IN THE
SUPREME COURT OF MISSOURI

No. SC84328

NANCY FARMER, STATE TREASURER,

Appellant,

v.

HONORABLE BYRON L. KINDER, *et al.*,

Respondents.

Appeal From The Cole County Circuit Court,
The Honorable Judge Ward Stuckey

Appellant's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Error! No table of authorities entries found.

Statutory and Constitutional Authority:
Error! No table of authorities entries found.

Other:
Error! No table of authorities entries found.

JURISDICTIONAL STATEMENT

The issues before this Court concern the validity of the Missouri Uniform Disposition of Unclaimed Property Act, the construction of a state constitutional provision defining the Treasurer's duties and the construction of the state constitutional provisions separating the powers assigned to the three branches of government. This Court has exclusive jurisdiction to hear such matters. Art. V, § 3.

The circuit court determined that the statute giving the Treasurer the power to bring an action to collect unclaimed property, § 447.575, RSMo 2000, from the courts and other public officers, § 447.532, RSMo 2000, is an unconstitutional delegation of authority in violation of Article IV, § 15 of the Missouri Constitution. The circuit court held that such an action under the statute would exceed the limits placed on the duties of the Treasurer by Article IV, § 15 of the Missouri Constitution, providing: "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." The circuit court further held that the action of the Treasurer in filing a petition to enforce her duty to receive unclaimed property administered by the four respondent receivers and controlled by the respondent judges was in violation of the Doctrine of Separation of Powers contained in Article II, § 1 of the Missouri Constitution. Thus, the circuit court's ruling places this matter squarely within this Court's exclusive jurisdiction. Art. V, § 3.

INTRODUCTION

The Treasurer commenced this action in accordance with her statutory duty to enforce the delivery of unclaimed property. § 447.575.[1] The suit sought to recover approximately $2.75 million in principal held by respondents and an additional approximately $3 million in interest the funds have generated while held by respondents minus the reasonable cost of administering the fund.

In addition to other holdings, the circuit court found that the Uniform Disposition of Unclaimed Property Act (§§ 447.500-.595) violates of the Constitution of Missouri in several respects. Initially, the court found that moneys constituting unclaimed property that will be deposited in the statutorily-created Abandoned Fund Account do not constitute "state funds" or funds received from the United States. As such, the circuit court reasoned, the Legislature is prohibited by Art. IV, § 15 from assigning to the Treasurer the duties of administering these funds or bringing suit to enforce her statutory obligation to receive unclaimed property in that such imposes a duty upon her unrelated to the receipt, investment, custody and disbursement of state funds. Some history of abandoned property laws may prove helpful in analyzing these holdings.

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

All fifty states have enacted legislation requiring holders to report and deliver to the state various types of abandoned property. Forty-three states have enacted legislation modeled after the Uniform Disposition of Unclaimed Property Act[2] or the Uniform Unclaimed Property Acts. 1 D. Epstein, Unclaimed

[2] In 1954, the National Conference on Commissioners on Uniform State Laws and the American Bar Association approved for the first time a Uniform Disposition of Unclaimed Property Act. Unif. Disposition of Unclaimed Property Act, Historical Notes, 8A U.L.A. 267 (1954). The Act was revised in 1966. Unif. Disposition of Unclaimed Property Act, Historical Notes, 8A U.L.A. 207-208 (1966) (superceded by Uniform Unclaimed Property Act (1981), which was superceded by Uniform Unclaimed Property Act (1995)). All versions of the Uniform Laws, from 1954 to the latest in 1995, have contained provisions applying the law to property held by courts. *See* Unif. Disposition of Unclaimed Property Act, 8A U.L.A. § 8 (1954 and 1966); Unif. Unclaimed Property Act, 8C U.L.A. § 13 (1981); Unif. Unclaimed Property Act, 8C U.L.A. § 2 (1995).

Property Laws and Reporting Forms 1-12 (2001). These statutes are purely custodial statutes. *Id*. 1-13. "Holders of abandoned property report the existence of that property to the state. If initial efforts by holders to reunite an owner with his property are not successful, the property is turned over to the state which holds it in perpetual custody for the missing owner." *Id*.

The purposes of these Uniform Unclaimed Property Laws are: "(1) to protect the interests of owners of such property; (2) to relieve the holders from annoyance, expense, and liability; (3) to preclude multiple liability; and (4) to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof." Unif. Disposition of Unclaimed Property Act, Prefatory Note, 8A U.L.A. 209 (1966).

Missouri's Uniform Disposition of Unclaimed Property Act is based on the Revised 1966 Uniform Disposition of Unclaimed Property Act. It was first enacted in 1984. *See* H.B. 1088, Laws of Missouri 1984. In the initial version, reports of unclaimed property were made to and enforcement actions were brought by the Director of the Department of Consumer Affairs, Regulation and Licensing (currently known as the Director of the Department of Economic Development). The primary activity undertaken by the Treasurer under this early version of the statute was to hold moneys constituting unclaimed property. § 447.543.1, RSMo Supp. 1984. Thus, it is apparent that the Legislature thought that moneys to be delivered to the state pursuant to the new statute were state funds and were required to be held by the Treasurer. In 1993, the functions previously performed by the department director were transferred to the Treasurer. *See* § 447.500-.595, RSMo Supp. 1993. In 1994, the Legislature amended and reenacted the provisions of the law at issue in this case. S.B. 757 ("Ownership and Conveyance of Property: Lost and Unclaimed Property"), Laws of Missouri 1994. Both versions of the Act require the Treasurer to notify certain persons appearing to be owners of abandoned property by newspaper publication and mail. § 447.541, 15 CSR 40-3.090. In addition, the Treasurer maintains a list of persons appearing to be owners of abandoned property on her website with directions regarding how to make claims. *See* www.showmemoney.com.

As disruptive as the circuit court's holdings are with regard to unclaimed property law, these pale in comparison to the significance of its multiple holdings concerning the separation of powers amongst the various branches of Missouri government. The circuit court held that the Treasurer's action – filing suit to recover unclaimed property in the hands of holders who refused to relinquish it – impermissibly interfered with the orderly disposition of funds by the circuit court and constituted a violation by the Executive Department of the Doctrine of the Separation of Powers. Art. II, § 1, Mo. Const. Further, the circuit court found that the Treasurer's determination that these funds were unclaimed property (and her decision to make a claim for the same) constituted an unconstitutional attempt to exercise superintending control and supervisory authority over the circuit court in violation of Art. V, § 4 of the Constitution. Finally, the court found that the Treasurer's attempt to collect the substantial interest generated by the unclaimed funds over many years, also violated the Separation of Powers contained in Art. II, § 1 of the Constitution.

In so holding, the circuit court opined that judges in Missouri are not obligated to follow generally applicable laws that create substantive rights. No holding could be more dangerous. If the circuit court's ruling is allowed to stand, no branch of government can act as a check and balance on judicial power. According to the circuit court, the Legislature cannot enact generally applicable laws creating substantive rights that impact and constrain judicial behavior and members of the Executive branch who seek to enforce

such generally applicable laws face the choice of violating their duty to execute Missouri law or violating the Constitution by seeking to constrain judicial caprice. The framers of Missouri's Constitution did not create a system of government wherein the judicial branch of government could exercise the type of unbridled power the circuit court found inherent in Missouri's Constitution. Indeed, the circuit court's ruling is repugnant to traditional notions of checks and balances. "The judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that." John Adams, *Thoughts on Government*, 1776.

STATEMENT OF FACTS

The facts set forth below are as alleged in the Treasurer's petition.

