IN THE
MISSOURI SUPREME COURT

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| NANCY FARMER, TREASURER OF MISSOURI, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | Case No. SC84328 |
| | ) | |
| HONORABLE BYRON L. KINDER, et al., | ) | |
| | ) | |
| Respondents. | ) | |

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Appeal from the Circuit Court of Cole County, Missouri
The Honorable Ward Stuckey, Judge

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# RESPONDENTS' BRIEF

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## JURISDICTIONAL STATEMENT

Respondent-judges agree that this Court has exclusive jurisdiction. Mo. Const. Art. V, §3.

## OBJECTION TO "INTRODUCTION"

Respondent-judges take issue with the Treasurer's "Introduction." First, it is not authorized under Rule 84.04, which governs the contents of briefs. Second, it is nothing but an argument of the Treasurer's views, out of order. Third, it contains an egregious misstatement: "In so holding, the circuit court opined that judges in Missouri are not obligated to follow generally applicable laws that create substantive rights." (Appellant's Brief, p. 16).

The trial court never rendered such an opinion. It is a classic "strawman" tactic on the part of the Treasurer. After she fabricates the proposition, she then proclaims: "No holding could be more dangerous." (Appellant's Brief, p. 16). Knocking over a strawman may be great sport, but it serves no purpose in a case with real issues of great importance.

## SUPPLEMENTAL STATEMENT OF FACTS

The Treasurer's statement of facts is not "fair", as Rule 84.04(c) requires. Her statement is adversarial, with no effort to present a balanced and fair exposition of the facts. Respondent-judges will rely upon other respondents to set the record straight, subject to a few matters raised herein.

Respondent-judges object to appellant incorporating conclusions of law from her petition as if they are admitted facts. They are not. Whether a "presumption" that property unclaimed after five or seven years is conclusive and whether judges are "holders", as those terms are used in §§477.500 to 447.595, are issues of law. As such, they are not conceded to be true for purposes of a dispositive motion.

The Treasurer complains about the procedure below, but she omits a significant procedural step. In response to appellant's objection to the timing of the motions for judgment on the pleadings, the trial court granted additional time after the hearing on October 18, 2001, for all parties to make further responses or submissions. (L.F. 5). The trial court held the motions under advisement for two months before entering judgment, during which time other filings were allowed. (L.F. 5-6). The Treasurer and her attorney were not cut short in any respect.

Finally, fairness requires the inclusion of two important facts: 1) No pleading was filed by the Treasurer or the Attorney General seeking a ruling on the disposition of the court funds in the underlying receivership cases. 2) The respondent-judges have been treated by appellant and her attorney as adversaries, even though they have made no

claim to the funds and even though their role has been limited to that of judges of a court of general jurisdiction.

# TABLE OF AUTHORITIES

## Cases



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## ARGUMENT

### I.

**THE JUDGMENT OF DISMISSAL IS CORRECT AND SHOULD BE AFFIRMED BECAUSE THE CIRCUIT COURT OF COLE COUNTY IS A JUDICIAL INSTITUTION, WHICH IS NOT ONE AND THE SAME AS RESPONDENTS KINDER OR BROWN, AND THERE IS NO CAUSE OF ACTION AND NO SUBJECT MATTER JURISDICTION OVER THE LAWSUIT FILED BY THE TREASURER AGAINST RESPONDENTS KINDER AND BROWN.**

In her petition against them, the Treasurer is attempting to hold respondents Kinder and Brown personally liable for what she alleges to be a failure on their part in their capacities as Circuit Judges, to *sua sponte* rule that funds in the underlying receivership cases are "unclaimed property" within the meaning of the Uniform Disposition of Unclaimed Property Act, §§447.500 to 447.595, RSMo ("UDUP"). This is an unprecedented lawsuit, and to file it the Treasurer had to overlook or ignore the difference between a court and the individuals who may exercise the judicial functions of a court. As this Court observed in the case of *State v. Horn,* 79 S.W.2d 1044, 1045 (Mo. 1935), there is a legal distinction between the terms "judge" and "court".

