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JURISDICTIONAL STATEMENT

Respondent Smith, Healey, Blackwell and Morgan agree with Appellant that the Supreme Court has exclusive jurisdiction of this appeal. The issues presented include issues involving the "validity . . . of a statute . . . of this state". Therefore, under Art. V, § 3, Missouri Constitution, the Supreme Court has exclusive appellate jurisdiction.

Introduction

Respondents Julie Smith, Elaine Healey, Jackie Blackwell and Sharon Morgan (hereinafter sometimes "These Respondents") adopt by reference the "Objection to 'Introduction'" with respect to Appellants' Brief which are set forth at page 4 of the Brief filed herein of the Respondent Judges, the Honorable Byron L. Kinder and the Honorable Thomas J. Brown, III (the "Respondent Judges").

This Appeal No. SC84238 (involving Cole County Circuit Court Case No. 01CV324800 [the "Personal Liability Case"] and Respondents Judge Byron L. Kinder, Thomas J. Brown, III, Julie Smith, Elaine Healey, Jackie Blackwell and Sharon Morgan) has been docketed together for oral argument with five other related appeals, namely, (i) SC84210 (involving Cole County Circuit Court Case Nos. 28594 and 28604 [the "Fuel Adjustment Surcharge Case"] and Respondent Julie Smith), (ii) SC84211 (involving Cole County Circuit Court Case No. CV185-1282CC [the "Old Security/KIGA[1] Class Action Case"] and Respondent Elaine Healey), (iii) SC84212 (involving Cole County Circuit Court Case Nos. CV189-808CC and CV189-809CC [the "Southwestern Bell I Case"] and Respondent Jackie Blackwell), (iv) SC84213 (involving Cole County Circuit Court Case No. CV194-24CC, et al. [the "Southwestern Bell II Case"] and Respondent Sharon Morgan), and (v) SC84301 (involving Osage County Circuit Court Case No. 01CV330548 [the "Quo Warranto Case"] and Respondent Judges Kinder and Brown.

[1] KIGA refers to the Kansas Insurance Guaranty Association. KIGA was the class representative in the class action proceedings.

The Fuel Adjustment Surcharge Case, the Old Security/KIGA Class Action Case, and Southwestern Bell I Case and the Southwestern Bell II Case are sometimes hereinafter referred to collectively as the "Underlying Cases".

Because all six of these appeals involve the four Underlying Cases and many common issues, the undersigned counsel has attempted to avoid needless repetition in briefing by incorporating by reference the contents of substantial portions of earlier filed Briefs. We continue that practice here by incorporating by reference into this Brief the Statement of Facts, Points Relied Upon, Arguments and authorities set forth in the following Briefs heretofore filed:

1. Brief of Respondent Julie Smith in SC84210 Relating to the Fuel Adjustment Surcharge Case. The Brief of Respondent Smith in SC84210 sets forth in its Points, Argument and authorities as to why the positions of all of the Respondents in all six appeals are proper and why the Judgments entered by the Honorable Ward B. Stuckey and the Honorable Gael D. Wood below should be upheld. In addition, the Statement of Facts in the Respondent Smith's Brief in SC84210 sets forth a comprehensive summary of the facts in the Fuel Adjustment Surcharge Case and the Ancillary Adversary Proceedings in that case. Respondent Smith's Brief in SC84210 is the principal Brief upon which These Respondents rely in all of the related appeals.
2. Brief of Respondent Elaine Healey in SC84211 Relating to the Old Security/KIGA Class Action Case. The Statement of Facts in Respondent

Healey's Brief in SC84211 sets forth a comprehensive summary of the facts in the Old Security Class Action Case and the Ancillary Adversary Proceedings in that case. Because SC84211 involves a trust which was established subsequent to a receivership, certain additional concepts and authorities are addressed in the Argument portion of Respondent Healey's Brief in SC84211. In other respects, the Brief of Respondent Healey in SC84211 incorporates by reference the Points Relied On, the Argument and authorities set forth in the Brief of Respondent Smith in SC84210.

3. Brief of Respondent Jackie Blackwell in SC84212 Relating to the Southwestern Bell I Case. The Statement of Facts in Respondent Blackwell's Brief in SC84212 sets forth a comprehensive summary of the facts in the Southwestern Bell I Case and the Ancillary Adversary Proceedings in that case. Because SC84212 involves proceedings relating to the closure of one receivership and the opening of another receivership coupled with the State of Missouri, represented by the Attorney General, being a party to those proceedings, certain additional concepts and authorities are addressed in the Argument portion of Respondent Blackwell's Brief in SC84212. In other respects, the Brief of Respondent Blackwell in SC84212 incorporates by reference the Points Relied On, the Argument and authorities set forth in the Brief of Respondent Smith in SC84210.

4. Brief of Respondent Sharon Morgan in SC84213 Relating to the Southwestern Bell II Case. The Statement of Facts in Respondent Morgan's Brief in SC84213 sets forth a comprehensive summary of the facts in the Southwestern Bell II Case and the Ancillary Adversary Proceedings in that case. Because SC84213 involves proceedings relating to the closure of one receivership and the opening of another receivership, certain additional concepts and authorities are addressed in the Argument portion of Respondent Morgan's Brief in SC84213. In other respects the Brief of Respondent Morgan in SC84213 incorporates by reference the Points Relied On, the Argument and the authorities set forth in the Brief of Respondent Smith in SC84210.

5. Brief of Respondent Judges Byron L. Kinder and Thomas J. Brown, III, in SC84301 Relating to the Quo Warranto Case. The Statement of Facts, Points Relied On, Argument and authorities contained in the Brief of Respondents Kinder and Brown in SC84301 demonstrate that any claims which the Appellant may have must be determined in the Underlying Cases (including the Ancillary Adversary Proceedings) and that any claims that Appellant might have cannot and should not be determined in the Personal Liability Case (SC84328).

6. Brief of Respondent Judges Byron L. Kinder and Thomas J. Brown, III, in this SC84328 Relating to the Personal Liability Case. The Statement of Facts, Points Relied On, Argument and authorities contained in this

SC84328 demonstrate that the Appellant cannot properly assert claims against Respondents Smith, Healey, Blackwell and Morgan in the Personal Liability Case.

STATEMENT OF FACTS

Because of inadequacies in Appellant's Statement of Facts, These Respondents do not adopt the Appellant's Statement of Facts. Instead, we restate certain facts which we believe are needed or helpful to this Court in considering the issues posed in this appeal. We also adopt the Statement of Facts contained in the Brief of the Respondent Judges in this appeal, No. SC84328.

Petition.

On July 25, 2001, the Attorney General filed a Petition for Appellant Nancy Farmer which was denominated "Petition for Delivery of Unclaimed Property" (the "Petition"). L.F. 1, 8-24; Appellant's Appendix A1-21. The Petition denominated Nancy Farmer, State Treasurer, as the "Petitioner" and Judge Byron L. Kinder, Judge Thomas J. Brown, III, Julie Smith, Elaine S. Healey, Jackie Blackwell, and Sharon Morgan as the "Respondents". L.F. 8, Appellant's App. A-1.

1. Petition Claims Against Judge Byron L. Kinder and Receiver Julie Smith With Respect to the Fuel Adjustment Surcharge Case.

Paragraphs 3 through 14 of the Petition are in effect a Count I of the Petition, though not denominated as such. This part of the Petition purports to assert claims against "Respondents Kinder and Smith" personally with respect to the Fuel Adjustment Surcharge Case. L.F. 9-11. It is alleged that on January 22, 1999, Julie Smith was appointed as Receiver in the Fuel Adjustment Surcharge

Case. It is further alleged with respect to the authority of the position of the Receiver in the Fuel Adjustment Surcharge Case:

> ". . . Respondent Kinder entered an order creating a receivership to hold the unrefunded surcharges. . . . The order named a receiver, noted that the funds were to be invested, reserved unto Respondent Kinder's authority regarding investment decisions and directed that no expenditures in excess of $250.00 be made without his written approval." (emphasis added).

L.F. 10.

The Prayer following paragraph 14 of the Petition is as follows:

"WHEREFORE, Petitioner respectfully requests that this Court:

"A. issue a mandatory injunction ordering Respondents Kinder and Smith to deliver to Petitioner all monies existing in "Fund 1" as of November 1, 1979, plus interest, dividends, or other earnings from November 1, 1979, to the present (minus only necessary and proper costs and payments made to claimants),

"B. order Respondents Kinder and Smith to pay penalties pursuant to § 447.577, RSMo 2000, subparagraphs 1 of 2, and

"C. award Petitioner costs of this action." (emphasis added).