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. L.F. 8-20. On July 25, 2001, the Treasurer, pursuant to § 447.575, filed a petition for delivery of unclaimed property in the Circuit Court of Cole County. *Id*. The Treasurer sought a mandatory injunction ordering Judges Kinder and Brown and their receivers to deliver to the Treasurer all the moneys existing in the funds as of the date the funds were presumed abandoned pursuant to § 447.532, plus interest, dividends, or other earnings from that date to present (minus only necessary and proper costs and payments made to claimants). *Id*. The Treasurer also sought penalties, pursuant to § 447.577, subparagraphs 1 or 2, for the failure to report and failure to deliver the unclaimed property as required by law. *Id*.

Fund 1

Fund 1 was established in 1981 by Judge Kinder, in two consolidated cases. L.F. 9-10. These cases involved challenges to the Public Service Commission's (PSC) approval of a fuel cost surcharge on utility customers. L.F. 9. The Missouri Supreme 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." *Id*.

After this Court's remand, Judge Kinder entered an order dated October 19, 1979, requiring the utility companies to make refunds to customers who had previously paid the surcharge. The time for the utility companies to make refunds was a period of one year, beginning November 1, 1979 and ending October 31, 1980. Any amount of unrefunded surcharge remaining at the end of the year was to be paid into the registry of the Cole County Circuit Court. L.F. 9.

On August 5, 1981, Judge Kinder entered an order creating a receivership to hold the unrefunded surcharges, which up to that point had been held in the court's registry. The order noted that the funds "are being held and administered so that refunds may be made therefrom to utility customers." L.F. 91. The order named a receiver, noted that the funds were to be invested, reserved unto Judge Kinder all authority regarding investment decisions, and directed that no expenditures in excess of $250.00 be made without his written approval. L.F. 10, 91-95.

The original receiver and her successors invested Fund 1 moneys so that the original principal has earned interest and dividends. All interest and dividends from the principal are required to be added to the principal, minus only necessary and proper costs and payments to claimants, pursuant to § 483.310.1. L.F. 10. The moneys in Fund 1 remained unclaimed by their owners for seven years after the fund was initiated on November 1, 1979, and as of November 1, 1986, were presumed abandoned pursuant to § 447.532, RSMo (1986). L.F. 10.

Judge Kinder and the receiver, who makes payments from Fund 1 pursuant to orders of Judge Kinder, are both "holders" of presumed abandoned property as that term is used in §§ 447.500 to 447.595. L.F. 11. As holders of the presumed abandoned property, Judge Kinder and the receiver were required, beginning November 1, 1986, to report to the Treasurer regarding the abandoned property. § 447.539, RSMo 1986 (as amended). No report has ever been filed regarding this presumed abandoned property. L.F. 10.

All moneys contained in the fund on November 1, 1979, plus all interest, dividends and other earnings accrued since that date, minus only necessary costs and payments made to claimants, were, as of November 1, 1986, and continue to be, presumed abandoned property which the holder is required by law to deliver to the Treasurer. § 447.543, RSMo 1986 (as amended). No portion of this presumed abandoned property has ever been paid to the Treasurer. L.F. 10.

Fund 2

Fund 2 was established in 1991, by respondent Brown, also from two consolidated cases. L.F. 12-13. These cases challenged a PSC order reducing Southwestern Bell telephone rates. L.F. 12. Respondent Brown stayed the PSC order and ordered Southwestern Bell to pay into the court registry the disputed telephone charges. L.F. 12. In his first order appointing a receiver, respondent Brown noted the funds had been previously required to be placed in interest bearing accounts as required by § 483.310.1, reserved unto himself authority for final investment decisions, and directed that there be no expenditures in excess of $500.00 without his written approval. L.F. 12.

On April 8, 1991, Judge Brown issued an "Order Approving Settlement and Directing Distribution of Stay Fund" and noted that the Stay Fund was in the possession of a receiver. L.F. 13. As of April 8, 1991, there remained in Fund 2 substantial sums of money because some customers owed a refund of telephone charges could not be located and others failed to cash their refund checks. L.F. 13. On April 26, 1993, Judge Brown entered an Order Closing Receivership and Transferring Funds into General Accounts of the Circuit Court. It noted that the funds represent a principal balance of $647,711 and a total balance of $778,683.97 as of April 21, 1993. Also on April 26, 1993, Judge Brown entered an Order Transferring Funds from the Registry of the Court and Appointing a Receiver. This order noted "these funds are being held and administered so that refunds may be made therefrom to utility consumers." L.F. 97. The order named a receiver, ordered that the moneys were to be invested, reserved unto Judge Brown authority regarding investment decisions, and directed that no expenditures in excess of $250.00 be made without his written approval. L.F. 13, 97-102.

The receiver invested the moneys in Fund 2 so that the original principal has earned interest and dividends. All interest and dividends from the principal are required to be added to the principal, minus only necessary and proper costs and payments to claimants, pursuant to § 483.310.1, RSMo 1986 (as amended). L.F. 13. The moneys in Fund 2 remained unclaimed by their owners for seven years after the fund was initiated on April 8, 1991, and as of April 8, 1998, were presumed abandoned pursuant to § 447.532, RSMo 1994. L.F. 14.

Judge Brown and the receiver, who makes payments from Fund 2 pursuant to orders of Judge Brown, are both "holders" of presumed abandoned property as that term is used in §§ 447.500 to 447.595. L.F. 11. As holders of the presumed abandoned property, Judge Brown and the receiver were required, beginning April 8, 1998, to report to the Treasurer regarding the abandoned property. § 447.539, RSMo 1994 (as amended). No report has ever been filed regarding this presumed abandoned property. L.F. 14.

All moneys contained in the fund on April 8, 1991, plus all interest, dividends and other earnings accrued since that date, minus only necessary costs and payments made to claimants, were, as of April 8, 1998, and continue to be, presumed abandoned property which the holder is required by law to deliver to the Treasurer. § 447.543, RSMo Supp. 1994 (as amended). No portion of this presumed abandoned

property has ever been paid to the Treasurer. L.F. 14.

Fund 3

The case establishing Fund 3 also involved a challenge to a PSC order that reduced Southwestern Bell's rates. L.F. 15. Judge Brown granted Southwestern Bell a temporary restraining order, prohibiting the implementation of rate reductions as ordered by the PSC, but directing Southwestern Bell to pay into the registry of the court all moneys collected from customers in excess of the rates set by the PSC. L.F. 15.

On February 17, 1994, Judge Brown issued an order finding that large sums of money will be paid over into the registry of the court and that a receiver should be appointed to hold and administer the moneys received. It directed that the moneys shall be placed in interest bearing accounts as required by § 483.310.1, that Judge Brown retain authority for final investment decisions and that the receiver not make and expenditures in excess of $500.00 without the written authority of Judge Brown. L.F. 16.

On October 7, 1994, Judge Brown entered an Order Approving Distribution of Stay Funds. It noted that the parties had reached an agreement and dismissed the review proceeding. L.F. 16. The order then set forth procedures for the proper distribution of the moneys collected by Southwestern Bell and paid into the court's registry pursuant to the court's previous orders. L.F. 16.

The receivers invested the moneys in Fund 3 so that the original principal has earned interest and dividends. All interest and dividends from the principal are required to be added to the principal, minus only necessary and proper costs and payments to claimants, pursuant to § 483.310.1, RSMo 1994 (as amended). L.F. 13. The moneys in Fund 3 remained unclaimed by their owners for more than five years, and as of January 1, 2000, were presumed abandoned property pursuant to § 447.532, RSMo Supp. 1999 (January 1, 2000, was the effective date of the amendment reducing the waiting period from seven to five years). L.F. 16.

