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 Reply Brief

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I.

Factual Matters

Respondents' Statement of Facts incorrectly accuses relator of submitting a one-sided, adversarial statement of facts, neither fair nor without argument. No specific citations to relator's statement of facts are tendered. Thus, the allegation stands unsupported and denied. Given the procedural posture of this case, the facts as alleged by relator in his petition and all reasonable inferences that can be drawn from them are deemed admitted.

This extraordinary dispute did not begin with a visit to respondents by Assistant Attorneys General as respondents allege. It began with a concern and should end with a determination about the propriety of respondents' behavior. It was the State Auditor who first questioned respondents about their continued retention of the now disputed funds. L.F.247. The Assistant Attorneys General, who spoke with respondents in Judge Kinder's chambers, did not ask respondents to enter any orders. Instead, they asked respondents to comply with the terms of the statutes (L.F.251), which do not require holders of unclaimed property to enter orders, but to file a report and tender the presumptively abandoned property. Respondents concede that the disputed funds are presumed abandoned property. L.F.289, ¶ 39.

Respondents next complain that following the denial of a writ of prohibition, for which respondents offered more than a dozen reasons for denial, relator failed to file a similar document in this Court. It seems odd that, having successfully defeated such a writ, the successful party would be entitled to demand that the unsuccessful litigant engage in repetitive behavior that has just been subject to the successful parties'

criticism. Relator brought a quo warranto action because it is his statutory duty to do so when confronted with facts that justify it. §531.010. Furthermore,

> Where quo warranto is an appropriate remedy, the fact that some other remedy may exist will not, when public interests are concerned, or, in other words, when the State or the public at large is affected by the alleged wrong, in the absence of a statute making such other remedy exclusive, prevent the use, on the part of the State of the extraordinary remedy of quo warranto.

State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 944 (Mo. 1938).

Respondents proceed to complain that this new procedural avenue, attempted to secure a resolution on the merits of this controversy, garnered media attention (while the writ of prohibition went totally undiscovered by the press). The media's attention to this matter was not the result of any misdeed on the part of relator. As instructed by respondents, Alex Bartlett was contacted about the filing of this proceeding (see respondent's brief in SC84210, p. 24, wherein he concedes that he was notified of the suit and the request for preliminary writ) and he appeared and argued against the preliminary order entered in this matter. Hence, the respondents were made aware of this suit in the manner they directed. The Attorney General has never issued a press release or held a press conference and, to counsel's knowledge, has never been quoted in the media regarding this dispute. Rather, he has discharged his statutory duty under §531.010 and performed a function necessitated by the circumstances. Relator has experienced no pleasure nor "political advantage" (Resp.Brf., 20, n. 4) from this dispute. There has been no attempt to "roast respondent - judges on the spit of public opinion" nor a plan to subject respondents to a relator-

created "fanfare of publicity." Resp.Brf. 7, 20. What media criticism respondents have received has resulted from their conduct – conduct about which the public is rightly concerned.

Relator has never alleged that respondents' behavior is properly characterized as willful misconduct because it is inconsistent with his opinion. Rather, relator asserts that respondents have engaged in willful misconduct because respondents' conduct has been inconsistent with Missouri statutes (respondents do not allege that they have complied with these statutes – §§447.532, 447.539, 447.543 and 483.310.1 – they instead assert that these statutes are inapplicable to them) and this behavior (particularly after the delivery of the legal memorandum respondents requested) was not accidental and, hence, was willful. The willfulness of respondents' misbehavior is further demonstrated by their surreptitious expenditure of interest two days after requesting relator to refrain from filing suit while respondents gave further consideration to the memorandum they requested.

Next respondents assert that the discussion had by respondents and the Assistant Attorney's General in Judge Kinder's chambers violated Rule 4-3.5. Exactly how this allegation fits into respondents supposedly non-argumentative statement of facts is unclear. The allegation is denied and warrants no further response here.