L.F. 11.

2. Petition Claims Against Judge Byron L. Kinder and Trustee Elaine Healey With Respect to the Old Security/KIGA Class Action Case.

Paragraphs 41 through 52 of the Petition are in effect a Count IV of the Petition, though not denominated as such. This part of the Petition purports to assert claims against "Respondents Kinder and Healey" personally with respect to the Old Security/KIGA Class Action Case. L.F. 18-20. It is further alleged that on December 31, 1986, Elaine Healey was appointed as Receiver in the Old Security Class Action Case.[2] It is further alleged with respect to the position of Elaine Healey in the Old Security Class Action Case:

> ". . . Respondent Kinder . . . appointed Respondent Healey as 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." (emphasis added).

L.F. 18-19.

[2] The Petition does not allege that Elaine Healey became Trustee; however, in filings which Appellant Farmer made in the trial court, she included docket sheets from each of the four Underlying Cases. The docket sheets for the Old Security Class Action Case reflect that a Trust was created on January 18, 1991. L.F. 174. Appellant Farmer in her Brief in SC No. 84211 at pages 18-19 recognizes that Elaine Healey became a Trustee on January 18, 1991.

The Prayer following paragraph 53 of the Petition is as follows:

"WHEREFORE, Petitioner respectfully requests that this Court:

"A. issue a mandatory injunction ordering Respondents Kinder and Healey to deliver to Petitioner all monies existing in "Fund 4" as of December 31, 1986, plus interest, dividends, or other earnings thereon (minus only the necessary and proper costs and payments made to claimants),

"B. order Respondents Kinder and Healey to pay penalties pursuant to § 447.577, RSMo 2000, subparagraphs 1 or 2, and

"C. award Petitioner costs of this action." (emphasis added).

L.F. 20.

3. Petition Claims Against Judge Thomas J. Brown, III, and Receiver Jackie Blackwell With Respect to the Southwestern Bell I Case.

Paragraphs 15 through 27 of the Petition are in effect a Count II of the Petition, though not denominated as such. This part of the Petition purports to assert claims against "Respondents Brown and Blackwell" personally with respect to the Southwestern Bell I Case. L.F. 12-15. It is alleged that on September 15, 1989, Jackie Blackwell was appointed by Judge Brown as Receiver to administer the funds in the Southwestern Bell I Case. It is further alleged with respect to Judge Brown's September 15, 1989, Order that –

". . . reserved unto Respondent Brown authority for final investment decisions and directed that there be no expenditures in excess of $500.00 without his written approval." (emphasis added).

L.F. 5.

The Petition further alleges with respect to the Southwestern Bell I Case that on April 26, 1993, an Order was entered by Judge Brown closing the receivership. The Petition then alleges that also on April 26, 1993, another Order was entered by Judge Brown again appointing Jackie Blackwell as receiver which –

". . . noted that the monies were to be invested, reserved unto Respondent Brown authority regarding investment decisions and directed that no expenditures in excess of $250.00 shall be made without his written approval." (emphasis added).

L.F. 13.

The Prayer following paragraph 27 of the Petition is as follows:

"WHEREFORE, Petitioner respectfully requests that this Court:

"A. issue a mandatory injunction ordering Respondents Brown and Blackwell to deliver to Petitioner all monies existing in "Fund 2" as of April 8, 1991, plus interest, dividends, or other earnings from April 8, 1991, to the present (minus only necessary and proper costs and payments made to claimants),

"B. order Respondents Brown and Blackwell to pay penalties pursuant to § 447.577, RSMo 2000, subparagraphs 1 or 2, and

"C. award Petitioner costs of this action." (emphasis added).

L.F. 14-15.

4. Petition Claims Against Judge Thomas J. Brown, III, and Receiver Sharon Morgan With Respect to the Southwestern Bell II Case.

Paragraphs 28 through 40 of the Petition are in effect a Count III of the Petition, thought not denominated as such. This part of the Petition purports to assert claims against "Respondents Brown and Morgan" personally with respect to the Southwestern Bell II Case. L.F. 15-18. It is further alleged that Sharon Morgan became the "current receiver" by an Order entered on January 26, 1996. An earlier Order entered by Judge Brown on February 17, 1994, is alleged to have provided for a receiver and to have also provided that –

". . . Respondent Brown retain authority for final investment decisions and that the receiver not make any expenditures in excess of $500.00 without the written authority of Respondent Brown." (emphasis added).

L.F. 16.

The Prayer following paragraph 40 of the Petition is as follows:

"WHEREFORE, Petitioner respectfully requests that this Court:

"A. issue a mandatory injunction ordering Respondents Brown and Morgan to deliver to Petitioner all monies existing in "Fund 3" as of October 7, 1994, plus interest, dividends, or other earnings from October 7, 1994, to the present (minus only necessary and proper costs and payments made to claimants),

"B. order Respondents Brown and Morgan to pay penalties pursuant to § 447.577, RSMo 2000, subparagraphs 1 or 2, and

"C. award Petitioner costs of this action." (emphasis added).

L.F. 17-18.

Motions of Respondents Directed to Petition.

1. "Defendant Brown's Motion to Dismiss" filed on August 24, 2001. L.F. 21-24. A copy of this Motion is set forth as Appendix A to this Brief at A-1.

2. "Motions of Julie Smith, Jackie Blackwell, Sharon Morgan and Elaine S. Healey" filed on August 24, 2001. L.F. 25-32. A copy of this pleading is set forth as Appendix B to this Brief at A-6. The Motions allege, *inter alia,* that the exclusive jurisdiction of any claims by State Treasurer Farmer are in the Underlying Cases; that there were prior pending proceedings in the Ancillary Adversary Proceedings in the Underlying Cases involving State Treasurer Farmer which were commenced on July 20, 2001, prior to the filing of this Personal Liability Case on July 25, 2001; and that for other reasons the Petition should be dismissed. This Motion further provides:

"12. **Judicial Notice**. Because the Petition references Consolidated Case No. 28594 and 28604 [the Fuel Adjustment Surcharge Case], Consolidated Case No. CV189-808CC and CV189-809CC [the Southwestern Bell I Case], Consolidated Case No. CV194-24CC, et al. [the Southwestern Bell II Case], and Case No. CV186-1282CC [the Old Security/KIGA Class Action Case] in the Cole County Circuit Court, Respondents request the Court to judicially note the proceedings in those cases in determining the Motions set forth herein."

L.F. 31; Appendix B at A-13 hereto.

3. "Motion of Respondent Byron L. Kinder to Dismiss Petition for Unclaimed Property" filed on August 27, 2001. L.F. 33-36. A copy of this Motion is set forth as Appendix C to this Brief at A-15.

4. Motion for Judgment on the Pleadings In Behalf of Respondents Kinder and Brown" filed on October 11, 2001. A copy of this Motion is set forth as Appendix D to this Brief at A-19. "Suggestions in Support of Motion for Judgment on the Pleadings in Behalf of Respondents Kinder and Brown" were also filed on October 11, 2001. L.F. 4, 224-233.

5. "First Amended Motions of Julie Smith, Jackie Blackwell, Sharon Morgan and Elaine S. Healey" filed on October 12, 2001. L.F. 50-64. A copy of this Motion is set forth as Appendix E to this Brief at A-32. These Motions expanded the allegations contained in the prior Motions of These Respondents

(para. 2, above) and requested a dismissal of the case on various grounds. In connection therewith this pleading reiterated the request that Judicial Notice be taken of the proceedings in the underlying cases:

> "18. **Judicial Notice**. Because the Petition references the Fuel Adjustment Surcharge Case (Consolidated Case No. 28594 and 28604), the Southwestern Bell Case (Consolidated Case No. CV189-808CC and CV189-809CC), the Southwestern Bell II Case (Consolidated Case No. CV194-24CC, *et al.*), and the Old Security/KIGA Class Action Case (Case No. CV186-1282CC), Respondents request the Court to judicially note the proceedings in those cases in determining the Motions set forth herein."

L.F. 62; Appendix E at A-45.

