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 Reply Brief

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Argument

I.

Factual Matters

Respondents add no new relevant facts. They do not dispute that the funds at issue were deposited into the registry of the court, that this money was held so that refunds could be made to utility consumers, telephone customers and insurance company claimants, and that they never reported or delivered the money to the Treasurer after the expiration of the abandonment period pursuant to the provisions of the Uniform Disposition of Unclaimed Property Act (hereafter the UPA). They seek to place before the Court additional facts not found in appellant's petition. Such attempts should be rejected. As this case is before the Court as a result of the trial court granting respondents' motions for judgment on the pleadings, the facts as alleged by the Treasurer in her petition and all reasonable inferences that can be drawn from them are deemed admitted.

The Treasurer was not required to file a pleading seeking a ruling in the long-closed underlying cases, as the judges suggest. She has statutory authority to file the action she filed. §447.575. Although the judges object to being treated as "adversaries," the judges themselves recognized the adversarial position they were taking with respect to the funds when, on May 3, 2001, they ordered Alex Bartlett to enter into "settlement negotiations" with the Treasurer. *See* L.F.43 (SC84210). That this order discloses, inaccurately, the content of those negotiations illustrates the origin of the adversarial nature found in these proceedings.

II.

Consistent with the Constitution, the Treasurer may administer the Unclaimed Property Act and enforce her right to receive funds. The current Act was not enacted in violation of the single subject and clear title requirements of the Constitution. (Addressing Receivers' Point I and partially addressing Judge's Point III.)

The judges argue that the abandoned property fund, §447.543.2, is not a state fund because "less than one percent of the money is on hand." JudgesBr.,16. The judges are apparently referring to the following provision of the UPA: "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. But the judges never explain why a transfer from one state fund (abandoned property fund) to another state fund (general revenue), makes the first fund not a state fund. The answer is that it does not.

The receivers' incorporated argument discusses a wide variety of funds and asserts that they are not state funds. *See* Rec.Brf., SC84210, 68-69. For example, receivers direct the Court's attention to unemployment taxes. But unemployment taxes, as authorized by Art. IV, § 15, are "separate and apart from all public moneys or funds of this state." §228.290. Unemployment taxes certainly do not meet the test appellant has proffered for state funds – funds "to be paid into the Treasury" and "subject to appropriation for public uses" by the legislature. *State ex rel. Thompson v. Board of Regents of Northeast Missouri Teacher's College,* 305 Mo. 57, 264 S.W. 698, 700 (1924). In contrast,

moneys delivered to the Treasurer pursuant to the terms of the UPA are required to be deposited to the Treasury and are only expended by appropriation.

Receivers recognize that the provisions of Senate Bill No. 1248 "were not addressed by Judge Stuckey or the parties in the Circuit Court" and "need not now be considered by this Court." Receiver's Brief (Rec.Brf.),45. Appellant concurs and, thus, receivers' subsequent three-page discussion of Senate Bill No. 1248 requires no response. As "this Court has not historically claimed for itself an extra-constitutional authority to issue advisory opinions as to the constitutionality of . . . newly-enacted statutes before an action is filed challenging their legality or before a full factual development of the issues in the trial court," this Court should not now consider challenges to S.B. 1248. *Comm. for Educational Equality v. State,* 878 S.W.2d 446, 459 (Mo.banc 1994) (Robertson, J., concurring).

As receivers adopt by reference receiver's arguments for this Point as set forth in Point I of receiver's Brief in SC84210, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part II of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in her Reply Brief in SC84210:

State Highway Comm'n v. Spainhower, 504 S.W.2d 121, 125 (Mo. 1973)

State ex rel. Thompson v. Regents for Northeast Missouri State Teacher's College, 264 S.W. 698 (Mo.banc 1924)

Board of Public Buildings v. Crowe, 363 S.W.2d 598, 607 (Mo.banc 1962)

Hatfield v. McCluney, 893 S.W.2d 822, 829 (Mo.banc 1995)

Art. III, § 36, Missouri Constitution

Art. IV, § 15, Missouri Constitution

Laws of Missouri 1994, S.B. 757, p. 1051 ("Ownership and Conveyance of Property: Lost and Unclaimed Property")

110 Op. Att'y Gen. 3 (January 12, 1970)

III.