> "A court has been defined to 'consist of persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice. A time when, a place where, and persons by whom judicial functions are to be exercised are essential to complete the

> idea of a court in the general legal acceptance of the term.' (citations omitted) . . . . A court is a judicial assembly. The judge of the court is its presiding officer. While the judge is often called the 'court', yet he is only so rightly called when the tribunal over which he presides is in session.'" (Quoting *State ex rel. Ballew v. Woodson*, 61 S.W. 252, 255 (Mo. 1901).)

Under the Constitution of Missouri, the judicial power is not vested in individual judges. Rather, it is vested in "courts". For example, Mo. Const. Art. V, §1 provides:

> "The judicial power of the state shall be vested in the supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts."

To narrow the focus to the specific court involved in this matter, the Constitution of Missouri does not vest judicial power in individual circuit judges. Rather, the Constitution vests the judicial power in "circuit courts." See Mo. Const. Art. V, §14(a):

> "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court."

The Constitution of Missouri goes on to divide the state into judicial circuits and to authorize judges of those circuits. In Mo. Const. Art. V, §15 the people authorized each circuit to have at least one circuit judge and additional circuit judges as provided by law, as well as personnel to aid in the business of the circuit court, such as clerks and other personnel.

The Treasurer has disregarded the idea that a Missouri circuit court is an institution for the exercise of the state's judicial power. Instead, she has treated the incumbent circuit judges and court personnel as if they were individuals acting in their own behalf. If her theory is correct, then every judge and every other staff person involved in the underlying receivership cases could be subjected to multi-million dollar assessments for principal, interest and penalties under the UDUP. She sued Judges Kinder and Brown as if they were personally liable, even though they have never personally claimed the money, and even though they recused themselves from deciding the issue of whether the receivership funds are unclaimed property. If she continues to follow this theory, then she could now sue Judge Stuckey, the Special Judge appointed by this Court, and if he recuses himself because he has been named as a defendant, and this Court appoints another special judge, she could sue the next special judge and the process could continue *ad infinitum* until all of the judges of Missouri's judicial department are respondents, including the members of this Court, if they disagree with her. While she may recognize it would be political folly for her to go down that path, the fact that her theory would allow her to do so demonstrates a fatal flaw in her lawsuit and grounds for affirming the dismissal below.

The Treasurer has not cited any case authority for her novel lawsuit. In its amicus brief, the National Association of Unclaimed Property Administrators ("NAUPA") failed to cite a single case upholding the right of an unclaimed property administrator to personally sue a judge. In all the cases cited by the NAUPA, the parties were the persons or institutions claiming ownership of the property at issue. Respondents Kinder and

Brown are not personally claiming any of the funds at issue here. They never have, and they never will.

The Treasurer thinks §447.575 gives her authority to sue the respondent-judges, but her reliance on §447.575 is misguided. This section allows the Treasurer to bring an action "if any person refuses to deliver property to the state as required under §§447.500 to 447.595. . . ." The UDUP provides a definition of the word "person" in §447.503.1(8):

> **"Person"**, any individual, business association, government or political subdivision, public corporation, public authority, estate, trust except a trust defined in section 456.500, RSMo, two or more persons having a joint or common interest, or any other legal or commercial entity."

It is significant that the definition of "person" does not include people serving as judges.

The UDUP does not authorize the Treasurer's lawsuit against the respondent-judges for the further reason that they are not a "holder" under the UDUP definition, §447.503.1(5). The definition of "holder" is "any person in possession of property subject to §§447.500 to 447.595 belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to sections 447.500 to 447.595." Clearly, circuit judges are not "holders."

The Treasurer places weight on the fact that there were not to be transactions involving the receivership funds except upon order of the court. But as anyone familiar with usual and customary procedures over court funds knows, the requirement that transactions can only occur "upon further order of court" is merely the manner in which

the law is applied. The institution of the circuit court is the forum in which disputes are presented and decided, based upon applicable laws. Any interested party is free to file a motion for the purpose of seeking an order. That is how a court functions. Rule 74.02. An order requiring no transactions except upon "further order of court' has never been held to be an exercise of personal dominion over court funds by a judge of the court. Individual judges come and go, but the institution of the court continues, as the place where the rule of law is enforced.