6. "Motion for Judgment On The Pleadings" of Respondents Smith, Healey, Blackwell and Morgan filed on October 12, 2001. This "Motion for Judgment On The Pleadings" was filed in each of the four Underlying Cases, in this Personal Liability Case and also in a sixth case which remains pending in the Cole County Circuit Court. L.F. 40. A copy of this Motion is set forth as Appendix F to this Brief at A-45. This Motion incorporated by reference the grounds for dismissal and the motions to dismiss set forth in the Motions (para. 2, above) and Amended Motions (para. 5, above) of These Respondents. Consequently, the Motion for Judgment Upon the Pleadings of These Respondents, coupled with the request to take judicial notice of the proceedings in

the four Underlying Cases, effectuated a traversal of the pleadings in the four Underlying Cases (including the Ancillary Adversary Proceedings) and this Personal Liability Case together.

The Four Underlying Cases

1. The Fuel Adjustment Surcharge Case. A comprehensive summary of the pleadings and proceedings in that case is set forth in the Statement of Facts at pages 13 through 30 of the Brief of Respondent Smith in SC84210, which Statement of Facts is incorporated herein by reference.

In order to clarify an erroneous interpretation of the proceedings in the Fuel Adjustment Surcharge Case which is contained in Briefs of *Amici Curiae* supporting the Appellant, we amplify here the Statement of Facts contained in the Brief of Respondent Smith in SC84210.

Following the Supreme Court's Opinion in the Fuel Adjustment Surcharge Case (*State ex rel. Utility Consumers Council, Inc*., 585 S.W.2d 41 (Mo. banc 1979)), the parties appeared before Judge Kinder on October 16, 1979, and presented arguments with respect to the refund order to be entered in the case. L.F. 66. On October 19, 1979, Judge Kinder entered an Order setting forth the mechanism for refunds of the fuel adjustment surcharges found to be illegal by the Supreme Court. L.F. 65-67. Substantial portions of the October 19, 1979, Order are quoted at pages 14-16 of the Brief of Respondent Smith in SC84210. While the Supreme Court Opinion at 585 S.W.2d at 60 directed a "determination by it [the Circuit Court] of the amounts due as a result of the surcharge and to whom",

the Circuit Court itself did not make individual "determinations" by name and amount due each utility customer but instead made a "determination" of the procedures for the utilities to follow in determining the names and amounts.

An appeal was taken from the October 19, 1979, Order of Judge Kinder, and in *State ex rel. Utility Consumers Council of Missouri, Inc.*, 602 S.W.2d 852 (Mo. App. W.D. 1980), the Court of Appeals held that interest on the refund should be calculated from the time of payment and that the rate of interest was adjusted from 6% to 9% on September 28, 1979, when the statutory interest change was changed.

No other party to the proceedings in the Fuel Adjustment Surcharge Case, including the Utility Consumers Council of Missouri, Inc., challenged any of the other provisions of the October 19, 1979, Order. Consequently, the matters decided by the October 19, 1979, Order, with the exception of the modification of the interest provisions, became final and binding upon the parties in the Fuel Adjustment Surcharge Case, including:

1. The determination of the amount and whom payments would be made was actually determined by the utilities pursuant to procedures set forth by the Court.
2. The utilities were not required to provide to the Court any names and addresses of any persons to whom payments were made or the amount of any such payment, be it those to whom payments were made or credits given, or those who could not be located.

3. The Public Service Commission was directed to audit the refund processes.

4. Paragraph 7 of the October 17, 1979, Order became and remains final, since it was not challenged in the appeal to the Western District of the Missouri Court of Appeals, provides:

> "7. Any amount of unrefunded surcharges at the end of the twelve month period shall be paid into the registry of the Court." (emphasis added).

L.F. 65-67.

The Utilities Consumers Council of Missouri, Inc., was in a position to challenge the remaining provisions of the October 19, 1979, Order by an appeal, but did not do so. Assuming that *Amicus Curiae* Utility Consumers Council of Missouri, Inc., is the same entity that was a party to the Fuel Adjustment Surcharge Case in 1979[3], that entity may not now contest the October 19, 1979, Order.

[3] The Business Entity database of the Missouri Secretary of State's office, http://www.sos.state.mo.us, reflects that the corporation which is now known as Utility Consumers of Mo., Inc. was not formed until August 10, 1998. It would therefore appear that *Amicus Curiae* Utility Consumer Council of Mo., Inc., is not the entity which was a party to the proceedings in 1979 in the Fuel Adjustment Surcharge Case.

2. The Old Security/KIGA Case. A comprehensive summary of the pleadings and proceedings in this Underlying Case is set forth in the Statement of Facts at pages 17 through 36 of the Brief of Respondent Healey in SC84211, which Statement of Facts is incorporated herein by reference.

In order to clarify an erroneous interpretation of the proceedings in the Old Security/KIGA Class Action Case which is contained in Briefs of *Amici Curiae* supporting the Appellant, we amplify the Statement of Facts contained in the Brief of Respondent Healey in SC84211.

The Old Security/KIGA Class Action Case is not the Old Security Life Insurance Company insurance receivership case. Upon the Petition of the Missouri Director of Insurance, the Circuit Court ordered that the Old Security Life Insurance Company be placed into receivership on October 20, 1977. That case was docketed as Cole County Circuit Court Case No. 29686. A 100% distribution was made upon all allowed claims in the Old Security insurance company receivership. The issues in this litigation do not involve any funds remaining because some claimants entitled to participate in the insurance receivership distribution could not be located. Instead, the Old Security/KIGA Class Action Case is a separate Cole County Circuit Court case which was opened on December 31, 1986, as Case No. CV186-1282CC. The funds in the Old Security/KIGA Class Action Case are settlement monies over and above the 100% allowance of claims in the insurance receivership. These funds do not include monies for which there was an allowed claim in the receivership with the claimant

not being able to be located at the end of the insurance company receivership. See generally, the Statement of Facts at pages 17 through 27 of the Brief of Respondent Healey in SC84211.

3. The Southwestern Bell I Case. A comprehensive summary of the pleadings and proceedings in this Underlying Case is set forth in the Statement of Facts at pages 16 through 34 of the Brief of Respondent Blackwell in SC84212, which Statement of Facts is incorporated herein by reference.

4. The Southwestern Bell II Case**.** A comprehensive summary of the pleadings and proceedings in this Underlying Case is set forth in the Statement Facts at pages 16 through 35 of the Brief of Respondent Morgan in SC84214, which Statement of Facts is incorporated herein by reference.

Objections of Appellant Nancy Farmer Prior to Motion Hearing.

Prior to the commencement of the motion hearing on October 18, 2001, before Judge Stuckey, the Attorney General as counsel for Appellant Farmer filed the "State Treasurer Nancy Farmer's Objections to Various Motions" (L.F. 65-72) and the "State Treasurer Nancy Farmer's Suggestions in Opposition to Various Motions" (L.F. 73-179) in each of the Ancillary Adversary Proceedings in the four Underlying Cases (SC84210, SC84211, SC84212 and SC84213) and also in this Personal Liability Case (SC84328). The Suggestions of Appellant Farmer attached copies of the docket sheets in each of the four Underlying Cases from the time those cases were opened. Consequently, the Appellant joined in putting at

issue pleadings and proceedings in the four Underlying Cases, including the Ancillary Adversary Proceedings, in this Personal Liability Case.

Counsel for the Appellant State Treasurer in the Objections complained that there was not sufficient time to prepare for the motion hearing on October 18. It is noted, however, that the same counsel had previously briefed and presented many of the same issues at earlier dates. See, e.g.,

i. Petition for Writs of Prohibition and Mandamus and Supporting Suggestions filed on April 30, 2001, in "State ex rel. Jeremiah W. (Jay) Nixon v. Byron L. Kinder and Thomas J. Brown, III," Case No. WD59910, Western District of the Missouri Court of Appeals, seeking a writ of prohibition prohibiting Judges Kinder and Brown from making any disposition of the funds in the four Underlying Cases other than to the State Treasurer and a writ of mandamus ordering Judges Kinder and Brown to turn over the funds in the four Underlying Cases to the State Treasurer. See, e.g., L.F. 309 of the Legal File in SC84301, where this is recounted.

ii. Petition and Supporting Suggestions filed in the Quo Warranto Case on June 28, 2001, and proceedings and briefs in that case, all of which took place at or prior to the motion hearing held on August 31, 2001, with the final judgment having been entered on September 10, 2001. See generally Legal File in SC84301. All of this occurred

more than a month prior to the October 18, 2001, hearing in this Personal Liability Case.

iii. On August 20, 2001, almost two months before the October 18, 2001, hearing, the same attorney filed "State Treasurer Nancy Farmer's Motion to Vacate and Disqualify and Suggestions in Support Thereof" (consisting of 18 pages plus attachments) in the Ancillary Adversary Proceedings in each of the four Underlying Cases. See, L.F. 405 in SC84210, L.F. 177 in SC84211, L.F. 124 in SC84212, and L.F. 81 in SC84213.