The separation of powers doctrine and other doctrines posited by the receivers and judges do not invest circuit judges with the power to control or expend funds, deposited by litigants in the registry of the court, in violation of state law. (Addressing Receivers' Points II and III and Judges' Point I and partially addressing Judges' Point III.)

The judges argue that the Treasurer cannot sue them because they are not the court. But the judges and receivers are "holders" of presumed abandoned property as that term is defined in the UPA. They are "person[s] in possession of property subject to sections 447.500 to 447.595 belonging to another." §447.503(5). And because the receivers' ability to turn over the funds is limited by the judges' orders, the receivers *and* the judges were named as parties. The judges argue that the Treasurer will next sue Judge Stuckey and "continue *'ad infinitum'* until all the judges of Missouri's judicial department are respondents." JudgesBr.,11. But Judge Stuckey and the rest of Missouri's judicial department are not "holders" of the property under the UPA. And although Judges Brown and Kinder note that they recused themselves from deciding the Ancillary Adversary Proceeding Questions, the Treasurer notes that in their recusal orders they declare that they are retaining control of the funds. Hence, they remain holders of the unclaimed property.

The judges next claim that the Treasurer cannot bring a claim against them pursuant to §447.575 because they are not "persons" under the UPA. They make this claim even though the definition of "person" includes "an individual," arguing that the definition "does not include people serving as judges." JudgesBr,12. But unless people serving as judges are not individuals, the definition includes the respondents here. Furthermore, respondent judges are subject to the UPA pursuant to §447.532.1,

regulating courts and public officers of this state.

The judges argue that the Treasurer's lawsuit violates the separation of powers doctrine. They quote Article II, § 1 of the Missouri Constitution, but cite no caselaw and never explain how the provision applies to the facts of this case. JudgesBr.,15-16. The Treasurer filed a lawsuit in circuit court that she was authorized and required to file under the UPA. In doing so, she has not exercised powers constitutionally assigned to the judiciary or interfered impermissibly with the judiciary's performance of a constitutionally assigned power. She therefore has not violated the separation of powers doctrine.

The receivers' lengthy incorporated argument describes *Van Gemert v. Boeing Co.,* 739 F.2d 730 (2d Cir. 1984) as "the leading case" for the proposition that trial courts have authority to determine the disposition of funds under their control notwithstanding the provisions of 28 U.S.C. §§2041-2044. Rec.Brf., SC84210, 84. The rationale offered by the *Van Gemert* court is clearly the same as respondents would have this Court adopt. The court said: "we refuse to put the legal shackles of §§2041 and 2042 on the hands of a court which strives to do equity." *Id*. at 736.[1] A simple refusal to follow a statute is not a precedent worthy of this Court's adoption.

But further examination of the opinion proves beneficial. As it relates to §§2041 and 2042, *Van Gemert* concerns whether funds held by a court should be deposited into the Treasury. That is not the

[1] Appellant notes that the court in Boeing required Boeing to publish notice that it held funds belonging to others and to have the judgment fund available in perpetuity for all future valid claims. This is certainly analogous to that which appellant seeks, though she will additionally seek out those to whom the money is owed.

issue before this Court. The funds here have already been placed in the registry of the court and Missouri has no requirement that court registry funds be initially deposited with the Treasurer. *Van Gemert* was not concerned with the proper disposition of funds that have been held by the court for a period in excess of the time prescribed by statute. In fact, the *Van Gemert* court clearly states, "[s]ections 2041 and 2042 will control when a court so orders or when the court fails to make any disposition of this type of fund." *Id*. at 735. Thus, faced with the issue before this Court, the *Van Gemert* court would enforce the UPA. Such a decision would be entirely consistent with the Supreme Court's finding in an earlier *Van Gemert* appeal, that "the members of the class, whether or not they assert their rights, are at least equitable owners of their respective shares in the recovery." *Boeing Co. v. Van Gemert*, 444 U.S. 479, 481-82 (1980).