Respondents describe in detail various audits that have been performed and finally review the January 4, 2000, audit report, asserting that it includes "no criticism about who was receiving the income from the funds."[1] Resp.Br., 10. For the three year period covered by the audit, the Audit Report states

[1] Respondents appear to suggest that because they did not perceive the Auditor to challenge their use of the funds over a lengthy time, the Attorney General may not prosecute this action. But "laches will

in detail the amount of interest transferred to Cole County ($687,118) and expended for various fees ($76,225), and then contrasts that to the principal amount that had been returned to claimants ($4,819). L.F.247. The Audit Report says various practices "could be improved" and recommended that the circuit judges "determine whether the receivership assets should be distributed to the state Unclaimed Property Section or be disposed of in another manner." *Id*. The report then notes that the transfers to Cole County go into an account "designated for courthouse improvements." L.F.248. The foregoing is not the absence of criticism; if the Auditor had said anymore she likely would have been derisively accused of violating the separation of powers and attempting to exercise superintending control of the courts at a time when it was likely hoped this matter and all its unpleasantries could be resolved without conflict. The Auditor's Report notes the Fund 1 ending balances for 1997 and 1998. L.F.249. These balances are less than the principal balances that should have remained in this fund. *Compare*, LF.249 (Ending Balances) with Reply Appendix (Rep.App.), 6 (Original Principal Amount). As reflected on the receiver's report filed on January 14, 2002, the original principal of Fund 1, $1,666,527.07, minus all claims paid, $317.11, should have left a remaining principal sum of $1,666,209.96. Rep.App., 6. During the years 1997, 1998, 1999 and 2000, Fund 1 did not have this amount of money on hand. Rather, for the years 1997, 1998, 1999, and 2000, the "Total Ending Balance Plus Retained Earnings" remaining in the fund was $1,644,282.89, $1,586,393.87, $1,609,505.52, and $1,595,238.76, respectively. *Id*. Thus, the receiver's report suggests

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not be permitted to bar a proceeding instituted by the State or its Attorney General to oust an official for neglect or misconduct. The nature of the proceeding and the inherent public interest preclude the application of that doctrine." *State ex inf. Danforth v. Orton*, 465 S.W.2d 618, 621 (Mo. 1971).

that for several years – 1997, 1998, and 2000 – Judge Kinder and Judge Brown[2] ordered the principal of Fund 1 transferred to the Cole County Commission. Rep.App., 6.

II.

The petition in this case adequately alleges facts, presumed true for the purposes of respondents' motion for judgment on the pleadings, demonstrating that relator is entitled to relief in quo warranto.

Respondents do not respond to the only point presented on appeal. While a respondent is only required to support the trial court's judgment, "[i]n so doing, [the] respondent must respond to the points presented and argued by the appellant to seek reversal of the trial court's order." *Boyer v. Grandview Manor Care Center, Inc.*, 793 S.W.2d 346, 347 (Mo.banc 1990). As respondents did not, it must be concluded that they discovered no law to support the manner in which the trial court disposed of this matter.

The trial court found that the issue before it was which extraordinary writ, quo warranto, prohibition or mandamus, was "appropriate based on the allegations set forth in the petition." L.F.342. The trial court

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[2] Respondent Brown's role in spending the principal of Fund 1involves the final order of the year 2000, an order he signed "in absence of" respondent Kinder. The order required the receiver to pay the Cole County Commission $7,019.50 "to reimburse the County funds expended by the Circuit Court of Cole County, Missouri." L.F.114. For the year 2000, the fund showed a negative in the "Ending Balance Retained Earnings" column of $70,971.20. Rep.App., 6. This amount reflects an additional principal loss of $14,266.76 in 1999. *Id.*

found that relator did not state a cause of action for a writ of quo warranto, although "Relator may be entitled to relief by prohibition and/or mandamus." L.F.343. Thus, the trial court found that relator had failed to state a claim upon which quo warranto relief could be granted.

Respondents assert in their Supplemental Facts that they may defend the judgment with any argument. Respondent's Brief (hereafter Resp.Brf.), 8. This is an overly broad statement of the law. A pleading that does not state a cause of action deprives the circuit court of subject matter jurisdiction. *In re Estate of Pittman*, 16 S.W.3d 639, 641 (Mo.App. 2000). Jurisdiction, it has been noted, "is a threshold issue dealing primarily 'with the right, power and authority of the court to act.'" *Woods v. Missouri Department of Corrections*, 806 S.W.2d 761, 762 (Mo.App. 1991)(*quoting State ex rel. Marlo v. Hess*, 669 S.W.2d 291, 293 (Mo.App. 1984)). In *Woods*, the trial court dismissed the case for want of subject matter jurisdiction and an intervening federal decision rendered that conclusion inaccurate. The appellant there argued that remand was required and that the appellate court could not consider the other grounds asserted below in the motion to dismiss, while the respondent contended that the appellate court could examine the other grounds asserted for dismissal. While "Missouri case law would seem to support respondent's position," the Western District found that remand was required because the dismissal was based on the absence of jurisdiction. 806 S.W.2d at 762.