Judge Brown and the receiver, who makes payments from Fund 3 pursuant to orders of Judge Brown, are both "holders" of presumed abandoned property as that term is used in §§ 447.500 to 447.595. L.F. 17. As holders of the presumed abandoned property, Judge Brown and the receiver were required, beginning January 1, 2000, to report to the Treasurer regarding the abandoned property. § 447.539, RSMo 1994 (as amended). No report has ever been filed regarding this presumed abandoned property. L.F. 17.

All moneys contained in the fund on October 7, 1994, plus all interest, dividends and other earnings accrued since that date, minus only necessary costs and payments made to claimants, were, as of January 1, 2000, and continue to be, presumed abandoned property which the holder is required by law to deliver to the Treasurer. § 447.543, RSMo Supp. 1994 (as amended). No portion of this presumed abandoned property has ever been paid to the Treasurer. L.F. 17.

Fund 4

On October 20, 1977, Judge Kinder entered an order placing Old Security Life Insurance Company in receivership. It was preceded and followed by extensive litigation to resolve claims regarding both the assets and liabilities of the company. L.F. 18. On December 31, 1986, Judge Kinder initiated a case by entering an Order appointing a receiver (L.F. 114) and an Order Regarding Distribution of Settlement Proceeds (L.F. 173). Fund 4 was created by these orders. The Order Regarding Distribution of Settlement Proceeds made findings of fact regarding efforts to find and make payments to claimants

owed refunds from the final settlement of the Old Security Life Insurance Company receivership. L.F. 18. As of December 31, 1986, substantial sums of money remained that had not been refunded to claimants because they could not be located or because refund checks were uncashed. L.F. 18. On December 31, 1986, Judge Kinder entered an order creating a receivership to hold the unrefunded moneys, appointed a receiver, noted that the funds were to be invested, reserved unto himself authority regarding investment decisions, and directed that no expenditures in excess of $250.00 shall be made without his written approval. L.F. 18-19, 114-119. Prior to the December 31, 1986 order, the moneys had been held by the law firm of Lathrop Koontz & Norquist. L.F. 19.

The receiver invested the moneys in Fund 4 so that the original principal has earned interest and dividends. All interest and dividends from the principal are required to be added to the principal, minus only necessary and proper costs and payments to claimants, pursuant to § 483.310.1, RSMo 1978 (as amended). L.F. 19. The moneys in Fund 4 have remained unclaimed by their owners from a date no later than December 31, 1986, and therefore were presumed abandoned no later than December 31, 1993, pursuant to § 447.532, RSMo 1986. L.F. 19.

Judge Kinder and the receiver, who makes payments from Fund 4 pursuant to orders of Judge Kinder, are both "holders" of presumed abandoned property as that term is used in §§ 447.500 to 447.595. L.F. 20. As holders of the presumed abandoned property, Judge Kinder and the receiver were required, no later than December 31, 1993, to report to the Treasurer regarding the abandoned property. § 447.539, RSMo 1994. No report has ever been filed regarding this presumed abandoned property. L.F. 19.

All moneys contained in the fund, plus all interest, dividends and other earnings accrued since at least December 31, 1986, minus only necessary costs and payments made to claimants, were, and continue to be, presumed abandoned property which the holder is required by law to deliver to the Treasurer. § 447.543, RSMo Supp. 1986 (as amended). No portion of this presumed abandoned property has ever been paid to the Treasurer. L.F. 19-20.

The Treasurer filed her Petition for Delivery of Unclaimed Property on July 25, 2001, based on the foregoing facts and relying on Missouri's unclaimed property law, § 447.500-.595. L.F. 8, Appendix (App.) A1. This law dictates that, upon expiration of the abandonment period, any holder's custody of the property now presumed abandoned must cease and the property be delivered to the protective custody of the Treasurer. L.F. 10, 14, 16, 17 and 19.

Judges Kinder and Brown disqualified themselves and this Court assigned the case to the Honorable Ward B. Stuckey. L.F. 3. The judges and receivers first filed motions to dismiss. L.F. 21-24; 25-32; 33-35; 50-64. The judges and receivers then filed motions for judgment on the pleadings. L.F. 36-37; 40-46. The judges and receivers noticed for hearing their motions for judgment on the pleadings for October 18, 2001. L.F. 38-39, 47-49. The Treasurer filed objections and suggestions in opposition. L.F. 65-72; 73-178. Following the hearing on the motions for judgment on the pleadings, the judges filed an answer on October 19, 2001. L.F. 179-185.

On December 17, 2001, the circuit court entered a written "Judgment on the Pleadings or in the alternative Order of Dismissal with Prejudice" in favor of the judges. L.F. 198-201, App. A14-A17. On February 11, 2002, the circuit court entered a written "Judgment on the Pleadings or in the alternative

Order of Dismissal with Prejudice" in favor of the receivers. L.F. 202-205, App. A18-A21. The circuit 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 pursuant to Article IV, § 15 of the Missouri Constitution. The circuit court held that such an action under the statute would exceed the limits placed on the duties of the 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 Government." Mo. Const. Art. IV, § 15. L.F. 199, 203. The court held that the funds in question are not state funds and, therefore, the Treasurer had no standing to bring the action. L.F. 199, 203. The circuit court further held that the present action by the Treasurer could not be sustained because the funds in question were subject to the pending case doctrine. L.F. 200, 203. The circuit court also determined that the action of the Treasurer in filing a petition for unclaimed property administered by the four receivers and controlled by the judges was an "attempt by the Treasurer to interfere with the orderly disposition of funds by the Cole County Circuit Court" and was therefore in violation of the doctrine of separation of powers contained in Article II, § 1 of the Missouri Constitution. L.F. 200, 204. The circuit court also determined the Treasurer's action was an attempt to "exercise superintending control and supervisory authority over the Circuit Court of Cole County in violation of Article V, § 4 of the Missouri Constitution." L.F. 200-201, 204. Finally, the circuit court determined that the assessment of penalties and interest against the respondent judges and a requirement that the respondent judges and receivers exhaust administrative remedies violated the separation of powers and that the judges and the receivers had absolute judicial immunity or the receivers had official immunity from the penalties and interest assessed. L.F. 201, 204-205.

This timely appeal followed on March 14, 2002. L.F. 206.

POINTS RELIED ON

I.

The circuit court erred in holding that the Treasurer lacked constitutional authority to administer the Uniform Disposition of Unclaimed Property Act as moneys to be delivered thereunder were not state funds because the authority to assign the Treasurer such duties is within the power granted to the Legislature by the Missouri Constitution in that the moneys to be received by the Treasurer are state funds to be deposited into an account created by a state statute for transfer to the state's general revenue fund or to their proper owner.

II.

The circuit court erred in holding that the Treasurer lacked standing to assert claims against the funds held by respondents because the Uniform Disposition of Unclaimed Property Act gives the Treasurer standing by obligating her to bring an action to enforce delivery of unclaimed property in that the funds are intangible personal property held for its owners by respondents that have remained unclaimed by the owner for longer than the statutory abandonment period and, hence, are properly subject to recovery by the Treasurer.

III.

The circuit court erred in holding that the Uniform Disposition of Unclaimed Property Act violates the doctrine of separation of powers because the Treasurer's act of petitioning the judicial branch of government for an order to enforce the delivery of abandoned property (under the authority granted by § 447.575) does not vest in the executive department powers or duties constitutionally assigned to the judiciary in that the power to dispose of abandoned property is neither an inherent judicial power nor a power assigned to the judiciary by the Missouri Constitution.