The defense of failure to state a claim upon which relief may be granted may be raised at any time, even while a case is on appeal. Rule 55.27(g)(2). Lack of jurisdiction of the subject matter also can be raised on appeal. Rule 55.27(g)(3). The respondent-judges are raising both defenses now.

**II.**

**THE JUDGMENT OF DISMISSAL IS CORRECT AND SHOULD BE AFFIRMED FOR THE FURTHER REASON IT IS UNCONSTITUTIONAL FOR THE TREASURER TO ASSUME A SUPERINTENDING ROLE OVER THE CIRCUIT COURT OF COLE COUNTY.**

Under the Constitution of Missouri, the Treasurer has no superintending power over circuit courts. Only superior courts have power to control circuit courts. See Mo. Const. Art. V, §4(1), which provides:

> "The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its

> jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power."

Cole County is in the Western District, so only the Missouri Court of Appeals for the Western District of Missouri and the Missouri Supreme Court have "superintending control" over the Circuit Court of Cole County.

The Treasurer's lawyer, the Attorney General, is not ignorant of the law in this regard. The Attorney General has already been to the Western District of the Missouri Court of Appeals to seek writs against the Circuit Court of Cole County in the underlying receivership cases. The Attorney General filed a petition for writs of prohibition and of mandamus with the Court of Appeals, case number WD59910, in which he alleged that respondents Kinder and Brown should transfer the money in the receivership cases over to the Treasurer, and cited the UDUP as authority. This effort on the part of the Attorney General was unsuccessful. On May 30, 2001, the Court of Appeals denied his petition for writs of prohibition and mandamus.

The Attorney General's next effort was to sue Judges Kinder and Brown in a concurrent court, that being the Circuit Court of Osage County. That effort also met with failure. On September 10, 2001, the presiding judge of the Circuit Court of Osage County entered judgment against the Attorney General, and that judgment is now on appeal to this Court, in SC84301. The instant lawsuit is the third action filed against the

respondent-judges by the Attorney General. None of them warranted, least of all this one.

The Treasurer argues in Point IV of her brief that she is not attempting to exercise superintending control or supervisory authority over the Circuit Court of Cole County. She says she is merely seeking an order "to compel respondents to discharge their ministerial duties." (Appellant's Brief, p. 55). She overlooks her own assessments against the judges for millions of dollars of principal, interest and penalties. Also, she seems to not grasp the inconsistency between what she is saying and what she is doing. What she is doing, of course, is suing circuit court judges for not doing their job to her satisfaction, which sure seems like supervision to them.

**III.**

**THE JUDGMENT OF DISMISSAL IS CORRECT AND SHOULD BE AFFIRMED FOR THE FURTHER REASON THAT THE TREASURER'S LAWSUIT VIOLATES THE SEPARATION OF POWERS DOCTRINE AND IT IS AN UNLAWFUL ATTEMPT BY THE TREASURER TO USURP JUDICIAL POWERS.**

The Separation of Powers Doctrine is a bed-rock concept of Missouri state government. It is enshrined in Article II, §1 of the Constitution:

> "The powers of 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."

The judicial power of the state is vested in the Supreme Court, the Courts of Appeal and the Circuit Courts. Mo. Const. Article V, §1. The Missouri Supreme Court has "general superintending control over all courts and tribunals." Mo. Const. Art. V, §4. This constitutional provision also grants to the Missouri Supreme Court "supervisory authority over all courts, and allows the Court to make 'appropriate delegations of this power.'" *Id*.

The Treasurer is a member of the Executive Department of Missouri's government. Mo. Const. Art. IV, §15. She has no superintending authority over the courts. Her duties are restricted to being the "custodian of all state funds and funds received from the United States government." Unclaimed properties under the UDUP are neither state nor federal funds.

The Treasurer's attempts to argue "unclaimed property" is the same as "state funds" are not persuasive. In fact, her arguments fly in the face of the basic provisions of the UDUP. To understand why this is so requires a review of the unclaimed property scheme.

When unclaimed property is turned over to the Treasurer, she makes an accounting entry in the "abandoned fund account." That account now has a book balance in excess of $200 million. But less than one percent of the money is on hand. The vast majority of it, over 99%, has been transferred to general revenue and spent by the state

government. How can the state take people's money and spend it, without violating the due process clauses of the state and federal constitutions?

