions, undertaken as if they were clerks, constitute an admitted and unlawful intrusion into the office of another – in this instance that of the circuit clerk. This admitted act of usurpation alone demonstrates that

[77] LF 276, ¶ 2.

the trial court had before it facts sufficient to compel the denial of a motion for judgment on the pleadings.

Conclusion

By limiting the time that courts may take to distribute funds belonging to others, Missouri law protects circuit court judges from the "inherent pressure and . . . natural inclination to defer distribution, [because the] interest return would be greater the longer the fund is held." *Webb's Fabulous Pharmacies, Inc., v. Beckwith,* 449 U.S. 155, 162 (1980). Respondents appear to have fallen victim to that "inherent pressure and natural inclination," holding funds and expending interest in the total absence of authority. To address this situation, relator filed a properly pled petition in quo warranto, a claim recognized by the law of this state. Under the circumstances presented here, the trial court's order granting judgment on the pleadings for respondents should be reversed and the cause remanded to the Circuit Court of Osage County for resolution of this controversy.

Respectfully submitted,

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(June 17, 2002)

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

The undersigned hereby certifies that on this 19th day of June, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6744 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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Assistant Attorney General

APPENDIX

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