IV.

The circuit court erred in holding that the Treasurer's suit to recover unclaimed property constituted an unconstitutional exercise of superintending control and supervisory authority over the Circuit Court of Cole County because the Treasurer exercised no power within the meaning of superintending control or supervisory authority vested in the appellate courts in that the Treasurer's action in this matter was limited to the initiation of litigation within the Circuit Court of Cole County.

V.

The circuit court erred in holding that the funds are subject to the pending case doctrine and that the Treasurer's action thus could not be sustained because the pending case doctrine does not apply in that the Treasurer's cause of action is not the same as any pending case, the four cases creating the receiverships are closed, and requiring the Treasurer to present her case in the Ancillary Proceedings violates the doctrine of separation of powers.

VI.

The circuit court erred in granting respondents a judgment on the pleadings or alternatively a judgment of dismissal because that judgment violated the rule that courts may only grant a motion for judgment on the pleadings after the pleadings are closed or a judgment of dismissal following a hearing on such a motion in that the pleadings in this case were not closed when the motions for judgment on the pleadings were filed or heard and are still not closed as the respondent receivers have not answered and respondents have never noticed for hearing their motions to dismiss.

VII.

The circuit court erred in granting respondents' motions for judgment on the pleadings or alternatively a judgment of dismissal case because the judgments violate the rule that courts entertaining such motions may only consider matters contained in the pleadings in that the circuit court considered matters outside the pleadings in granting respondents' motions.

VIII.

The circuit court erred in holding that the judges and receivers had absolute judicial immunity and official immunity from a suit claiming penalties and interest because judicial and official immunity do not apply in that neither the judges nor the receivers were functioning in a judicial capacity when they administered the funds and the receivers' acts were ministerial in nature.

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).

ARGUMENT

I.

The circuit court erred in holding that the Treasurer lacked constitutional authority to administer the Uniform Disposition of Unclaimed Property Act as moneys to be delivered thereunder were not state funds because the authority to assign the Treasurer such duties is within the power granted to the Legislature by the Missouri Constitution in that the moneys to be received by the Treasurer are state funds to be deposited into an account created by a state statute for transfer to the state's general revenue fund or to their proper owner.

"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. *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973). If a statute may be so construed as to avoid conflict with the Constitution, this will be done. *Id*. The circuit court ignored these principles in the present case.

The circuit court held that it is beyond the constitutional authority of the Treasurer to administer the Uniform Disposition of Unclaimed Property Act. The court premised its holding on Article IV, § 15 of the Missouri Constitution which provides that "the 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 in the Constitution but other constitutional provisions and their constructions provide significant insight into its proper definition. Consider Article III, § 36, requiring all revenue collected and money received by Missouri to be deposited in the treasury. This section should be read to be in harmony with the limitations found in Art. IV, § 15 and has been the subject of informative construction by this Court. In *State ex rel. Thompson v. Board of Regents of Northeast Missouri Teacher's College*, 264 S.W. 698 (Mo. banc 1924), this Court defined the terms "revenue" and "state money."

> By revenue . . . is meant the current income of the State from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources . . . but, no matter from what source derived, if required to be paid into the Treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment or, as aptly put by the respondent, state money means money the State, in its sovereign capacity, is authorized to receive -- the source of its authority being the Legislature.

Id. at 700, recognized and approved by *Board of Public Buildings v. Crowe*, 363 S.W.2d 598, 607 (Mo. banc 1962). This logical definition of state money seems similarly applicable to the appropriate definition of state funds.

Further, while the term "state funds" is not specifically defined, the term "nonstate funds" is defined

and limited to "all 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.[3] Unclaimed property moneys deposited to the Abandoned Fund Account (§ 447.543.2) are not within the definition of nonstate funds; they are not local taxes collected by or on behalf of political subdivisions nor funds designated as nonstate funds by the Legislature.

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. But the circuit court essentially amended the constitutional definition of nonstate funds to include those moneys that the Treasurer is directed to deposit to a statutorily-created account and from which transfers are made to general revenue so long as those

[3] Some examples of money designated "nonstate funds" administered by the department of revenue are the U.S. Olympic Festival Trust Fund, § 143.1010 (dollars designated by tax payers from tax refunds); the Over-Dimension Permit Fund, § 226.135.3 (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 "nonstate fund."

funds are subject to the unasserted claims of others. In fact, explaining its holding that the moneys at issue are not state funds, the circuit court offered that the "Attorney General in fact argues that these funds are individual assets of divers (sic) persons." L.F. 199, 203. Under this judicially-enacted constitutional amendment, moneys collected by the Department of Revenue and transferred to general revenue could not be held by the Treasurer so long as they remained subject to a refund claim by the taxpayer. Such is not the law and it was not the province of the circuit 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).

There is no suggestion in the Constitution that Missouri must have an exclusive interest in moneys for them to constitute state funds. In fact, the constitutional definition of nonstate funds suggests that it is only those moneys constituting taxes to be distributed to local governments that are categorically nonstate funds. Here, where a large percentage of the funds deposited to the Abandoned Fund Account are subject to transfer to general revenue to meet the state's general obligations, it must be conceded that the state has an interest in the funds superior to all but the actual, unlocated, owner.[4]

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[4] Perhaps the circuit court suggests that these moneys 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 that are subject to a refund claim would not become state funds until after the taxpayers' beneficial interest in the taxes – protected by a statutory opportunity for refund – had expired. As the period of time to claim a refund is two years, § 136.035, a construction of "state funds" consistent with this suggestion would disrupt state finances.

The inclusive nature of "state funds" is revealed by the variety of funds received, invested, held, 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 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 Treasurer comprise donated funds to be applied to a very narrow and specific purpose, such as the "Doctor Edmund A. Babler Memorial 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 moneys 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 Treasurer. These moneys are considered state funds despite the narrow scope of permissible expenditures.

The abandoned property fund, § 447.543.2, is indistinguishable from the funds identified above in that it has a private funding source - not the state or federal government. However, the abandoned property fund has a much broader, in fact state-wide, purpose – 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 account. § 447.543.2. From this account, 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 statutorily-mandated disbursal of moneys from the abandoned property fund to general revenue to meet the state's general obligations is indicative of the fact that moneys deposited to the account constitute state funds as that term is used in the Constitution and is consistent with this Court's holding in *Thompson*, 264 S.W. at 700.

Having found that moneys to be deposited in the abandoned property fund do not constitute state funds, the circuit court concluded that the Treasurer could not administer the Act by relying 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, the circuit court narrowed the inclusive constitutional language. 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, holding it, delivering it to its rightful owners, and transferring any surplus to the general revenue fund, is surely "related to the receipt, investment, custody and

disbursement of state funds."[5]

The statutory duties imposed on the Treasurer by § 447.500-.595 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 circuit court's ruling. *See Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001). Thus, this Court should reverse the circuit court's ruling as to the unconstitutionality of the Uniform Disposition of Unclaimed Property Act.

[5] Even if this Court concluded that the statute's imposition of the duty on the Treasurer to collect unclaimed property from recalcitrant holders exceeded constitutional limitations, the prior statute, § 447.575, RSMo 1986, conferring this duty on the department director would be reinstated. *Missouri ex rel. SSM Health Care St. Louis v. Neill*, No. SC84092, slip op. at 2 (Mo. banc, June 25, 2002).

II.