Hearing on October 18, 2001

On October 18, 2001, a motion hearing was held before Judge Stuckey in the Ancillary Adversary Proceedings in each of the four Underlying Cases and in this Personal Liability Case. The Court's docket in this Personal Liability Case reflects the following actions on October 18, 2001:

"Parties appear before the Court by counsel Robert Russell, Dale Doerhoff, Alex Bartlett and James McAdams; Motion for Judgment on the Pleadings on Behalf of Respondents Kinder and Brown and Motion for Judgment on the Pleadings (with incorporated Motions) on behalf of Respondents Smith, Blackwell, Morgan and Healey taken up, arguments presented to the Court with respect to said Motions, Court grants all parties five additional days to make further responses or submissions with respect to said Motions, and Court

takes said Motions under advisement; Respondents' Motion for Consolidation not presented to the Court." (emphasis added).

L.F. 5.

Further Submissions Prior to Ruling Motions

Within the "five additional days" allowed by Judge Stuckey "to make further responses or submissions with respect to said Motions", the Respondent Judges filed an Answer (L.F. 179) on October 19, 2001, and filed their "Suggestions of Respondents Kinder and Brown in Opposition to State Treasurer Nancy Farmer's Objections to Various Motions" (L.F. 194) on October 23, 2001.

Appellant Farmer did not take the opportunity to file any further memoranda or submissions during that five day period. See Docket Sheets at L.F 1-7 and Legal File generally.

On November 2, 2001, Legal Aid of Western Missouri and Legal Services of Eastern Missouri filed their motion requesting leave to file an *amicus curae* brief or suggestions, which was granted by Judge Stuckey on November 3, 2001. L.F. 249-252. On November 9, 2001, *Amici* Legal Aid of Western Missouri, Legal Services of Southern Missouri and Mid-Missouri Legal Services Corporation filed Suggestions in support of the position of Respondent Judge Brown. L.F. 254. *Amici* Legal Services of Eastern Missouri, Inc., and Mid-Missouri Legal Services also filed Suggestions in support of the Respondents on the same date. L.F. 269.

An extensive "Appendix of Selected Cases and Authorities . . . In Opposition to the Petition for Delivery of Unclaimed Property" consisting of 143 pages (L.F. 283-426) was also filed by *Amici* Legal Services of Eastern Missouri and Mid-Missouri Legal Services on November 9, 2001. L.F. 283.

On November 26, 2001, Respondent Judge Kinder filed further suggestions. L.F. 427.

Appellant Farmer had the opportunity to submit any further memoranda or submissions which she desired to submit to Judge Stuckey, or she could have requested additional time to make such submissions. She did neither.

Judgments

It was not until December 17, 2001, that Judge Stuckey entered the first Judgment and not until February 11, 2002, that Judge Stuckey entered the second Judgment. L.F. 198, 202. The February 11, 2002, Judgment contains the following conclusions and determinations:

> "1. Article IV, § 15 of the Missouri Constitution limits the duties that may by law be assigned to the State Treasurer: '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 funds in question are not state funds or funds received from the United States. The attorney general in fact argues on behalf of Petitioner that these

funds are the individual assets of divers persons. Therefore, the Treasurer has no standing to bring the action.

"2. The funds in question are already in the custody of the Circuit Court of Cole County and have been under the continuous supervision of the Circuit Court of Cole County from the date they were received. The funds are residual funds from actions which are either class actions or which are in the nature of class actions and are subject to disposal by the Circuit Court of Cole County. They are therefore not unclaimed or abandoned property and are the subject of presently existing litigation, i.e., the receiverships and the trusteeship, and are thus involved in pending litigation. As the subject of pending litigation and being subject to the disposition by the Circuit Court of Cole County, these funds are subject to the Pending Case Doctrine. Because there is a pending case which already has jurisdiction over these funds the present action by the State Treasurer cannot be sustained.

"3. If the monies in question could possibly be qualified as abandoned or unclaimed property, the Treasurer has the opportunity to present that case to the Circuit Court of Cole County in Case Nos. 28954 and 28604, CV186-1282CC, CV189-808CC and CV189-809CC, and CV194-24CC, the underlying cases where the funds are presided over by the Circuit Court of Cole County. Even though

invited to enter those cases, the Treasurer has not seen fit to do so but has taken the action of making assessments against the Respondent Judges by directing them to pay the monies over to the Treasurer.

"4. The 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 11, § 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.

"5. The action of the Treasure in making a determination that the monies are abandoned and unclaimed and directing that the monies be paid over by the Cole County Circuit Court to the State Treasurer in an attempt by the State Treasurer to exercise superintending control and supervisory authority over the Circuit Court of Cole County in violation of Article V, § 4 of the Missouri Constitution. The sole superintending control over the Circuit Court of Cole County is vested in the Missouri Court of Appeals, Western District and in the Missouri Supreme Court and the sole authority for

supervision of the Cole County Circuit Court by way of supervisory authority is in the Missouri Supreme Court.

"6. The assessment by the Treasurer of penalties and interest against the individual Respondent Judges and the requirement by the Treasurer that the Respondent Receivers and Trustee exhaust all administrative remedies provided by the Executive Department is also a violation of the Doctrine of Separation of Powers contained in Article 1, § 2 of the Missouri Constitution. Further, there is no authority in law for the Treasurer to assess penalties and interest against the individual Respondent Receivers and Trustee for the reason that said Respondents have absolute judicial immunity from such actions or alternatively have official immunity from such actions. *State ex rel. Raack v. Kohn*, 720 S.W.2d 941 (Mo. banc 1986); *Howe v. Brouse*, 427 S.W.2d 467 (Mo. 1968); and *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000).

"7. The record presented by the Treasurer in her suggestions in Opposition to Various Motions filed on October 18, 2001, include Orders in Case Nos. 28954 and 28604, CV186-1282CC, CV189-808CC and CV189-809CC and CV194-24CC which specifically preclude the Respondent Receivers and Trustee from disbursing any monies which are claimed by the Treasurer."

L.F. 216-218.

POINTS RELIED ON

I.

The trial court did not err as asserted in Appellant's Points I through VIII inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the "receipt, investment, custody and disbursement of state funds and funds received from the United States government" and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the "single subject" and "clear title" provisions of Article III, Section 23, Missouri Constitution.

Cases

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

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974)

Carmack v. Director, Department of Agriculture, 945 S.W.2d 596 (Mo. banc 1997)

Other Authorities

Article IV, Section 15, 1945 Missouri Constitution

Debates, Missouri Constitutional Convention – June 1944

Article IV, Sections 13, 14 and 22, 1945 Missouri Constitution

Article IV, Section 15, Missouri Constitution, as amended in 1986

Article III, Section 23, Missouri Constitution

Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bill No. 566, 87th General Assembly, First Regular Session

Sections 447.575, 447.532.1, 447.503(7), 447.539, 447.543 and 447.517, RSMo 2000

Opinion No. 110 of Attorney General Danforth, January 12, 1970

II.

The trial court did not err as asserted in Appellant's Points I through VIII because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

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

Van Gemert v. Boeing Company, 739 F.2d 730 (2nd Cir. 1984)

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. Bank 1986)

Friar v. Vanguard Holding Corp., 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)

Other Authorities

Article V, Sections 1, Missouri Constitution

Article V, Section 14, Missouri Constitution

Article V, Sections 3, 4 and 8, Missouri Constitution

Article II, Section 1, Missouri Constitution

Section 447.532, RSMo 2000

Section 456.010, RSMo 2000

Section 456.210, RSMo 2000

Chapter 456, RSMo 2000

Kevin M. Forde, *What Can A Court Do With Leftover Class Action Funds? Almost Anything!",* 35 Judges Journal 19 (Summer 1996, American Bar Association)

III.