Here, where the trial court entered judgment against relator for failing to state facts sufficient to state a claim in quo warranto – a jurisdictional holding – Missouri law requires, in the event that this Court disagrees with the trial court, a remand. Other arguments cannot be considered at this juncture. Alternatively, this Court may enjoy the power under Art. V, §4, to retain jurisdiction of this matter in lieu of a remand.

III.

The use of quo warranto to oust respondents from exercising long-lost jurisdiction to control funds is constitutionally permissible and long-recognized. (Addressing Respondents' Points I, II and III.)

A. Removal from Office.

Respondents' point one argues that quo warranto cannot be used to remove from office a public officer subject to impeachment, citing *State ex rel. Nixon v. Morarity*, 893 S.W.2d 806 (Mo.banc 1995). Resp.Brf., 11. While accurate, this argument is entirely irrelevant. Relator has never sought respondents' removal from office and respondents know it. L.F.2, 16, 256, 258-59, 260-61, 271, and 324; Relator's Brief, 10, 12 and 19. Relator seeks what he has always sought in this proceeding, a writ of quo warranto ousting respondents from their control these funds in the absence of all jurisdiction. The mechanisms cited by respondents to remove judges from office cannot accomplish the limited objective relator seeks.

B. The Nature of Quo Warranto.

Respondents urge this Court to adopt a very limited view of quo warranto; one that would actually diminish the constitutional powers granted to the courts of this state. *See* Art. V, §§4 and 14, empowering this Court, the Court of Appeals and the circuit courts to "issue and determine original remedial writs." Respondents argue that "[t]he statute [§531.010] appears to provide nothing more than a means to challenge a usurper to a judicial office." Resp.Brf., 15. The statute reads more broadly, authorizing the issuance of quo warranto against any person who shall "usurp, intrude into or unlawfully hold or execute any office or franchise." And this statute, which cannot divest the courts of their constitutional powers, must

be seen as providing the courts with additional authority to issue writs of quo warranto. "It is beyond the power of the Legislature to interfere with this jurisdiction, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board." *State ex rel. McKittrick v. Wymore*, 119 S.W.2d 941, 942 (Mo. 1938). Here the Legislature did so by enacting §531.010, a statute that has been a mainstay throughout Missouri's history. *See, e.g., State v. Planned Parenthood of Missouri and Kansas*, 66 S.W.3d 16, 19 (Mo. 2002) ("[T]he attorney general has specific authority to bring a quo warranto proceeding to prevent any unlawful conduct in the execution of the duties of a public office. Sec. 531.010."); *State ex inf. Dalton v. Harris*, 363 S.W.2d 580, 582-83 (Mo. 1962) (discussing §531.010 and finding it to contain "broad and comprehensive" language); *State ex rel. Turner v. Fitzgerald*, 44 Mo. 425, 427 (Mo. 1869) (noting Gen. Stat. 1865, Ch 157 (§531.010's predecessor) applies where "any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise").

Furthermore, respondents' argument ignores the rich history and utility of the writ as it has developed in Missouri. It is the purpose of quo warranto to protect the public from those who would usurp any franchise granted by the state. "That franchise may be the right to hold public office, *the right to exercise certain powers thereunder*, the right to a public or private corporate franchise or the right to exercise powers thereunder." Charles B. Blackmar, *Quo Warranto*, in 2 Appellate Practice and Extraordinary Remedies, §14.3, p. 14-4 (Fourth ed.) (emphasis added). "Quo warranto can be used to prevent a public officer . . . from exercising powers he . . . does not possess, while leaving such officer . . . secure in the exercise of its powers and franchises which are lawfully possessed." *Id*. at p. 14-3. This is

precisely what this Court authorized in *State ex rel. Allen v. Dawson*, 284 Mo. 427, 224 S.W. 824, 826 (1920)(en banc)(quo warranto brought to oust circuit judges from exercising power to appoint deputies for various county officials).

A writ of quo warranto will issue where an 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 question is not whether the respondents are attempting to misuse a power possessed, but whether they are attempting to exercise a power which has not been given to them." *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527, 531-32 (1941). This is precisely what relator alleges respondents have done.