Van Gemert cannot be considered the leading case for the proposition respondents posit; that trial courts have unlimited discretion in the disposition of funds deposited to the registry of the court. In fact, it does not even support respondents' contention. The most analogous case to the facts before the Court is surely *State v. Snell*, 950 S.W.2d 108 (Tex.Ct.App. 1997), to which respondents have not responded.

If this Court were to seek direction from the federal courts, the Treasurer would direct the Court's attention to *Hansen v. U.S.*, 340 F.2d 142 (8th Cir. 1965). In *Hansen*, the court had previously found that the defendant had charged rents in excess of permissible levels. Judgment was entered and moneys were collected for deposit into a trust account within the Treasury of the United States. The funds were held for the benefit of overcharged consumers. The court noted: "[t]here is no statute authorizing the Court to direct payment of these trust funds to any person other than the designated beneficiaries or their estates." *Id*. at 143. The original judgment debtor, relying on the law of trusts, suggested that the unclaimed funds

should be paid to him. The court rejected the argument, stating: "[t]he trust fund here involved is created by federal law. The federal statutes heretofore described [including 28 U.S.C. §2042] control the proper disposition of the trust fund." *Id*. at 144.

It is much the same here. The funds here deposited and invested were held in a statutory trust. §483.310.1. As such, state statutes (§447.500, et seq.) control their proper disposition. As the proceedings that created these funds were statutory proceedings, (§375.1150, et seq., §386.510 and §386.520), it is within the Legislature's power to enact statutes to control the disposition of unclaimed funds remaining following the conclusion of these statutory proceedings.

As receivers adopt by reference their arguments for this Point set forth in their Briefs in SC84210, SC84211, SC84212 and SC84213, the Treasurer adopts by reference her reply to receiver's arguments for these Points set forth in Part III of her Reply Briefs in SC84210, SC84211, SC84212 and SC84213.

The Treasurer sets forth here the authorities which are set forth in her Reply Briefs in SC84210, SC84211, SC84212 and SC84213:

Bosworth v. Sewell, 918 S.W.2d 773, 777 (Mo.banc 1996)

Cantwell v. Merritt, 988 S.W.2d 51, 55 (Mo.App. 1999)

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Comfort v. Higgins, 576 S.W.2d 331, 336 (Mo. 1978)

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Missouri Highway and Transp. Comm'n v. Meyers, 785 S.W.2d 70, 73 (Mo.banc 1990)

State ex rel. Nixon v. Am. Tobacco Co., No. ED76054 (2000 Mo.App. Lexis 90) (slip op. at 10, January 18, 2000), *aff'd on other grounds*, 34 S.W.3d 122 (Mo.banc 2000)

State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228 (Mo.banc 1997)

State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo.banc 1982)

State v. Snell, 950 SW.2d 108 (Tex.Ct.App. 1997)

Tinch v. State Farm Ins. Co, 16 S.W.3d 747, 751 (Mo.App. 2000)

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§447.543, RSMo

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§470.270, RSMo

§483.310.2, RSMo

Art. IV, § 13, Missouri Constitution

IV.

The Treasurer has exercised no power within the meaning of superintending control or supervisory authority vested in the appellate courts. (Addressing Judges' Point II.)

The judges argue that the Treasurer's lawsuit violates the constitution because the Treasurer has no superintending power over circuit courts. They quote Article V, § 4(1) of the Missouri Constitution, but cite no caselaw and never explain how the provision applies to the facts of this case,[2] other than to state it "sure seems like supervision to them." JudgesBr.,15. The Treasurer filed a lawsuit in circuit court that she was authorized and required to file under the UPA. In doing so, she has not exercised superintending power over a circuit court. She has asked a circuit court to decide whether the funds should be delivered pursuant to the provisions of the UPA. Asking a circuit court to enforce the law is not "supervision," even when it is requested that the law be enforced against judges.

[2] The judges refer in their argument to assessments against the judges. JudgesBrf.,15. Those assessments are not part of this case. The judges challenged these assessments in a separate case, No. 01CV325409, currently pending in the Circuit Court of Cole County.

V.