The circuit court erred in holding that the Treasurer lacked standing to assert claims against the funds held by respondents because the Uniform Disposition of Unclaimed Property Act gives the Treasurer standing by obligating her to bring an action to enforce delivery of unclaimed property in that the funds are intangible personal property held for its owners by respondents that have remained unclaimed by the owner for longer than the statutory abandonment period and, hence, are properly subject to recovery by the Treasurer.

The circuit court found that the Treasurer lacked standing to enforce her right to receive unclaimed property despite the clarity of the statutes involved and the respondents' failure to conform their conduct to these clear statues to the detriment of the Treasurer's ability to perform her statutory functions. "Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury." *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). Under the express terms of the statutes, the Treasurer has an appropriate interest in the subject matter of this litigation and she, the State of Missouri, and the multitude of owners of the unclaimed property held by respondents continue to suffer an actual injury.

The statutory scheme enacted by the Legislature is designed to efficiently transfer unclaimed property from one holder, in this case respondents, to another holder, the Treasurer, until the true owners can be located.

> 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 imposes a duty on the holder of such property to deliver it to the Treasurer. This duty is 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 statute directs the Treasurer 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.

The judges and receivers 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 and all public officers 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). It is indisputable that the respondent judges are public officers. Mo. Const., Art. VII.

The moneys contained in the funds in this case meet the definition of unclaimed property as set forth

in § 447.532.1. The moneys constitute intangible personal property "held for the owner by any court ... or public officer of this state." Judges Kinder and Brown recognized this fact in their orders appointing the receivers when they stated that "these funds are being held and administered so that refunds may be made therefrom to" utility customers, telephone customers and unlocated class members. L.F. 91, 97, 107, 114. Thus, the moneys in question are being held for the owners (utility consumers, telephone customers and yet unlocated class members 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 moneys contained in the fund have "remained unclaimed by the owner for more than seven years or five years." § 447.532.1.[6]

Under these statutes, the Treasurer has a legally cognizable interest in the subject matter of this suit that is threatened by respondents' actions. As such, the circuit court's holding that she lacks standing to pursue her claim must be reversed.

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[6] Section 447.536 provides that the abandonment period referenced in §§ 447.505 to 447.595, shall change from seven to five years beginning January 1, 2000. The length of the abandonment period is not material to this action as the remaining moneys in all four funds have remained unclaimed for more than seven years. This year the Legislature amended § 447.532 to shorten the abandonment period for monies held by courts or other public officers to three years. *See*, SB 1248, App. A38. This legislation was signed by the Governor on June 19, 2002, and contains an emergency clause.

III.

The circuit court erred in holding that the Uniform Disposition of Unclaimed Property Act violates the doctrine of separation of powers because the Treasurer's act of petitioning the judicial branch of government for an order to enforce the delivery of abandoned property (under the authority granted by § 447.575) does not vest in the executive department powers or duties constitutionally assigned to the judiciary in that the power to dispose of abandoned property is neither an inherent judicial power nor a power assigned to the judiciary by the Missouri Constitution.

The circuit court held that "[t]he attempt by the Treasurer to direct the Cole County Circuit Court as to the disposition of the monies in question is an unconstitutional attempt by the Treasurer to interfere with the orderly disposition of the funds by the Cole County Circuit Court and it is therefore a violation by the Executive Department of the Doctrine of Separation of Powers contained in Article II, § 1 of the Missouri State Constitution. Further, to the extent that § 447.575 RSMo, is interpreted to provide authority for such action by the Treasurer, it is unconstitutional for the same reason." L.F. 204, 213. Article II, § 1 states that "[t]he powers of the government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." Mo. Const. Art II, § 1. But the Treasurer's exercise of her statutory authority does not infringe on any powers belonging to the judiciary.

As interpreted by this Court, the separation of powers clause is designed "to prevent the concentration of unchecked power in the hands of one branch of government." *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993). It proscribes the "exercise of powers or duties constitutionally assigned to one department by either of the other two." *Chastain v. Chastain*, 932 S.W.2d 396, 398 (Mo. banc 1996). It may be violated when one branch of government "interfere[s] impermissibly with the other's performance of its constitutionally assigned [power]." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). But it does not "erect an impenetrable wall of separation between the departments of government." *Dabin v. Director of Revenue*, 9 S.W.3d 610, 612-13 (Mo. banc 2000).

The Treasurer filed this action under the Uniform Disposition of Unclaimed Property Act seeking delivery of unclaimed property and interest properly accrued. She did so under generally applicable laws that created substantive rights and did not exercise powers constitutionally assigned to the judiciary or interfere impermissibly with the judiciary's performance of a constitutionally assigned power. In filing this action, the Treasurer followed statutes duly enacted by the Legislature and rules duly promulgated by the Missouri Supreme Court. Respondents are subject to the rule of law, including the law that authorized the Treasurer to bring this action.

A. The Executive Power

The Treasurer is within the executive department. Mo. Const. Art. IV, § 12. "Under our system of government, it is universally agreed that it is the function of the executive department, honestly and efficiently, to administer and enforce the laws as written . . . Thus, the power to administer and enforce the law lies solely with the executive branch." *State Auditor v. Joint Comm. on Legislative Research*,

956 S.W.2d at 231 (citation omitted). The Treasurer's action in filing this lawsuit amounts to nothing more than the discharge of her duty to administer and enforce the laws as written. She has not engaged in a power grab. The Legislature wrote the law; she is simply enforcing it. Section 447.575 of the Uniform Disposition of Unclaimed Property Act states that the Treasurer "*shall* bring an action in a court of appropriate jurisdiction to enforce . . . delivery" of property required to be delivered to the state under sections 447.500 to 447.595. § 447.575 (emphasis added). The moneys contained in the funds at issue meet the definition of unclaimed property as set forth in § 447.532.1. The moneys are intangible personal property "held for the owner by any court ... or public officer of this state." The judges recognized this very fact in their orders appointing receivers where they stated: "[t]hese funds are being held and administered so that refunds may be made therefrom to" utility consumers, telephone customers and yet unlocated class members. L.F. 91, 97, 107, 114.

B. The Legislative Power

The Uniform Disposition of Unclaimed Property Act was duly enacted by the Legislature. The Act – including its assignment of authority to the Treasurer – was well within the Legislature's power.

The legislative power of the Missouri General Assembly under Article III, § 1 of the Missouri Constitution is plenary (full, complete, and absolute) except as limited by other provisions of the Constitution. *State Auditor v. Joint Comm. on Legislative Research,* 956 S.W.2d at 231. Any constitutional limitation thereon must be strictly construed in favor of the power of the General Assembly. *Board of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994). Deference due the General Assembly requires that doubt be resolved against nullifying its action if possible to do so by any reasonable construction of its action or by any reasonable construction of the Constitution. *Id*. This Court is required to construe the General Assembly's enacted legislation in a manner that renders it constitutional and avoids the effect of unconstitutionality if reasonably possible. *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 73 (Mo. banc 1982).

The power of the Legislature to apply unclaimed property provisions to the courts was acknowledged in *State v. Snell*, 950 SW.2d 108 (Tex. Ct. App. 1997). In *Snell*, the State of Texas and Texas State Treasury challenged the trial court's order approving an allocation plan in a class action. Under the trial court's plan, settlement distribution checks or amounts which might be unclaimed, and which would otherwise be subject to the unclaimed property provisions of the Texas Property Code, would instead be paid to a charity designated by the trial judge. *Id*. at 110. The Texas Court of Appeals held that the trial court's order violated the express terms of the Texas unclaimed property statute because "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." *Id*. at 113. The Court explained: "The disposition of unclaimed property in the State of Texas is not left to the whim of the private citizens or the courts, and rightly so." *Id.* at 112. Instead, "the Texas Legislature has imposed a specific and detailed procedure for identifying, reporting, and tendering, and has further provided for governmental custody and distribution of unclaimed property." *Id.* The Court maintained that "[t]he judiciary of the State of Texas, as a third but nonetheless equal branch of government, is charged with the duty to interpret and apply the law as declared by the Legislature, and to give effect to its stated purpose or plan." *Id*. at 113.