C. Respondents' Violations of Law.

1. Retention of Funds After Statutory Abandonment Period. Relator alleged that respondents violated Missouri's Uniform Disposition of Unclaimed Property Act (UPA) which, as relevant here, provides that all intangible personal property held by any court or public officer is presumed abandoned after the expiration of five years. §447.532. Everyone holding presumed abandoned property must file a report with the Treasurer, listing the name of the owner of the property (if known), the last known address (if any), the nature or description of the property and the date the property became payable, demandable or returnable. §447.539.1-.2. Finally, every person filing the report described above "shall pay all moneys to the treasurer . . . at the time of filing the report." §447.543. Furthermore, any funds subject to distribution in an insurance company liquidation remaining in the liquidator's hands when he is ready for discharge must be disposed of as provided by laws for unclaimed property. §375.1224. Hence, respondents' retention and expenditures of funds after the expiration of the statutory abandonment period

were in violation of the law.[3] 2. Expenditures of Interest. It is not only Missouri's UPA that respondents have violated. Even before the expiration of the statutory abandonment period, §483.310.1 controlled respondents' conduct regarding the expenditures of interest generated by these funds. As respondents at times recognized, the four funds were created under the authority of §483.310.1, which is designed for funds "reasonably expected to remain on deposit for a period sufficient to provide income through investment."[4] When a party so requests (as occurred here when four utilities requested that their payments be deposited into interest bearing accounts) (L.F.24, December 16, 1980) or when a judge orders moneys

[3] In interpreting Missouri's UDA, the "Act shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it." §447.500. Several State Courts have found that funds held by courts are subject to the reporting and delivery requirements of the respective state's unclaimed property laws. *See, e.g., City of Providence v. Solomon*, 444 A.2d 870, 871 (R.I. 1982)(probate court registry); *Dyer v. Davenport*, No. 01A01-9103-CH00106, 1991 Tenn. App. LEXIS 632 (Aug. 14, 1991)(funds held by special master of the Chancery Court); *Texas v. Melton*, 970 S.W.2d 146, 149 (Tex.App. 1998), *aff'd*, 993 S.W.2d 95 (Tex. 1999)(cash bail bonds held in the court registry); *State v. Snell*, 950 S.W.2d 108, 113 (Tex.App. 1997)("the trial court had no discretion or authority to order any unclaimed property to an escrow agent who would then transfer the funds to a yet unnamed charity").

[4] This conclusion follows, sometimes explicitly and other times implicitly, from each of the four orders establishing receiverships in each of the four funds, all indicating that the funds may be held for "a lengthy period of time" and should be invested L.F.98, 122 (specifically mentioning §483.310.1), 164 (specifically mentioning §483.310.1), 191.

deposited into the registry of the court to be invested (as occurred here for each Fund), this section limits the expenditure of investment income to "[n]ecessary costs, including reasonable costs for administering the investment" and provides that the "net income so derived shall be added to and become a part of the principal." §483.310.1. Respondents' expenditures of interest income for anything other than administration costs violated this statute, and, hence, were wholly without jurisdiction.

And it is not only this statute that controlled respondents' expenditure of the interest generated by Fund 1. Respondent Kinder, on October 19, 1979, ordered the utility companies to pay simple interest on refunds payable from Fund 1 from September 11, 1979 (the date this Court's mandate reversing the trial court) to the date the refund was actually made, at the rate of 6% per annum. L.F.96-97. An appeal was taken regarding the starting date for the payment of interest and the Western District reversed stating: "the consumers who paid surcharges illegally collected will not have been restored to all things lost if they are not awarded interest from the date the charges were collected to compensate for the loss of use of their money." *State ex rel. Utility Consumers Council v. Public Service Comm'n*, 602 S.W.2d 852, 855 (Mo.App. 1980). It ordered that the interest awarded on the amount due each consumer be calculated from the date such amount was collected from that consumer "*until paid*." *Id.* at 856. Fund 1, while earning over $2,000,000, has insufficient funds on hand to pay interest, as ordered by the appellate court, as a result of improper interest expenditures by respondents. "The trial court is without power to modify, alter, amend or otherwise depart from the appellate judgment. Its proceedings contrary to the directions of the mandate are 'null and void.'" *In re Marriage of Hankins*, 864 S.W.2d 351, 353 (Mo.App. 1993)(citation omitted.) The orders of respondents, diverting interest to Cole County and away

from over-charged utility customers who need it to make them whole, is in complete disregard of the appellate court's decision.