Circuit judges may not expend interest generated by money deposited to the court's registry when it was invested by judicial order pursuant to §483.310.1, not at the discretion of the circuit clerk as required by §483.310.2. No colorable authority exists for the apparent transfer of fund principal to Cole County. (Addressing Receivers' Point IV.)

As receivers adopt by reference their arguments for this Point as set forth in their Briefs in SC84210, SC84211, SC84212 and SC84213, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part IV of her Reply Briefs in SC84210, SC84211, SC84212 and SC84213.

The Treasurer sets forth here the authorities which are set forth in her Reply Briefs in SC84210, SC84211, SC84212 and SC84213:

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 165 (1980)

Phillips v. Washington Legal Foundation, 524 U.S. 156, 172 (1998)

§483.310, RSMo

91 Op. Att'y Gen. 32 (May 15, 1991)

VI.

The trial court erred in granting the Motion for Judgment on the Pleadings because the case was not ripe for such adjudication in that Respondents had not filed answers and the pleadings were not closed. (Addressing Receivers' Point V.)

Receivers adopt by reference receiver's arguments for this Point set forth in Point V of receiver's Brief in SC84210. Thus, receivers do not dispute that they did not file an answer. The judges do not respond to this argument at all, but it is undisputed that the judges filed their motion for judgment on the pleadings prior to filing an answer in this case.

Receivers argue that their motion for judgment on the pleadings could be considered a motion to dismiss, citing *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676 (Mo.App. 1997). But receivers and the judges filed, but did not call for hearing, motions to dismiss. Failing proper notice, these motions could not properly have been granted. And *Bramon* held that the ruling of a trial court granting judgment on the pleadings is premature when the answer has not been filed. It then proceeded to sustain the trial court's ruling on the motion to dismiss that were properly before the trial court. *Id*. at 679. Here, the motions to dismiss filed by the respondents were not properly before the trial court as they have never been noticed for hearing.

VII.

The circuit judge erred in holding that the funds are subject to the pending case doctrine because the Treasurer's cause of action is not the same as any pending case and the underlying cases are not pending cases. (Addressing Receivers' Point VI and Judges' Point V.)

The judges argue that the pending case doctrine prohibits the Treasurer from bringing her unclaimed property action, citing *Stark v. Moffit*, 352 S.W.2d 165,167 (Mo.App. 1961). But the Treasurer's action does not meet the test set forth in *Stark*, which requires there be a prior action between the same parties involving the same subject matter. *Id*. There is no pre-existing action filed by the Treasurer seeking delivery of unclaimed property from the judges and receivers. In addition, with regard to the four lawsuits that created the receiverships, they are not pending cases. There are no parties to those cases remaining before the court. All issues raised by the parties to those lawsuits have been resolved. And the "bright line" test for finality that the judges cite was not the law at the time these cases became final. *See, e.g., Cozart v. Mazda Distributors, Inc.*, 861 S.W.2d 347, 351 (Mo.App. 1993)(decision resolving all issues is final irrespective of its title).

The judges argue that "[w]hat the Treasurer is doing is tantamount to a fan in the stands throwing rocks and bottles at the umpire of a baseball game because the game has gone on too long." JudgesBrf.,19. The Treasurer is not aware of any statute limiting the length of a baseball game nor authorizing the hypothetical fans to engage in such behavior. Conversely, the Treasurer brought this lawsuit pursuant to a statute that authorized and required her to file it (§447.575), claiming that the judges and their appointed receivers had not followed the rules limiting expenditures from the funds (§483.310.1) and that

they had held the funds way too long (§447.532). The judges analogy, while engaging, does not suggest the proper resolution of this controversy.

As receivers adopt by reference receiver's arguments for this Point set forth in Point VI of receiver's brief in SC84210, the Treasurer adopts by reference her reply to receiver's arguments for this Point set forth in Part VIII of her Reply Brief in SC84210.

The Treasurer sets forth here the authorities which are set forth in her Reply Brief in SC84210:

State ex rel. Sullivan v. Reynolds, 107 S.W. 487, 492 (Mo.banc 1908)

Neun v. Blackstone Building & Loan Assoc., 50 S.W. 436 (Mo. 1899)

§386.510, RSMo

§386.520, RSMo

§447.539, RSMo

Supreme Court Rule 66.02

VIII.