Likewise, in Missouri, the disposition of unclaimed property is not left to the whim of private citizens or the courts. The Missouri General Assembly has enacted a law of general applicability, as opposed to

a law that impacts a specific case, which imposes a specific and detailed procedure for identifying, reporting, and tendering unclaimed property. RSMo, § 447.500 *et seq*. As in Texas, the Missouri law further provides for governmental custody and distribution of unclaimed property. As the *Snell* Court recognized, the judiciary, "as a third but nonetheless equal branch of government, is charged with the duty to interpret and apply the law as declared by the Legislature, and to give effect to its stated purpose or plan." 950 S.W.2d at 113. Missouri's Uniform Disposition of Unclaimed Property Act clearly mandates that courts report and deliver to the Treasurer intangible personal property held for the owner by the courts longer than the statutory abandonment period. § 447.532. The Missouri Legislature has expressly barred the courts from retaining unclaimed property in perpetuity or from diverting unclaimed property for a purpose other than payment to the owners. This legislative mandate must be given effect.

C. The Judicial Power

The judicial power of the state is vested in the courts designated in Article V, § 1 of the Missouri Constitution. "The authority that the constitution places exclusively in the judicial department has at least two components – judicial review and the power of courts to decide issues and pronounce and enforce judgments." *Chastain*, 932 S.W.2d at 399. "The 'quintessential element' of judicial review is the power to make final decisions as to questions of law." *Id*. at 400. The Uniform Disposition of Unclaimed Property Act does not authorize the Treasurer to exercise or impermissibly interfere with these powers dedicated exclusively to the judicial branch by the Constitution.

The Act does not allow the Treasurer to declare the law or pronounce and enforce final judgments. It does not permit the Treasurer to exercise judicial review. The Act merely classifies, as abandoned property, property held for an owner by any court that has remained unclaimed for a period of years. § 447.532. And it directs the Treasurer to initiate a cause of action *in the courts* against those wrongfully withholding unclaimed property. Her cause of action must be considered, determined and reviewed by the judicial department. *See Chastain*, 932 S.W.2d at 400.

The respondent judges exercised their constitutionally assigned powers when they made determinations regarding the legality of surcharges, charges, rates, and claims, and ordered the companies to pay refunds. The Treasurer took no part in these decisions. On the other hand, the judges have not been exercising a constitutionally assigned power when, years after these cases were closed, they invested funds and expended interest. Instead, they are acting in an administrative capacity, performing functions that the clerk normally performs in the absence of judicial intervention. *See* § 483.310.2.

This is not a situation in which there is litigation pending regarding whether the property is subject to distribution. In the four funds at issue, the original litigants (not to be confused with the owners who may continue to claim their property) long ago lost or relinquished any claim to the moneys in the four funds. The funds have long been payable or distributable to the owners, i.e., utility customers or insurance company claimants. The problem here is that the judges and receivers, who were never supposed to develop any interest in holding the funds, other than to see them returned to rightful owners, have improperly created a situation contrary to law in which they have an incentive to continue improperly controlling and expending the funds.

The judiciary may not interfere with the substantive rights created by the Legislature. "[T]he determination of whether a civil claim for relief exists is within the province of the legislature, or in the absence of legislative enactment, with the court as a matter of common law. *Kilmer v. Mun*, 17 S.W.3d

545, 552 (Mo. banc 2000). The principle that the judiciary may not abolish substantive rights is embodied in Article V, § 5, Mo. Const., granting this Court specific power to establish rules "relating to practice, procedure and pleading." Such rules have the force and effect of law. *Id*. Even here, however, there are constitutional constraints on the Court's power; "[t]he rules shall not change substantive rights." *Id*.

The Uniform Disposition of Unclaimed Property Act and § 483.310.1 create substantive rights. "[S]ubstantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to a cause of action, while procedural law is the machinery used for carrying on the suit." *Wilkes v. Missouri Highway and Trans. Comm'n,* 762 S.W.2d 27, 28 (Mo. banc 1988).

The Uniform Disposition of Unclaimed Property Act and § 483.310.1 create substantive rights in the owners of unclaimed property held by courts and invested pursuant to an exercise of judicial power. Under the Act, every person who transacts business with specific private entities and with public entities in this state knows that, to the extent that the transaction leaves one party with moneys belonging to the other, the residual amount will be protected. If these moneys are held by a court and invested pursuant to a judicial order, the interest generated, minus only reasonable expenses, will become part of the principal. After a suitable period of time, the moneys will be transferred to the Treasurer who is duty bound to make reasonable efforts to reunite the moneys with their true owner. The principal amount and accumulated interest will remain available in perpetuity. It is difficult to imagine a set of rights more properly denominated as substantive or more clearly designed to foster an appropriate relationship between people and their government. All this the circuit court ignored in order to bestow upon respondents unchecked power.

If there is one aspect of the doctrine of separation of powers that the Founding Fathers agreed upon, it is the principle: "To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power." Montesquieu, The Spirit of Laws (Edinburgh, 1772) Bk. XI, C. IV. The Uniform Disposition of Unclaimed Property Act provides what here, unfortunately, proves to be a necessary check on the judicial branch.

IV.

The circuit court erred in holding that the Treasurer's suit to recover unclaimed property constituted an unconstitutional exercise of superintending control and supervisory authority over the Circuit Court of Cole County because the Treasurer exercised no power within the meaning of superintending control or supervisory authority vested in the appellate courts in that the Treasurer's action in this matter was limited to the initiation of litigation within the Circuit Court of Cole County.

The circuit court held that the Treasurer's action was an attempt to "exercise superintending control and supervisory authority over the Circuit Court of Cole County in violation of Article V, § 4 of the Missouri Constitution." L.F. 201, 204. But the Treasurer is not acting as a superior court vis-a-vis respondents in this proceeding. Rather, she filed her case in the Cole County Circuit Court, pursuant to the provisions of the Act that require her to "bring an action in a court of appropriate jurisdiction to enforce . . . delivery" of abandoned property. § 447.575.

In no discovered case has a superior court in Missouri exercised its superintending control and supervisory authority over an inferior court by filing a lawsuit against the judges of the inferior court. Rather, superior courts in Missouri appear to exercise this control or authority primarily by the issuance of writs (at the behest of litigants) and beyond that "only to the matter of compelling the proper performance of purely ministerial duties." *State ex rel. St. Louis Boiler and Equip. Co. v. Gabbert*, 241 S.W.2d 79, 82 (Mo. App. 1951). The Treasurer, in filing suit, certainly issued no extraordinary writ nor did she attempt to issue an order compelling the performance of purely ministerial duties. Rather, she asked a court of proper jurisdiction to compel respondents to discharge their ministerial duties. This can in no way be construed as the exercise of superintending control or supervisory authority.

V.

The circuit court erred in holding that the funds are subject to the pending case doctrine and that the Treasurer's action thus could not be sustained because the pending case doctrine does not apply in that the Treasurer's cause of action is not the same as any pending case, the four cases creating the receiverships are closed, and requiring the Treasurer to present her case in the Ancillary Proceedings violates the doctrine of separation of powers.