The trial court did not err as asserted in Appellant's Points I through VIII because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

Cases

State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965)

Other Authorities

Section 447.532.1, RSMo 2000

Section 447.503(7), RSMo 2000

IV.

The trial court did not err with respect to any claims of the Appellant to interest on funds in the Underlying Cases as asserted under Appellant's Points I through VIII inasmuch as interest upon the funds in the Underlying Cases may be used and disbursed as provided in the Orders Appointing Receiver and in Section 483.310.2, RSMo, in each of the Underlying Cases, and the Order Establishing Trust in the Old Security/KIGA Class Action case.

Other Authorities

Section 483.310, RSMo 2000

V.

The trial court did not err as asserted in Appellant's Points VI and VII inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

Cases

Angelo v. City of Hazelwood, 810 S.W.2d 706 (Mo. App. E.D. 1991)

VI.

The trial court did not err as asserted in Appellant's Points III, IV and V inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in the four Underlying Cases, any claim to the funds held in the four Underlying Cases must be asserted in the four Underlying Cases or the Ancillary Adversary Proceedings thereto, the Circuit Court had the authority to require that Appellant assert any claims to the funds in the Ancillary Adversary Proceedings in the Respective Underlying Cases, and the Ancillary Adversary Proceedings

were properly instituted and were pending prior to the initiation of this case.

Cases

State ex rel. Sullivan v. Reynolds, 107 S.W. 487 (Mo. banc 1907)

Brady v. Ansehl, 787 S.W.2d 823 (Mo. App. E.D. 1990)

Robin Farms, Inc. v. Bartholomew, 989 S.W.2d 238

State ex rel. Gleason v. Rickhoff, 541 S.W.2d 47 (Mo. App. E.D. 1977)

Other Authorities

Supreme Court Rule 66.02

Supreme Court Rule 52.07

Supreme Court Rule 54.01

Supreme Court Rule 44.01(d)

VII.

The trial court did not err as asserted in Appellant's Point VIII inasmuch as the Respondent Receivers and Trustee have absolute judicial immunity, or alternatively official immunity, and therefore the Appellant is barred from pursuing this action against These Respondents.

Cases

Pogue v. Swink, 284 S.W.2d 868 (Mo. 1956)

State ex rel. Bird v. Weinstock, 864 S.W.2d 376 (Mo. App. E.D.1993)

Nelson v. McDaniel, 865 S.W.2d 747 (Mo. App. W.D. 1993)

Smallwood v. United States, 358 F.Supp. 398 (E.D. Mo. 1973),

aff'd 486 F.2d 1407 (8th Cir. 1973)

ARGUMENT

I.

The trial court did not err as asserted in Appellant's Points I through VIII inasmuch as the State Treasurer had and has no authority or standing to collect unclaimed property or administer the Uniform Disposition of Unclaimed Property Act because those are duties imposed by statute which cannot constitutionally be imposed upon the State Treasurer because of the provisions of Article IV, Section 15, Missouri Constitution, prohibiting the imposition of any duty by law which is not related to the "receipt, investment, custody and disbursement of state funds and funds received from the United States government" and, alternatively, because the statutes imposing collection and administrative duties under said Act were enacted in violation of the "single subject" and "clear title" provisions of Article III, Section 23, Missouri Constitution.

These Respondents adopt by reference as their arguments for this Point I the arguments set forth by Respondent Smith under Point I of the Argument of her Brief.

We note and briefly discuss Senate Bill No. 1248 enacted in 2002 during the Second Regular Session of the 91st General Assembly. This enactment is referred to at page 44 of Appellant's Brief and in some of the other Briefs of this case and the companion cases. Senate Bill No. 1248 became a "Christmas tree" bill for "revenue

enhancement" measures near the end of the 2002 Regular Session of the General Assembly. The provisions of Senate Bill No. 1248 were not addressed by Judge Stuckey or the parties in the Circuit Court. Consequently, the provisions of that enactment need not now be considered by this Court. See, *Green v. Lebanon R-III School District*, 13 S.W.2d 278 (Mo. banc 2002), indicating that issues not developed in the Circuit Court should be first addressed by the Circuit Court.

But, out of an abundance of caution, we do raise and assert that the provisions of S.B. No. 1248 which purport to repeal, amend or newly enact provisions within Chapters 447 and 470 relating to unclaimed property and escheats were unconstitutionally enacted in violation of the "single subject" and "clear title" provisions of Section 23 and the no change in "original purpose" provisions of Section 21 of Article III, and the no additional duties upon the State Treasurer provisions of Section 15 of Article IV, Missouri Constitution.

> The original title to Senate Bill No. 1248 as introduced was as follows:
>
> "AN ACT To repeal sections 30.260, 30.270, 142.824, 143.225, 143.261, 143.431, 143.451, 143.811, 144.190, 147.120, 148.074, 313.805, 313.820, 630.460, and 644.051, RSMo, and to enact in lieu thereof eighteen new sections for the sole purpose of establishing and funding the schools of the future fund, with an emergency clause."

There were no provisions with respect to any unclaimed property, escheat, Chapter 447, RSMo, in the Senate Bill No. 1248 when introduced.

Senate Bill No. 1248 as truly agreed and finally passed contained provisions with

respect to unclaimed property, escheat, Chapter 447, RSMo, and Chapter 470, RSMo, and has the following title:

> "AN ACT To repeal sections 143.121, 143.811, 313.300, 447.532, 470.010, 470.020, 470.030, 470.040, 470.050, 470.060, 470.070, 470.080, 470.130, 470.150, 470.190, 470.200, 470.210, 470.220, 470.230, 470.240, 470.250, 470.260, 470.270, 470.280, 470.290, 470.300, 470.310, 470.320, 470.330, 470.340, 470.350 and 542.301, RSMo, and to enact in lieu thereof thirty-five new sections relating to certain funds for public elementary and secondary education, with an emergency clause."

By reason of the provisions of Sections 23 and 21 of Article III, Missouri, the provisions within Senate Bill No. 1248 as truly agreed and finally passed relating to unclaimed property, escheat, Chapter 447, RSMo, and Chapter 470, RSMo, are unconstitutional and those provisions should be ordered severed from the other provisions of Senate Bill No. 1248, as enacted. See, *Home Builders Association of St. Louis v. State*, Case No. SC83863, 2002 WL 1051989, ___ S.W.3d ___ (Mo. banc May 28, 2002); and *Carmack v. Director, Department of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997).

The provisions of Senate Bill No. 1248 as enacted take authority and duties with respect to escheats from the Department of Revenue to the State Treasurer. This was effected near the end of the legislative session and is precisely the type of law which the provisions of Article IV, Section 15, Missouri Constitution, were designed to prevent. Hence, the provisions within Senate Bill No. 1248 relating to escheat, unclaimed

property, Chapter 470, RSMo, and Chapter 447, RSMo, are also unconstitutional because of the provisions of Section 15 of Article IV, Missouri, prohibiting the imposition of such duties upon the State Treasurer. Evidently, these provisions in Senate Bill No. 1248 relating to unclaimed property, escheat, Chapter 447, RSMo, and Chapter 470, RSMo, were enacted at the suggestion of Appellant Farmer — even though Judge Stuckey had earlier held that such duties could not be imposed upon the State Treasurer. Prudence would have dictated that all these duties be shifted to the Department of Revenue — but that was not done. The *St. Louis Post Dispatch* for Thursday, May 16, 2002, at page A1, reported that on Wednesday prior to the end of session on Friday, May 18, that the following occurred before the Senate and House negotiators:

> "State Treasurer Nancy Farmer came up with a less controversial idea. At her suggestion, the committee decided Wednesday to change the way it handles money sent to the state by probate courts when people die without wills and their heirs cannot be located.
>
> Under current law, the state must hold the money in an "escheats" fund for 21 years. If still unclaimed, it reverts to the state. Farmer wants to move the money to the Unclaimed Property Fund, where the rightful owners can claim it no matter how long it has been there. In the meantime, the state gets to use the money. She said that would give the state $6.6 million to use next year."

The Appellant evidently did not advise the legislators that there might be constitutional problems if these duties were assigned to the State Treasurer and also evidently did not

advise the legislators that the Article IV, Section 15, constitutional problems would be cured if the duties were shifted to the Department of Revenue rather than vice versa. Rather, Appellant sought to enhance her authority.