Additionally, respondents have ignored other statutory provisions. Funds 2 and 3 are comprised of funds created in statutory proceedings seeking review of an order of the Public Service Commission, pursuant to §386.510. As authorized by §386.520, Judge Brown imposed a stay and ordered the utility "to pay into the court registry 'such sums as it may collect from and after the date of the entry of this Order which it would not have been entitled to collect but for this stay.'" *State ex rel. Southwestern Bell v. Brown*, 795 S.W.2d 385, 386 (Mo. 1990). When a stay is issued, as with Funds 2 and 3, the statute requires utilities "to keep such accounts . . . as may . . . suffice to show the amounts being charged or received by such corporation, person or public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations and persons to whom overcharges will be refundable in case the charges are made by the corporation, person or public utility, pending the review, be not sustained by the circuit court." §386.520.3 The refund to the overcharged person is to include interest earned. §386.520.5. With respect to Fund 2, this Court noted that because the review, stay, and the deposit into the court were authorized by the statute, "the circuit court's authority extends no farther than the authority granted by the statute." *State ex rel. Southwestern Bell*, 795 S.W.2d at 388. Thus, interest expended by respondents from Funds 2 and 3 was expended wholly without jurisdiction.

Fund 4 comprises monies unclaimed at the time the insurance liquidator was ready for discharge. It appears that the case created to manage Fund 4 was created by an order of Judge Kinder, not a petition

by one of the parties.[5] L.F.188, 191-96. However, there is no dispute that the funds were subject to distribution in an insurance company liquidation and they remained in the liquidator's hands when he was ready for discharge; thus, the funds were subject to the dictates of the UPA, §375.1224, or its predecessor statute.

Aside from the various statutory schemes articulated above that demonstrate the impropriety of respondents' interest expenditures, case law dictates a similar conclusion. *See Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 165 (1980)(county may not, consistent with the takings clause, take for its own use interest generated on monies deposited into the registry of the Court). This was

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[5] The Western District Court of Appeals explicitly stated that Judge Kinder exceeded his jurisdiction in his earlier appointment of a trustee because the "statutory scheme for the receivership in liquidation of an insurance company, section 375.560, *et seq*., sets up a self-contained and exclusive statutory scheme. It makes no provision for the appointment of a trustee to take over the duties of the director of insurance acting as receiver." *State ex rel. ISC Financial Corporation v. Kinder*, 684 S.W.2d 910, 913 (Mo.App. 1985)(internal citation omitted). Section 375.560, *et seq*., was repealed in 1992 by H.B. 1574 §A and the current §375.1150, *et seq*., was adopted. It is noteworthy that the §375.760, RSMo (1969), that was in effect at the time of the decision, provided that any unpaid or unclaimed moneys held by the director of insurance one year after final settlement must be paid into the state treasury to be held and disposed of as provided by laws for escheats. That section is now §375.1224, which requires that unclaimed funds be disposed of as provided by laws for unclaimed property.

not a significant change for Missouri, for we have long held to the rule; "interest follows principal." "[A court clerk is] under no obligation to place funds deposited with him as clerk of court upon interest . . . . But having placed them where they drew interest, that interest must be considered as having the same ownership as the principal which produced the interest." *Synder v. Cowan*, 120 Mo. 389, 25 S.W. 382, 384 (1894)(citations and internal quotations omitted). Respondents have offered no rationale to vary from this long-standing rule.

As the foregoing demonstrates, respondents were expressly denied jurisdiction to expend interest as they did and lost jurisdiction over the principal of these funds after the expiration of the statutory abandonment period. These funds must be delivered to the Treasurer. Respondents' continued use and retention of the funds constitute acts undertaken wholly without jurisdiction and behavior usurping the office of the circuit clerk and the State Treasurer. To remedy this situation, quo warranto should issue.

3. Expenditures of Principal. Quo warranto is necessary not simply because respondents have neglected their duty to relinquish control of these funds in violation of the UPA and have misdirected the interest generated by these funds. Additionally, respondents appear to have misappropriated principal from one of these funds. No statute or common law doctrine even arguably suggests that respondents may use this property to engage in discretionary spending funneled through the county in which they reside in order to beautify their own surroundings.