The circuit court held that the funds were "the subject of presently existing litigation, i.e. the receiverships and trusteeship" and, "because there is a pending case which already has jurisdiction over these funds," the funds are subject to the "Pending Case Doctrine." L.F. 200, 203. Hence, the circuit court found that the present action by the Treasurer could not be sustained. But the "pending case doctrine," properly construed, has no application here. **A. Not same cause of action**

It has long been recognized in Missouri that "pendency of a prior action or suit for the same cause of action, between the parties, in a court of competent jurisdiction, will abate a later action or suit, either in the same court or another court of the same jurisdiction." *Erdman v. Auer*, 444 S.W.2d 427, 431 (Mo. banc 1969). But 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). There is no pre-existing action between the Treasurer, respondent judges and receivers seeking the delivery of unclaimed property. The issues for determination presented in this unclaimed property action have not vested in any other court. This action, seeking the delivery of unclaimed property, is fundamentally different from any other previously pending case.

B. No pending cases - the four cases creating the receiverships are closed.

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) (intervention denied to raise issues related to child custody after final judgment had been entered in dissolution proceeding because there was not a proceeding pending in which one could intervene).

The four lawsuits that created the receiverships were filed in the years 1976, 1986, 1989, and 1994. The issues raised by the multiple parties in the cases concerned the proper utility rate charges or claims against an insolvent insurance company. All the issues raised by all parties in those original lawsuits have long since been litigated, appealed, and/or settled to full and final resolution. Under the law applicable at the time these precursor cases were 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" or "decree"). The decisions of the courts accepting the settlements and resolving the issues between the plaintiffs and defendants in the precursor cases were final judgments.

In the litigation that created Fund 1, judgment was entered by Judge Kinder on May 31, 1977, upholding the validity of the fuel surcharge. The Missouri Supreme Court reversed and remanded the case to the circuit court for a determination of the amounts due, to whom, and the proper method of restitution. L.F. 9. This finally determined the validity of the surcharge, leaving open only the amount and process of

refunds. Judge Kinder entered an order dated October 19, 1979, directing the utilities to file a refund plan containing amounts to be refunded, requiring the utilities to implement the plan and directing that at the end of twelve months any amount unrefunded shall be paid into the registry of the court. Stipulations and orders regarding the amounts due, to whom, and the method of restitution were filed by the multiple utilities involved in the litigation from October 1979 until May 1981. Once the utilities had deposited the funds into the registry of the court, all moneys raised by the parties and all duties imposed on the parties had been resolved and satisfied; there ceased to be a "pending case." L.F. 91-95.

In the litigation that created Fund 2, the petition for review of utility rates was filed in the Cole County Circuit Court on July 21, 1989. On April 26, 1993, Judge Brown found that all material terms associated with his April 8, 1991 "Order Approving Settlement and Directing Distribution of Stay Fund" had been satisfied, that the receivership initially established on or around October 17, 1990 shall be closed, and that all remaining funds be placed into the general accounts of the circuit court. On that same date Judge Brown created a new receivership, appointed a receiver and directed that she hold, invest and administer the funds. L.F. 97-102.

In the litigation that created Fund 3, Southwestern Bell, on January 11, 1994, petitioned for review of a decision of the Public Service Commission. 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. 104-105. The issue between the parties were resolved and the parties were no longer before the court. Much later, on January 26, 1996, Judge Brown ordered that funds held in a previously created receivership be transferred to a successor receivership, noting that $63,915,156.04 had been refunded but moneys still remained that were due individual telephone customers who could not be located. L.F. 107-112.

In the litigation that produced the moneys used to create Fund 4, Old Security Life Insurance was placed into receivership by order of Cole County Circuit Court on October 20, 1977. A final order disposing of outstanding issues regarding distribution of the settlement proceeds was entered by Judge Kinder on December 31, 1986. This order was used to create a new case in which the court deposited the moneys that became fund 4.[7] The order directed the parties to pay to the court-appointed receiver all settlement proceeds still undistributed. L.F. 114-119.

[7] This "case" was created without the filing of a petition in violation of Rule 53.01. Hence, it was never a "pending" case.

In each of these cases there ceased to be a pending case when the issues presented by the parties were resolved and no parties were before the court. The judges' jurisdiction of these matters ended 30 days after the date entering the final order resolving all of the issues of all of the parties to the action. Supreme Court Rule 75.01.[8] From that time forward the judges were without jurisdiction to take any further action. *See State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928 (Mo. 1997) (en banc); *see also State of Missouri ex rel. Division of Family Servs. v. Oatsvall*, 612 S.W.2d 447, 451-52 (Mo. App. 1981). The "orders" subsequently entered by the judges were simply documentation of the administrative actions taken with regard to the funds.

The judges' and receivers' contention that all issues regarding the fund must be resolved in the precursor cases is similar to the position of the respondent judge in *Oatsvall*. There, the respondent judge had issued untimely modification orders in closed cases and without benefit of any motion filed by any party. The Court rejected such unilateral action in unambiguous language, holding:

> 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

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[8] In fact, in response to a writ filed in one of the precursor cases, this Court clearly stated the rule and its converse. There, Judge Brown initially entered an order dismissing the 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 challenging Judge Brown's authority to issue the second order. This Court first restated the rule; the circuit 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) (internal quotations omitted). However, because Judge Brown issued a new order "29 days after the 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.*

> 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.

Oatsvall, 612 S.W.2d 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 v. Weinstein*, 413 S.W.2d 178, 181 (Mo. banc 1967).

C. Violates Separation of Powers

The circuit court found that the Treasurer failed to bring her claim for the moneys comprising funds 1 through 4 in the precursor cases as supposedly required. There is no such requirement. 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. The circuit court's finding that the Treasurer must assert any claim she has to these disputed funds in ancillary proceedings created from closed cases 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 of this state may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where . . . the law vests such right to exercise judgment in a discretionary manner with the 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.").

VI.

The circuit court erred in granting respondents a judgment on the pleadings or alternatively a judgment of dismissal because that judgment violated the rule that courts may only grant a motion for judgment on the pleadings after the pleadings are closed or a judgment of dismissal following a hearing on such a motion in that the pleadings in this case were not closed when the motions for judgment on the pleadings were filed or heard and are still not closed as the respondent receivers have not answered and respondents have never noticed for hearing their motions to dismiss.

Rule 55.27(b), Mo.R.Civ.P., provides: "*After* the pleadings are closed . . . , any party may move for judgment on the pleadings." (Emphasis added.) Here, respondent judges filed their motions for judgment on the pleadings and noticed them for hearing on October 11, 2001. L.F. 4-5. Respondent receivers filed their motion for judgment on the pleadings and notice of hearing on October 12, 2001. *Id*. The hearings on the motions for judgment on the pleadings were noticed for and heard on October 18, 2001. *Id*. Respondent judges filed their answer on October 19, 2001 (L.F. 5), while the respondent receivers have never answered. Hence, the pleadings were not closed prior to the filing of the motions for judgment on the pleadings and any such judgment is void. *Branson v. U-Haul*, 945 S.W.2d 676, 679 (Mo. App. 1997) (ruling of trial court granting judgment on the pleadings is premature when answer, closing the pleadings, had not been filed).

Respondent Brown and the respondent receivers filed motions to dismiss on August 24, 2001, while respondent Kinder filed his motion to dismiss on August 27, 2001. L.F. 3-4. These motions were never noticed for hearing and, thus, could not have been properly granted.