Judicial and official immunity do not apply because the judges and receivers were not functioning in a judicial capacity and the receivers' acts were ministerial. (Addressing Receivers' Point VII and Judges' Point IV.)

The judges and receivers do not dispute that the judicial immunity does not apply to requests for injunctive relief. Hence, respondents concede that judicial immunity does not ban a directive for them to deliver the principal of the funds and accumulated interest. Hence, this proffered defense only concerns misappropriated interest generated by the funds and statutory penalties. Analytically, the Court should first determine the proper disposition of interest earned on these funds. If the Court determines that expenditures of interest were limited by §483.310.1, the Court should reverse the judgment on the pleadings granted respondents and allow the trial court the first opportunity to consider partial defenses to liability.

If judicial immunity must be addressed at this juncture, respondents properly articulate the standard. "A judge *with subject matter jurisdiction* has judicial immunity for all actions taken, even when acting in excess of his jurisdiction." *State ex rel. Roach v. Kohn*, 720 S.W.2d 941, 944 (Mo.banc 1986), Rec.Brf., 65, JudgesBr., 18, emphasis added. *See also Stump v. Sparkman*, 435, U.S. 349, 355-56 (1978)(a judge "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"). This is precisely what is alleged. Respondents' misappropriation of interest was done in direct contravention of statutes affirmatively denying them the power to act as they did, and their continued retention of the funds directly violates statutes explicitly controlling their behavior. Thus, these actions were taken in clear absence of jurisdiction. The judges essentially concede the point; they only posit that they

"did" have subject matter jurisdiction over the underlying fund cases – not that they "do" have it or that they had it at the time that they expended the interest or when they retained the funds past the statutory abandonment period. JudgesBrf., 18.

With regard to monetary penalties, the receivers do not respond to the Treasurer's argument that the statute effectively waives immunity for penalties because it authorizes penalties from delinquent holders of unclaimed property, including courts and public officers. The judges' response is simply the unsupported assertion that the statute "does not override the rule of judicial immunity."

The receivers argue that they are entitled to qualified immunity, citing *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996). Rec.Brf.,60. Qualified immunity applies to violations of *federal constitutional* rights. *Saucier v. Katz*, 533 U.S. 194 (2001). The Treasurer has alleged a violation of *state statutes*. Regardless, the Treasurer stated a claim for violation of clearly established law when she alleged a violation of unambiguous statutes that have been on the books since 1977 (§483.310.1) and 1984 (§447.532, 447.539 and 447.543). The receivers also argue that they are entitled to official immunity, but official immunity only exempts public officials from liability resulting from their *discretionary* acts. *Green v. Lebanon R. III School District*, 13 S.W.3d 278 (Mo.banc 2000)(school board members entitled to official immunity for discretionary acts of selecting tax levy rate). Following the dictates of a statute is not a discretionary act. The receivers never explain why they are required to post a bond if they could not possibly be liable for any conduct they engage in. Furthermore, the Treasurer has not been permitted to do discovery to determine whether any respondent purchased insurance and whether such purchase would constitute a waiver of immunity to the extent of the purchase.

Finally, the receivers suggest that the Treasurer examine the manner in which Missouri has handled

"outlawed checks" (checks issued by the state that have remained uncashed for longer than one year). While the Office of Administration (OA) initially refused to transfer the funds corresponding to such checks, asserting that §30.200 created a separate procedure for them, OA has now come into compliance with the UPA. The same cannot be said for respondents.

Conclusion

"Courts, no less than the citizens they serve, must abide the rules and precedents defining their jurisdiction. To do otherwise is to erode the very foundation of the rule of law." *Comm. for Educational Equality,* 878 S.W.2d at 450. Respondents have failed to abide by this imperative.

For the reasons set forth above and those expressed in Appellant's Brief, the Treasurer requests that the Court reverse the judgment entered by the trial court and remand this matter for further proceedings.

Respectfully submitted,

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

The undersigned hereby certifies that on this 29th 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 limitation contained in Rule 84.06(b), and that the brief contains 4,791 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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