D. Superintending Control.

Respondents argue that the trial court here cannot consider a writ of quo warranto against respondents because the same is tantamount to the exercise of superintending control over the circuit courts, a power restricted to appellate courts by the Constitution. Art. V, §4(1), Resp.Brf., 14. Here it is respondents who confuse the " courts" with individuals otherwise judges who, acting wholly without jurisdiction, are mere usurpers of judicial power and not "courts" at all. Respondents would have this Court hold that quo warranto cannot be pled in a circuit court against circuit court judges. But this is exactly what happened in *State ex rel. Joyce-Hayes v. Twenty-Second Judicial Circuit,* 864 S.W.2d 396 (Mo.App. 1993)(where the circuit attorney filed a quo warranto petition in circuit court to oust circuit court judges from approving mayoral appointments) and the appellate court, while dismissing the appeal, did not find that the circuit court lacked jurisdiction over the controversy.

Respondents' argument would require this Court to declare yet another statute, §531.010, unconstitutional. Respondents mention §531.010 but once (Resp.Brf., 15) and there suggest that relator reads the statute too broadly or that it is unconstitutional. But respondents did not allege below that this statute is unconstitutional. See Respondents' Answer, L.F. 275-92; their Suggestions in Support of their Motion for Judgment on the Pleadings, L.F. 311-22; and the motion itself, L.F. 309-10. As such, any such claim raised here for the first time on appeal, must be rejected. *See Hatfield v. McCluney,* 893 S.W.2d 822, 829 (Mo.banc 1995) (constitutional attack not raised in trial court at earliest opportunity is not preserved for appeal). Circuit courts are courts of general jurisdiction, having their "jurisdiction determined and regulated by the Constitution . . . and the statutes enacted pursuant thereto." *State ex rel. Spencer*

v. Anderson, 101 S.W.2d 530, 533 (Mo.App. 1937). Pursuant to this facially valid and unchallenged statute, the circuit court of Osage County properly considered this case.

Because respondents were denied by statute the very powers they usurped, the retention of funds held for others past the statutory abandonment period for an unduly lengthy time and the expenditure of both principal and interest generated by the funds they controlled, quo warranto is the appropriate remedy to address respondents' unlawful behavior.

E. Escheat Statute.

Respondents complain that relator never filed an action against them pursuant to the "Funds in Custody of Courts" provisions of Missouri's Escheat Law, §§470.270-.350. Resp.Brf., 15. While the Attorney General could have filed such a claim, such a claim would be brought if the Attorney General desired to extinguish the right of over-charged utility customers and unsatisfied insurance company claimants to recover their money. Here, where their money has been held for a considerable time by respondents who undertook virtually no effort to distribute the money to its proper owners, the Attorney General properly concluded an escheat action would be inappropriate.[6] Respondents advance, without evidentiary

[6] If the Attorney General had elected to bring an escheat action, the funds would have been escheatable "with all interest and earnings actually accrued thereon to the date of the judgment and decree for escheat of the same." §470.270. Hence, respondents, recognizing that these funds were subject to escheat (SC84210, Kinder, L.F.131, SC84212, Brown, L.F.38), should have preserved – not expended – the interest earned on these funds. It should further be noted that §470.270 specifically authorizes the state to secure funds held by courts through Missouri's unclaimed property laws.

support, several observations concerning the legislative history of Senate Bill 1248 and proceed to argue its unconstitutionality. However, these arguments are not before the Court. Moreover, it is doubtful whether a complete listing of those who supported or opposed S.B. 1248 would disclose their reasons behind their stance on that bill, nor should it have any material effect on this case.

IV.

Judicial Immunity is Irrelevant to this Proceeding. (Addressing Respondents' Point IV).

Relator has not asked for fines or requested that respondents be personally liable in this proceeding. The relief sought – ouster from control of the funds over which respondents are devoid of any jurisdiction – is the sole remedy prayed for in this action. The remaining discussion contained in Respondents' Point IV, in the guise of judicial immunity, seems only to serve as an opportunity for hostile rhetoric.

V.

The Pending Case Doctrine Does Not Apply to this Action and neither Respondents nor their Receivers have title the disputed funds. (Addressing, in part, Respondents' Point V).

The pending case doctrine is well-established in Missouri law, and does not impact relator's action in the trial court. *See Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541, 548 (Mo.App. 1998); *State ex inf. Riederer v. Collins*, 799 S.W.2d 644, 650 (Mo.App. 1990); *see also State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391 (Mo. 1975). Generally, the doctrine of abatement is designed to avoid a multiplicity of suits, and for a pending case to abate a later-filed action, there must be an identity of issues and parties. *State ex inf. Riederer*, 799 S.W.2d at 650. A court cannot stay proceedings in a pending case when there is "a distinction in the subject matter and relief sought in the two disputes." *State ex rel. Campbell v. Svetanics*, 548 S.W.2d 293, 295 (Mo.App. 1977).