The answer is one of the cleverest accounting devices this side of WorldCom, where expenditures were booked as assets. In theory, unclaimed funds still belong to the owners, even though most of the funds are spent. The book entries in the abandoned fund account are like IOU's from state government to the owners. What would happen if the owners of all the $200 million plus in assets showed up tomorrow at the Treasurer's office, claiming their property? She could not pay, because over 99% of the money is gone. The state cannot engage in deficit spending. So the charade of the IOU's must be maintained, and the abandoned property fund account will be carried into perpetuity. That is why the Treasurer cannot be heard to say that unclaimed property is one and the same as state funds. She cannot have it both ways.

## IV.

## THE JUDGMENT OF DISMISSAL IS CORRECT AND SHOULD BE AFFIRMED FOR THE FURTHER REASON THAT TO THE EXTENT THE TREASURER IS ATTEMPTING TO FIX PERSONAL LIABILITY ON RESPONDENTS, THEY HAVE ABSOLUTE JUDICIAL IMMUNITY.

In the course of her escalating attacks on the respondent-judges, the Treasurer has targeted them for personal liability for the funds and all interest ever generated by the funds. In her haste to financially embarrass them, the Treasurer has overlooked or ignored the law of judicial immunity. The United States Supreme Court observed: "Few doctrines were more solidly established at common law than the immunity of judges from

liability for damages for acts committed within their jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 555-54 (1967). This immunity applies "even when the judge is accused of acting maliciously and corruptly." *Id.* at 554. Was this rule designed as a favor to judges? No. The immunity exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id*. The immunity rule and the rationale for its existence also apply in Missouri. *State ex rel. Raack v. Kohn,* 720 S.W.2d 941, 944 (Mo. banc 1986).

The doctrine of absolute judicial immunity applies even when a judge, within his or her jurisdiction, is acting "in excess of his jurisdiction." *Howe v. Brouse,* 427 S.W.2d 467, 468 (Mo. 1968). What this rule means is that if a judge has subject matter jurisdiction over a case (the Treasurer does not even attempt the argument that respondents did not have subject matter jurisdiction in the underlying fund cases – they clearly did), then any actions within the case, even actions in excess of jurisdiction, are protected by judicial immunity. *State ex rel. Raack v. Kohn,* 720 S.W.2d 941, 944 (Mo. banc 1986).

The UDUP does not override the rule of judicial immunity. It does not create personal liability for judges. The Treasurer's reliance on the UDUP is without merit.

**V.**

**THE JUDGMENT OF DISMISSAL IS CORRECT AND SHOULD BE AFFIRMED FOR THE FURTHER REASON THAT JURISDICTION OVER THE**

**FUNDS IS IN THE UNDERLYING RECEIVERSHIP CASES, AND THIS CASE CANNOT ACQUIRE JURISDICTION OVER THE SAME SUBJECT**

Under the pending case doctrine, jurisdiction over a matter continues, subject only to the authority of a superior court, until the matter is finally and completely disposed. *Stark v. Moffit*, 352 S.W.2d 165, 167 (Mo.App. E.D. 1961). The Treasurer attempts to avoid the pending case doctrine by arguing that at the end of five or seven years, the funds in the receivership cases automatically became unclaimed property. This argument is contrary to one of the most fundamental rules of procedure for Missouri's courts. It is rudimentary that a case in a trial court ends only upon entry of a judgment, and unless and until there is a final judgment fully and finally disposing of all issues, the case is not over. Entry of a "judgment" is a "bright line" test for finality. *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997); *A. L. v. Peeler*, 969 S.W.2d 262, 265 (Mo.App. E.D. 1998); Rule 74.01.

Unless and until a final judgment is entered in the receivership cases, the Treasurer has no alternative but to intervene in those cases and make her claims there. After listening to the evidence and arguments in behalf of all plaintiffs, the judge or judges in those cases would then rule. That is the normal way of the judicial process. Suing the judges personally is not. What 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.

## CONCLUSION

The judgment below is correct for several reasons and should be affirmed.

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**CERTIFICATION OF SERVICE AND COMPLIANCE WITH RULE 84.06(b) and (c)**

I hereby certify that on the 29th day of July, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,047 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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Dale C. Doerhoff