Clearly, the provisions of Senate Bill No. 1248 relating to unclaimed property, escheat, Chapter 447, RSMo, and Chapter 470, RSMo, are unconstitutional.

These Respondents set forth here the authorities which are set forth under Point I of the Argument of the Brief of Respondent Smith in SC84210:

Article IV, § 15, 1945 Missouri Constitution

Debates, Missouri Constitutional Convention, June 1944

Article IV, § 13, 1945 Missouri Constitution

Article IV, § 14, 1945 Missouri Constitution

Article IV, § 22, 1945 Missouri Constitution

Article IV, § 15, Current Missouri Constitution

Article III, § 23, Current Missouri Constitution

Article III, § 36, Current Missouri Constitution

Article IV, § 36(a), Current Missouri Constitution

Article X, § 15, 1875 Missouri Constitution

Article X, § 17(1), Current Missouri Constitution

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to 447.595, RSMo

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

Blydenburg v. David, 413 S.W.2d 284 (Mo. banc 1967)

Opinion No. 110 of Attorney General Danforth, January 12, 1970

Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974)

Buechner v. Bond, 650 S.W.2d 611 (Mo. banc 1983)

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

Howell v. Division of Employment Security, 215 S.W.2d 467 (Mo. 1948)

Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bill No. 566, 87th General Assembly, First Regular Session

Carmack v. Director, Department of Agriculture, 945 S.W.2d 956 (Mo. banc 1997)

Home Builders Association of St. Louis v. State, Case No. SC83863, 2002 WL 1051989, _____ S.W.3d _____ (Mo. banc May 28, 2002)

Kelly v. Hanson, 931 S.W.2d 816 (Mo. App. W.D. 1996)

State v. Planned Parenthood, 66 S.W.3d 16 (Mo. banc 2002)

Wilkes v. The King, (1768) Wilm. at pp. 327

Cooley, "Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies", The American Journal of Legal History, Vol. 2, pages 304, 307 (1958)

Section 447.503(7), RSMo 2000

Section 447.517, RSMo 2000

Section 447.532.1, RSMo 2000

Section 447.539, RSMo 2000

Section 447.543, RSMo 2000

Section 447.575, RSMo 2000

House Bill No. 1088, 82nd General Assembly, Second Regular Session

Section 100.260, RSMo 2000

Section 104.150, RSMo 2000

Section 104.440, RSMo 2000

Sections 288.290 through 288.330, RSMo 2000

Supreme Court Rule 6.04

Supreme Court Rule 7

Supreme Court Rule 7.02

II.

The trial court did not err as asserted in Appellant's Points I through VIII because the Cole County Circuit Court has the authority to make a disposition of the funds (including interest thereon) in this case even if *arguendo* the State Treasurer has the authority to assert claims and collect unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act.

These Respondents adopt by reference as their argument for this Point II the arguments set forth by Respondent Smith under Point II of the Argument of her Brief.

In addition to the reasons set forth in the Brief of Respondent Smith in SC84210, there were certain other and additional reasons why relief cannot be granted to the Appellant which were set forth under the respective Point IIs of the Argument of the Briefs of Respondent Healey in SC84211, Respondent Blackwell in SC84212 and Respondent Morgan in SC84213. The arguments set forth under the respective Point IIs of the Argument of the Briefs of Respondent Healey in SC84211, Respondent Blackwell in SC84212 and Respondent Morgan in SC84213 are also incorporated by reference by these Respondents as additional arguments for this Point II.

These Respondents do, however, set forth here the authorities which are set forth Under Point II of the Argument of the respective Briefs of Respondent Smith in SC84210, Respondent Healey in C84211, Respondent Blackwell in SC84212 and Respondent Morgan in SC84213:

Article II, § 1, Current Missouri Constitution

Article V, § 1, Current Missouri Constitution

Article V, § 14, Current Missouri Constitution

Article V, § 3, Current Missouri Constitution

Article V, § 4, Current Missouri Constitution

Article V, § 8, Current Missouri Constitution

State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. banc 1970)

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

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

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

United States v. Morgan, 307 U.S. 183 (1937)

Market Street Railway Co. v. Railroad Commission, 171 P.2d 875 (Cal. Bank 1946)

State ex rel. South Missouri Pine Lumber Co. v. Dearing, 79 S.W. 454 (Mo. banc 1904)

State ex rel. Hampe v. Ittner, 263 S.W.2d 158 (Mo. 1924)

Van Gemert v. Boeing Company, 739 F.2d 730 (2nd Cir. 1984)

Friar v. Vanguard Holding Corp., 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)

Kevin M. Forde, "*What Can A Court Do With Leftover Class Action Funds? Almost Anything!"*, 35 Judges' Journal 19 (Summer 1996, American Bar

Association). A copy of this article is set forth in Appendix B of this Brief at A-05.

Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997)

Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission, 84 F.3d 451 (D.C. 1996)

Houck v. Folding Carton Administration Committee, 881 F.2d 494 (7th Cir. 1989), *on remand sub nom. In Re Folding Carton Antitrust Litigation*, No. MDL 250, 1991 WL 32857 (N.D. Ill. March 6, 1991)

Jones v. National Distillers, 56 F.Supp.2d 355 (S.D. N.Y. 1999)

Northern Natural Gas Co. v. Federal Power Commission, 225 F.2d 886 (8th Cir. 1954)

In Re Wells Fargo Securities Litigation, 991 F.Supp. 1193 (N.D. Cal. 1998)

State v. Levi Strauss & Co., 715 P.2d 564 (Cal. Bank 1986)

In Re Miamisburg Train Derailment Litigation, 635 N.E.2d 46 (Ohio App. 1993)

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to 447.595, RSMo

28 U.S.C. § 2041

28 U.S.C. § 2042

Section 447.532, RSMo 2000

Section 456.010, RSMo 2000

Section 456.210, RSMo 2000

Chapter 456, RSMo 2000

III.

The trial court did not err as asserted in Appellant's Points I through VIII because the Appellant State Treasurer is not in a position to make any claim to the funds in this case pursuant to the Uniform Disposition of Unclaimed Property Act.

These Respondents adopt by reference as their arguments for this Point III the arguments which are set forth by Respondent Smith under Point III of the Argument of her Brief in SC84210.

These Respondents do, however, set forth here the authorities which are set forth with respect to Point III in the Brief of Respondent Smith in SC84210:

Uniform Disposition of Unclaimed Property Act, Sections 447.500 to 447.595, RSMo

Section 447.503(7), RSMo 2000

Section 447.532.1, RSMo 2000

House Bill No. 1088, 82nd General Assembly, Second Regular Session

State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965)

Citronelle-Mobile Gathering, Inc. v. Boswell, 341 So.2d 933 (Ala. 1977)

Douglas Aircraft Co. v. Cranston, 374 P.2d 819 (Cal. 1962)

Country Mutual Insurance Co. v. Knight, 240 N.E.2d 612 (Ill. 1968)

IV.

The trial court did not err with respect to any claims of the Appellant to interest on funds in the Underlying Cases as asserted under Appellant's

Points I through VIII inasmuch as interest upon the funds in the Underlying Cases may be used and disbursed as provided in the Orders Appointing Receiver and in Section 483.310.2, RSMo, in each of the Underlying Cases, and the Order Establishing Trust in the Old Security/KIGA Class Action case.

These Respondents adopt by reference as their arguments for this Point IV the arguments set forth in Respondent Smith under Point IV of the Argument of her Brief.

These Respondents do, however, set forth here the authority which is set forth with respect to Point IV in the Brief of Respondent Smith in SC84210:

Section 483.310, RSMo.

These Respondents also incorporate by reference under This Point IV the arguments and authorities which are set forth in the Briefs of Respondent Cole County in SC84210, SC84211, SC84212 and SC84213.

V.

The trial court did not err as asserted in Appellant's Points VI and VII inasmuch as the Motion for Judgment on the Pleadings incorporated other pleadings and motions, that Motion could be considered as a motion to dismiss and the trial court could properly conclude that the State Treasurer could not assert a claim to the funds or had not properly asserted a claim to the funds.

These Respondents adopt by reference as their arguments for this Point V the arguments set forth by Respondent Smith under Point V of the Argument of her Brief in

SC84210.

These Respondents do, however, set forth here the authorities which are set forth with respect to Point V in the Brief of Respondent Smith in SC84210:

Angelo v. City of Hazelwood, 810 S.W.2d 706 (Mo. App. E.D. 1991)

VI.