This is the first quo warranto action filed regarding respondents' conduct. And, most certainly, the parties involved in this action are not the same parties as the underlying long-closed cases. Indeed, as to Fund 4, one wonders whether there can be an identity of parties or issues, as such "case" was merely assigned a case number upon order of Judge Kinder, without the filing of a petition. Nor are the issues identical to those in the closed utility rate overcharge and insurance company liquidation cases. Furthermore, we are before the Court to review the grant of a judgment on the pleadings. Relator never alleged that these matters were subject to pending litigation and vigorously disputed respondent's allegations to that affect. Consequently, the pending case doctrine cannot be held to bar the present action.

Even if identity of the parties and issues could be established, the pending case doctrine would not bar this suit. Respondents argument was the losing argument in *State ex inf. Dalton v. Eckly*, 347 S.W.2d 704 (Mo.banc 1961). There the Attorney General brought a quo warranto action against a school board that continued to exercise jurisdiction over a particular geographical area that had become part of a different school district. The respondent school district asserted that the pending case doctrine barred the suit. This Court, rejecting the argument, stated: "Quo warranto may be resorted to in such a case [one brought by the Attorney General that involves the public interest] even though a suit is pending in a lower court involving the same issues." *Id*. at 707. Under the circumstances presented here, the pending case doctrine did not prevent the trial court or this Court from entertaining jurisdiction over relator's petition. The UPA directs the disposition of the property held by respondents and their receivers. No previously pending case raised the issue that respondents are subject to partial ouster from exercising jurisdiction over this cause.

Respondents suggest that these funds have been "titled" in the court-appointed receivers. Resp.Brf., 21. There is no indication of such a title transfer in the pleadings and respondents cannot truly consider themselves title holders to property that has been repeatedly acknowledged to belong to over-charged utility customers and intended recipients of an insurance company liquidation proceeding. The funds have simply been placed with respondents in "trust" (§483.310.1) and they elected to invest these funds so held, subjecting them to the statutory constraints attached to that conduct.

VI.

Under Clearly Established Separation of Powers Principles, it is for the Legislature to Articulate the Public Policy of the State of Missouri. (Addressing, in part, Respondents' Point V.)

Respondents conclude their brief with a public policy argument, arguing that allowing this action to proceed "would initiate judicial chaos and result in gridlock, with concurrent courts issuing writs against one another." Resp.Brf., 24. Given the scarcity of suits of this type, one must seriously doubt whether the "floodgates" scenario respondents advance will materialize.[7] This litigation is one of a few examples in Missouri's history in which quo warranto has been sought against circuit judges. *See State ex rel Allen v. Dawson,* 284 Mo. 427, 224 S.W. 824 (1920); *State ex rel. St. Louis County v. Edwards,*589 S.W.2d 283 (Mo.banc 1979); *State ex inf. Joyce-Hayes v. Twenty-Second Judicial Circuit,* 864 S.W.2d 396 (Mo.App. 1993).

But more importantly, under the separation of powers enshrined in Missouri's Constitution, it is the function of the Legislature to articulate the public policy of the State of Missouri through duly enacted legislation. It is the function of the courts to follow those policy determinations unless they are in

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[7] Compliance with the UPA would result in no cataclysmic event. Since the UPA was first enacted through the end of 2001, courts and circuit clerks have filed 1026 reports of presumed abandoned property and delivered $5,808.285.70 to the State. During this same time period, the Cole County Circuit Clerk has filed 16 reports of presumed abandoned property and delivered $27,487.99 to the Treasurer. Rep.App., 7-9.

unavoidable conflict with the Constitution. Respondents have, over a period of decades, ignored the laws of this State and they seek this Court's sanctification of their misdeeds. It is respondents' course of conduct that threatens "public confidence in the integrity of the courts" (Resp.Brf., 20, n.4), and it is within the power of the courts to condemn the conduct and, thus, dissipate the threat.

Conclusion

For the foregoing reasons and those contained in relator's initial brief, the decision of the trial court should be reversed.

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

The undersigned hereby certifies that on this 12th day of August, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,389 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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