> It is a cardinal principle of the law that whenever a party's rights are to be affected by a summary proceeding or motion in court, he shall have timely notice thereof in order that he may appear for his own protection. . . . If the court passed upon the joint motion without giving the parties prior notice and an opportunity to be heard there can be no reasonable doubt that the judgment entered was void and should have been set aside.

Humphrey v. Humphrey, 362 S.W.2d 92, 94 (Mo. App.1962) (citations omitted).

The circuit court could not simply convert the motions for judgment on the pleadings into an unnoticed motions to dismiss. When the Treasurer went to the October 18 hearing on motions for judgment on the pleadings, she entered the courtroom with an absolute defense to the pending motions for judgment – the pleadings were not closed. A post-hearing judicial conversion of the motions for judgment on the pleadings into motions to dismiss denied the Treasurer due process.

VII.

The circuit court erred in granting respondents' motions for judgment on the pleadings or alternatively a judgment of dismissal case because the judgments violate the rule that courts entertaining such motions may only consider matters contained in the pleadings in that the circuit court considered matters outside the pleadings in granting respondents' motions.

The circuit court's judgment made findings and conclusions about matters not within the pleadings before the court in this proceeding. Specifically, the circuit court on multiple occasions accepted as true allegations that the Treasurer made assessments against respondents concerning the disputed funds and further concluded that the cases in which the four funds were created were "class actions" or matters "in the nature of class actions." L.F. 199, 202. The petition filed by the Treasurer in this matter contains no allegations regarding these topics.

While the Treasurer had, in fact, issued notices of assessments to the judges and receivers pursuant to statutory authority prior to filing the current action for delivery of unclaimed property, no allegations are made concerning these notices in the pleadings properly before the circuit court in this case. Instead, the judges and receivers challenged these earlier-issued assessments in a separate case, No. 01CV325409, currently pending in the Circuit Court of Cole County. That pending circuit court case and the issues raised therein are not before this Court nor were they before the circuit court in the case at bar. No pleading before the court conceded that the cases in which the funds were created were class actions or actions in the nature of class actions. As these allegations were not before the circuit court in a proper pleading in this case, the circuit court erred in considering these matters outside the pleadings in ruling the motions for judgment on the pleadings. *Arnold v. American Family Mutual Ins. Co.*, 987 S.W.2d 537, 539 (Mo. App. 1999).

VIII.

The circuit court erred in holding that the judges and receivers had absolute judicial immunity and official immunity from a suit claiming penalties and interest because judicial and official immunity do not apply in that neither the judges nor the receivers were functioning in a judicial capacity when they administered the funds and the receivers' acts were ministerial in nature.

The circuit court did not specifically address the question of the Treasurer's entitlement to recover interest generated by the funds (as requested in the pleadings). The abandoned property that must be delivered to the State includes not only the original principal but also interest. § 447.533. Further, the funds at issue were subject to the constraints of § 483.310.1. 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). Because the investment and expenditures from these funds were dictated by judicial order, and not at the discretion of the circuit clerk as required by § 483.310.2, these funds are subject to the constraints of § 483.310.1. The circuit court failed to clearly address and resolve the Treasurer's entitlement to interest under these statutory provisions. Instead of addressing the Treasurer's request for interest, the circuit court appears to have made a ruling regarding the Treasurer's assessment, which was not an issue in this case. Furthermore, judicial immunity and official immunity are not applicable to the issues that are before this Court.

A. Judicial immunity is not applicable.

The Treasurer does not violate the doctrine of judicial immunity by seeking the delivery of unclaimed property. This relief is in the nature of a mandatory injunction. To the extent that the Treasurer's petition seeks injunctive relief – delivery of the presumed abandoned property and the interest the property generated – judicial immunity does not apply. *See Pulliam, Magistrate for the County of Culpeper, Virginia v. Allen et al.*, 466 U.S. 522 (1983) (holding that injunctive relief against a judge, though rarely ordered, is not barred by judicial immunity).

It must be noted that judicial immunity is relevant, if at all, to the extent that the Treasurer's petition seeks payment of penalties. Judicial immunity is a common law doctrine, *see State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 382 (Mo. App. 1993), not a constitutional doctrine, and therefore subject to change by statute. Here the statute, § 447.577, authorizes the Treasurer to secure penalties from delinquent holders of unclaimed property. Because the law explicitly applies to courts and all public officers, the statute effectively waived any immunity the judges might have otherwise enjoyed.

It is important to draw a distinction between "truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. . . . [I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988). The United States Supreme Court has repeatedly recognized this distinction stating: "[T]his Court, has long favored a 'functional' inquiry--immunity attaches to particular official functions, not

to particular offices." *Westfall v. Erwin*, 484 U.S. 292, 296 n.3 (1988); *see State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 382 (Mo. App. 1993) (citing cases).

Since the conclusion of the cases in which the funds were created, respondents' only role has been to hold the moneys for the owners. A review of the docket sheets since the cases were closed (L.F. 125-178) reveals that the judges' and receivers' actions have been no different than that of private holders of unclaimed property such as banks, i.e., giving notice (here rarely) of the existence of the unclaimed funds, investing the funds, paying necessary expenses, and paying (equally rarely) valid claims. These are administrative, not judicial functions, particularly in light of the fact that the cases in which the judges purported to act are closed. As such, they are not entitled to judicial immunity. *See Forrester,* 484 U.S. at 224; *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir. 1984).

The rationale for judicial immunity is that it exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, [in] whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986) (citing to *Pierson v. Ray,* 386 U.S. 547, 554 (1967)). This rationale presumes that the function being exercised is a judicial function, because it is not in the public interest to allow judges to hold and spend money, owned by others, with independence and without fear of consequences.

Quasi-judicial immunity can extend to clerks and receivers who perform judicial functions at the direction of and under the jurisdiction of a court. However, this does not help the receivers since their actions were not judicial in nature (they acted in place of the circuit clerk) and their actions were merely ministerial. *See Grant v. Fletcher,* 564 S.W.2d 944 (Mo. App. 1978) (and the cases cited therein).

B. Official Immunity is not applicable.

The official immunity doctrine exempts public officials from liability resulting from their discretionary acts or omissions, but permits the imposition of liability while performing ministerial acts. *Kanagawa v. State*, 685 S.W.2d 831, 835 (Mo. banc 1985). Whether a function is discretionary or ministerial is a case-by-case determination. *Charron v. Thompson*, 939 S.W.2d 885, 886 (Mo. banc 1997). A discretionary act requires the exercise of professional expertise and judgment "in the adaption of means to an end, and discretion in determining how or whether an act should be done or a course pursued." *Kanagawa*, 685 S.W.2d at 836 (quoting *Rustici v. Weidemeyer*, 673 S.W.2d 762, 769 (Mo. banc 1984)).

A ministerial function, in contrast, is one that a public official is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the officer's own judgment or opinion concerning the propriety of the act to be performed. *Charron*, 939 S.W.2d at 885. A ministerial function is the antithesis of a function that is left to be performed in a manner the acting official believes to be "appropriate" or "suitable." *Warren v. State,* 939 S.W.2d 950, 954 (Mo. Ct. App. 1997).

The acts of reporting abandoned property and delivering abandoned property were required to be performed on these facts, in a prescribed manner, in obedience to the mandate of the Uniform Disposition of Unclaimed Property Act, §447.500-.595 and § 483.310.1. They constitute ministerial functions to which official immunity does not apply.

CONCLUSION

For the reasons stated above, the judgment of the circuit court should be reversed and this matter remanded to the circuit court for further proceedings.

Respectfully submitted,

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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 15,577 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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