The trial court did not err as asserted in Appellant's Points III, IV and V inasmuch as the Cole County Circuit Court had and continues to have jurisdiction over the funds in the four Underlying Cases, any claim to the funds held in the four Underlying Cases must be asserted in the four Underlying Cases or the Ancillary Adversary Proceedings thereto, the Circuit Court had the authority to require that Appellant assert any claims to the funds in the Ancillary Adversary Proceedings in the Respective Underlying Cases, and the Ancillary Adversary Proceedings were properly instituted and were pending prior to the initiation of this case.

These Respondents adopt by reference as their arguments for this Point VI the arguments set forth by Respondent Smith under Point VI of the Argument of her Brief in SC84210.

These Respondents do, however, set forth here the authorities which are set forth with respect to Point VI in the Brief of Respondent Smith in SC84210:

State ex rel. Sullivan v. Reynolds, 107 S.W. 487 (Mo. banc 1907)

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

Supreme Court Rule 66.02

Supreme Court Rule 52.07

Crist v. ISC Financial Corp., 752 S.W.2d 489 (Mo. App. W.D. 1988)

Brady v. Ansehl, 787 S.W.2d 823 (Mo. App. E.D. 1990)

Roosevelt Federal Savings & Loan Association v. First National Bank of Clayton, 614 S.W.2d 289 (Mo. App. E.D. 1981)

Supreme Court Rule 54.01

Supreme Court Rule 54.02

American Refractories Co. v. Combustion Controls, 70 S.W.3d 660 (Mo. App. S.D. 2002)

State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24 (Mo. App. W.D. 1984)

State on Inf. of Attorney General v. Arkansas Lumber Co., 190 S.W. 894 (Mo. banc 1916))

Ainsworth v. Old Security Life Insurance Co., 685 S.W.2d 583 (Mo. App. W.D. 1985)

In Re Transit Casualty Co. in Receivership, Pulitzer Publishing Co. v. Transit Casualty Co. in Receivership, 43 S.W.3d 293 (Mo. banc 2001)

Clay v. Eagle Reciprocal Exchange, 368 S.W.2d 344 (Mo. 1963)

In Re Transit Casualty Co. in Receivership v. William Blair Realty Partners, II, v. Transit Casualty Co. in Receivership, 900 S.W.2d 671 (Mo. App. W.D. 1995)

Article II, § 1, Current Missouri Constitution

Supreme Court Rule 51.07

Supreme Court Rule 2, Canon 3

Article V, § 4, Current Missouri Constitution

State ex rel. Buchanan v. Jensen, 379 S.W.2d 529 (Mo. banc 1964)

Robin Farms, Inc. v. Bartholomew, 989 S.W.2d 238 (Mo. App. W.D. 1999)

State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996)

Supreme Court Rule 44.01(d)

State ex rel. Gleason v. Rickhoff, 541 S.W.2d 47 (Mo. App. E.D. 1977)

Jenkins v. Jenkins, 784 S.W.2d 640 (Mo. App. W.D. 1990)

VII.

The trial court did not err as asserted in Appellant's Points VIII and V inasmuch as the Respondent Receivers and Trustee have absolute judicial immunity, or alternatively official immunity, and therefore the Appellant is barred from pursuing this action against These Respondents.

The actions of the Respondent Receivers and the Respondent Trustee were set forth and circumscribed by Orders of the Cole County Circuit Court. There is no allegation that These Respondents acted other than pursuant to the Orders of the Circuit Court. In fact, the allegations of the Petition reflect that the authority of These Respondents to disburse any monies is very limited, it being alleged that the Receivers and the Trustee can disburse no more than $250 or

$500 without a specific court order.[4] These Respondents were prohibited, in effect, by the Orders of Judges Kinder and Brown from transferring any of the funds to the Appellant State Treasurer. All of the Respondents in this Personal Liability Case are entitled to judicial immunity with respect to the claims asserted by Appellant.

It is clear that Appellant seeks a "pound of flesh" from all of the Respondents personally — not merely an order to turn over the funds now held by These Respondents pursuant to the orders of the Respondent Judges. The proper procedure for the Appellant and the Attorney General to have followed if the State Treasurer has any claims to the funds in the four Underlying Cases was to have filed a motion to intervene in the four Underlying Cases, coupled with a proposed pleading setting forth the claims, or after the Ancillary Adversary Proceedings had been commenced, to join issue in those proceedings and assert claims. Had such requested relief been denied, the Appellant could thereafter have taken an appeal or pursued a prohibition or mandamus remedy in the Missouri Court of Appeals or in this Court, as appropriate.

The Appellant seeks to impose personal liability upon all of the Respondents (i) for all interest and earnings on the funds which have heretofore been disbursed and over which the Respondents now have no control, (ii) for costs expended pursuant to Court Order which are "after the fact" determined not to be "necessary and

[4] The record in the four Underlying Cases reflects that disbursements of interest have uniformly only been made pursuant to Court order, even though interest could have been disbursed on a frequent basis in smaller amounts. See Legal Files in SC84210, SC84211, SC84212 and SC84213.

proper costs", (iii) for "penalties" and (iv) for "costs". In the case of Respondents Smith and Morgan, the relief sought involves monies disbursed by their predecessors as Receivers. See, "prayers" in the Petition in this Personal Liability Case quoted at the beginning of the Statement of Facts, *supra*.

In determining whether a person is entitled to immunity, be it absolute judicial immunity or a qualified immunity, such should be determined at the threshold of the litigation before there is discovery on the merits or any trial on the merits. Consequently, while we address the immunity argument as Point VII of the Points Relied On and in the Argument,[5] for judicial administration purposes the threshold immunity issues in this Personal Liability Case should be reached first in this case. Judgments should be affirmed on this immunity ground.

The trial court in its Judgment with respect to These Respondents pertinently concluded:

> "Further there is no authority in law for the Treasurer to assess penalties and interest against the individual Respondent Receivers and Trustee for the reason that said Respondents have absolute judicial immunity from such actions or alternatively have official immunity from such actions. *State ex*

[5] These arguments are set forth as a Point VII in this Brief to avoid confusion with the Points and Arguments numbered I through VI which are essentially the same as Points I through VI of our Briefs in SC84210, SC874211, SC84212 and SC84213, which have been incorporated herein by reference.

rel. Raack v. Kohn, 720 S.W.2d 941 (Mo. banc 1986); *Howe v. Brouse*, 427 S.W.2d 467 (Mo. 1968); and *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000)."

L.F. 217-218.

Even when qualified immunity rather than absolute immunity is at issue, the issue of immunity should be first determined. "'Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal prior to the commencement of discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996).

In Missouri, the law is clear that Judges are entitled to broad immunity for any claims for monies, no matter what the type of proceeding might be and regardless of whether or not a Judge may have acted in excess of his jurisdiction. See, *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986), holding that attorneys fees and costs could not be recovered from a Judge in prohibition proceedings:

> "Relator seeks assessment of attorney's fees and costs against the respondent judge. A judge with subject matter jurisdiction has judicial immunity from all actions taken, even when acting in excess of his jurisdiction. *Howe v. Brouse*, 427 S.W.2d 467 (Mo. 1968); *Pogue v. Swink*, 365 Mo. 503, 284 S.W.2d 868 (1956); *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980). Judicial immunity 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.' *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967), quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 350 n., 20 L.Ed. 646 (1872), quoting *Scott v. Stansfield*, 3 L.R. – Ex. 220, 223 (1868). We find no precedent for the assessment of attorney's fees and costs against a judge acting in his official capacity."

See also cases cited in *Raack*. In *Pogue v. Swink*, 284 S.W.2d 868 (Mo. 1955), this Court was faced with a claim that Circuit Judge J. O. Swink had personal liability because he had ordered the County Court [now County Commission] to increase the salary of a deputy circuit clerk. Judge Swink's order was not made in any pending case before him and was entered without there being any statutory authority for a Circuit Judge to order an increase in a deputy circuit clerk's salary. This Court held that even though Judge Swink's actions were void and he acted "in excess of his jurisdiction", Judge Swink had no personal liability. Even if, *arguendo*, it be conceded that the four Underlying Cases are closed, there is therefore no pending case and the Respondent

Judges have been acting in excess of their jurisdiction as asserted in Appellant's Point V,[6] under *Swink* all of the Respondents are entitled to judicial immunity.

In *Stump v. Sparkman*, 435 U.S. 349 (1978), the Supreme Court held that a state judge who ordered a 15 year old girl to be sterilized was immune from any personal liability, even though sterilization of a minor who was not confined in an institution was not authorized by statute. The United States Supreme Court reasoned that:

> ". . .the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"

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[6] Appellant has contended that the Underlying Cases were closed. That argument is specious. For as long as funds are being held in a case, contrary to the assertions of Appellant in her Point V, "all issues have [not] been resolved" and the case is not over or closed. Appellant does not seem to "get it" that when a court issues an order creating a receivership or a trust and appointing a receiver or a trustee and the court thereafter continues to enter order in the case, the court is continuing to exercise jurisdiction. It has been said that if something looks like a duck, and quacks like a duck, it probably is a duck". *Leroux v. Doniphan Retirement Home*, 663 S.W.2d 791, 792 (Mo. App. 1984). "Applying that test to the. . . ." (*Id.*) creating and continuation of the receiverships and trust in the Underlying Cases here, those cases are not yet closed or over, the Respondent Judges continue to have jurisdiction over the Underlying Cases.

435 U.S. at 355-356.

Continuing, the Supreme Court in *Stump* reasoned that:

> "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." (emphasis added, 435 U.S. at 362).

Here, the appointment by a judge to hold and administer monies connected with the subject matter of the case is a "function normally performed by a judge." The fact that no party to the four Underlying Cases objected to the appointment of the Receivers and the Trustee and the disbursement of interest and earnings conclusively demonstrates that such actions were within "the expectations of the parties".

The next question is whether the Respondent Receivers and Trustee are entitled to judicial immunity. All of These Respondents were appointed and have been acting pursuant to the Orders of the Cole County Circuit Court. Here, the appointments were by the Circuit Court — not, as is the case with a Special Deputy Receiver of an insolvent insurance company who is appointed by the Director of Insurance rather than the Court, with only the approval of a court of such appointment being required and whose immunity is dependent upon statutory provisions.

Missouri appellate courts and courts in other jurisdictions have held that persons performing functions at the direction of a court, as is the situation with These

Respondents, are also entitled to judicial immunity. In *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376 (Mo.App. E.D.1993), the Court held that a guardian ad litem appointed by the Court in a child custody proceeding was entitled to what was termed "quasi-judicial immunity" and that a writ of prohibition should be made permanent with respect to any monetary claims for negligence against the court appointed guardian ad litem. The Court held that it was proper to apply the same judicial immunity rationale as set forth in *Raack*, *supra*, to persons appointed by a court and who act pursuant to orders of a court.

And see also, *Nelson v. McDaniel*, 865 S.W.2d 747 (Mo.App. W.D. 1993), in which the Court, after citing *Raack* and *Stump*, *supra*, held that a sheriff acting pursuant to court order was entitled to judicial immunity with respect to any claims against him.

A number of cases have held that court appointed receivers acting pursuant to court order are entitled to judicial immunity. In *Smallwood v. United States*, 358 F.Supp. 398 (E.D. Mo. 1973), *aff'd* 486 F.2d 1407 (8th Cir. 1973), a court appointed receiver, as well as that receiver's attorneys, were held to be entitled to judicial immunity:

> "The court appointed receiver is a quasi-judicial officer within the protection afforded by the doctrine of judicial immunity. *Bradford Auto Corporation v. Pious*, 392 F.2d 67 (2nd Cir. 1968). As a receiver appointed by the Court, it is evident that defendant Symington acted only pursuant to court direction and thus is protected by the judicial immunity doctrine and immune from suit."

358 F.Supp. at 404. The judicial immunity was further extended in *Smallwood* to Receiver Tim Symington's court approved attorney, Tom Guilfoil, and to a Trustee.

Other cases extending judicial immunity to court appointed receivers include *Davis v. Bayless*, 70 F.3d 367, 372 (5th Cir. 1995) ("Court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity. . . ."; *New Alaska Development Corporation v. Guetschow*, 869 F.2d 1298 (9th Cir. 1989); *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (3rd Cir. 1976); *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599 (11th Cir. 1985); *Capitol Terrace, Inc. v. Shannon & Luchs, Inc.*, 564 A.2d 49 (D.C. App. 1989); and *Perry Center, Inc. v. Keitkamp*, 576 N.W.2d 505 (N.D. 1998).

Consequently, it is clear that These Respondents are entitled to judicial immunity. There are no allegations that any of These Respondents acted other than pursuant to court order or that they acted in a malicious manner.

But even if, *arguendo*, judicial immunity is not available to These Respondents, the Receivers and Trustee do qualify for official immunity. See, e.g., *Green v. Lebanon R. III School District*, 13 S.W.2d 278 (Mo. banc 2000), holding that school board members were entitled to official immunity and were not personally liable to taxpayers for alleged Hancock Amendment violations. There is nothing which is alleged in the Appellant's Petition which would make the official immunity doctrine inapplicable.

Any claims that the Appellant has or had to the current funds in the four Underlying Cases should have been asserted in those four Underlying Cases, or after the initiation of the Ancillary Adversary Proceedings, in those Proceedings. Neither the Appellant nor the Attorney General have done so. The funds in each Underlying Case constitute a "res" which are within and under the jurisdiction of the Circuit Court in each

such Underlying Case. Any claims against the "res" must be asserted in the Underlying Case or in ancillary proceedings thereto. See, Point VI of the Points Relied On and Point VI of the Argument and authorities therein cited in the Brief of Respondent Smith in SC84210, which are here incorporated by reference.

Finally, we would note that if this Court would hold that the Respondents are not entitled to immunity with respect to monetary claims against the Respondents personally, the precedent would be set which would allow the State Treasurer to be personally sued under the Unclaimed Property Act. We note that last Report of the State Auditor with respect to the Hancock Amendment, Report No. 2002-28, "*Review of Article X, Sections 16 through 24, Constitution of Missouri, for the Year Ended June 30, 2001"*, which was issued by the Missouri State Auditor on April 15, 2002, reflects a state "revenue" account, account number 1822, which for the fiscal year "revenues" total approximately $8.6 million attributable to "outlawed checks". See page 17 of Report No. 2002-28. This account is described by the State Auditor in Note "N" of her Report No. 2002-28 at page 28, as follows:

> "Outlawed checks, which are state checks that were not cashed by the payee within the time allowed, are redeposited in the state treasury. . . ." (emphasis added)

Consequently, rather than transfer the funds represented by these checks into an abandoned property account, it appears that the State Treasurer has placed those revenues into general revenue or the account from which the check was written. If any of the Respondents are personally liable for any of the amounts alleged in the

Petition, then the State Treasurer should in due course after a passage of time[7] be personally liable to pay over $8.6 million for outlawed checks because she had not paid this amount over to an abandoned property account.

Clearly, we submit, the Judgments below should be affirmed on the basis of judicial immunity, or alternatively, on the basis of official immunity.

[7] Earlier State Auditor Reports with respect to the Hancock Amendment reflect a similar treatment of the funds involved with "outlawed checks". See, e.g., State Auditor Report No. 2000-18, issued on March 22, 2000, for the fiscal year ending June 30, 1999. The requisite period of time has now passed for a turnover of the funds involved in "Outlawed Checks" during the 1990s. Perhaps the Appellant should consider a lawsuit against former State Treasurer Bob Holden and former Deputy State Treasurer Nancy Farmer personally with respect to the funds involved with the "outlawed checks" in the 1990s.

CONCLUSION

For the reasons set forth in the Briefs of these Respondents SC84210 SC84211, SC84212, SC84213 and hereinabove, the Judgments entered by Judge Stuckey should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains 14,080 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

_____

Alex Bartlett

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief along with a double-sided, high-density IBM PC compatible disk with the text of the Brief were served on August 14, 2002, by United States Mail, postage prepaid, to Mr. James McAdams, Office of the Missouri Attorney General, P. O. Box 899, Jefferson City, MO 65102, attorney for Appellant Nancy Farmer, to Robert G. Russell, P. O. Box 815, Sedalia, MO 65302-0815, attorney for Respondent Byron L. Kinder, and to Dale C. Doerhoff, 231 Madison Street, Jefferson City, MO 65101, attorney for Respondent Thomas J. Brown, III.

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Alex Bartlett