NO. SC 93471

IN THE MISSOURI SUPREME COURT

MELODY FRYE,

Respondent,

v.

RONALD J. LEVY, DIRECTOR,
STATE OF MISSOURI DEPARTMENT OF SOCIAL SERVICES,
CHILDRENS' DIVISION,

Appellant.

Appeal from the Thirty-Seventh Judicial Circuit, Howell County, Missouri, Honorable Michael J. Ligons, Associate Circuit Judge

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SUBSTITUTE BRIEF OF RESPONDENT MELODY FRYE

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondent adopts Appellant's Statement of Facts with the following additions. Respondent Melody Frye, a Licensed Practical Nurse, was working the "graveyard shift" at the local hospital (Ozarks Medical Center) at the time of her infant daughter Jaycee's death in the family home on May 9, 2006. LF 151, 153, 137, 96. Melody Frye was in the 34th week of a pregnancy when she learned her youngest daughter Jaycee tragically passed away. LF 27, 28, 31. When Melody was informed of Jaycee's death, she began having labor pains and had to be admitted to the hospital. LF 28. While in the hospital and under heavy sedation, Children's Division investigator Gail Smotherman advised Melody Frye of a hotline complaint investigation over concerns for her children. LF 28. Upon discharge from the hospital, Children's Division immediately insisted Melody Frye prohibit any contact between her husband Joseph Frye and her two children. LF 31, 32, 36. Despite Melody's advanced pregnancy and its complications, this requirement effectively meant Melody and her children had to vacate the family home. LF 35. For the duration of the investigation, Melody and her children lived with her mother Kathy Geery. LF 35. The Children's Division was aware of Melody's living arrangement and had Ms. Geery's correct address for notification purposes. LF 48.

The Children's Division investigated Melody Frye for failure to supervise her husband, Joseph Frye, in relation to all three of Melody's children. Only the complaint concerning Jaycee Hardin was "substantiated." L.F. 137.The criminal prosecution of

Joseph Frye for the death of Jaycee was dismissed by the State for want of evidence. L.F.154. Melody denies Joseph was responsible for Jaycee's death. LF 151.

The judgment of the trial court was unanimously affirmed by a three-judge panel of the Missouri Court of Appeals, Southern District, on May 9, 2013. On June 19, 2013, Appellant Director filed his application to transfer the instant cause to this Court, alleging the presence in the case of "questions of general interest and importance" and that the opinion of the Southern District was "contrary" to one specified prior opinion of this Court and two specified prior opinions of the Court of Appeals, none of them involving RSMo. §210.152 or cognate statutes. The application failed to mention *Petet v. Department of Soc. Servcs*., 32 S.W.3d 818 (Mo. App. W.D. 2000), a prior consistent opinion of the Western District giving mandatory effect to the same statutes implicated in the case at bar.

While the transfer application pended, a unanimous three-judge panel of the Missouri Court of Appeals, Western District on July 23, 2013 affirmed a judgment of the Circuit Court of Jackson County, ordering a child neglect investigation subject's name removed from the Central Registry on the same grounds invoked by the trial court below. *In re Williams*, No. WD 75693[1].

[1] A companion case before the Western District styled *Smith v. State of Missouri* WD 75673 raised identical issues litigated in *Williams* but the parties agreed to stay the matter on appeal. The *Smith* notice of appeal and trial court judgment are included in the separately filed Appendix.

On August 13, 2013, this Court sustained Director's application and ordered the record transferred from the Southern District. Finally, on September 3, 2013, Director filed his Substitute Brief in this Court.

POINTS RELIED ON

I. The trial court properly ordered Melody Frye's name removed from the Central Registry, because the Childrens' Division has no authority to delay notice of its determination of child neglect reports beyond ninety days, in that the Division's powers derive exclusively from Missouri Statutes; the requirement is couched in mandatory language and its violation is presumed prejudicial; RSMo. §210.152.2 contains no "good cause " exception; a directory reading of the statutes would confer unchecked agency discretion to delay or defer investigation indefinitely; and noncompliance with statutory time limits is prejudicial to investigation subjects such as Melody Frye .

Petet v. Dep't of Social Services, 32 S.W.3d 818 (Mo. App. W.D. 2000).

In re Williams, ___ S.W.3d ___ Mo. App. No. WD75693, WL3797548 (July 23, 2013).

Jamison v. Dep't of Social Services, 218 S.W.3d 399 (Mo. banc 2007).

In re A.H. (Y.O. v. Benton County Juvenile Ofc.), 169 S.W.3d 162 (Mo. App. S.D. 2005).

RSMo. §210.152.2 (Supp. 2005).

ARGUMENT

I. The trial court properly ordered Melody Frye's name removed from the Central Registry, because the Children's Division has no authority to delay notice of its determination of child neglect reports beyond ninety days, in that the Division's powers derive exclusively from Missouri Statutes; the requirement is couched in mandatory language and its violation is presumed prejudicial; RSMo. §210.152.2 contains no "good cause " exception; a directory reading of the statutes would confer unchecked agency discretion to delay or defer investigation indefinitely; and noncompliance with statutory time limits is prejudicial to investigation subjects such as Melody Frye.

Standard of Review

Respondent concurs in Appellant's recital of the applicable standard of review for cases resolved by summary judgment upon questions of law. However, Respondent objects to the superfluous second paragraph, which asserts "Melody Frye is not entitled to judgment as a matter of law" and "the trial court was incorrect." These comments do not illuminate the relevant standard of review and violate the concision requirement of Rule 84.04(e).

Preliminary Analysis

As framed by Director's sole Point Relied On, the issue before this Court hinges on the existence of "good cause" for delaying the requisite statutory notice beyond ninety days. According to Appellant, "**when good cause for a delayed conclusion exists**" (but,

implicitly, not otherwise) the time limit should be treated as "directory" – that is, merely aspirational and therefore unenforceable.

If this, Appellant's sole contention, indeed raised a question of general interest or importance, then its supporting argument would need to explain, among other things: (1) what constitutes "good cause;" (2) whether the Division is the final arbiter of whether "good cause" exists; (3) why §210.152 contains no "good cause" exception when the legislature plainly could have included one, as it did in §210.145.14; (4) whether the existence of "good cause" is to be presumed whenever the Division ignores the 90-day time limit, or whether the Division must prove it when a citizen challenges an untimely notice ; (5) what particular material in the trial court's summary judgment record established "good cause" for the belated notification to Melody Frye[2]; and (6) why this notionally implicit "good cause" exception is now proposed for the first time in the Supreme Court.

Appellant's Argument, however, contains none of this analysis and hence collapses under its own weight. In view of Appellant's default, this Court could, and by all rights should, rescind its order of transfer as improvidently granted pursuant to Rule 83.09.

In any case, appellant concedes that §210.152.2 contains no explicit "good cause" exception, and the cases hold that absent such express exception, none will be implied. Compare, *In re Donaldson*, 214 S.W.3d 331 (Mo. banc 2007), where the statute imposing

[2] *But see* n.2, *infra*.

a 90-day deadline for retrial after mistrial on a "sexually violent predator" determination also permitted continuance beyond the deadline for good cause. *Id.* at 333. By contrast, the 90-day limit of §210.152 is unqualified and not subject to extension for any reason.

Finally, as for the subsequent amendment of §210.145.14 to permit indefinite investigative time in the case of child death, Appellant argues that this merely "clarified" what was already the law at the time of the Frye investigation. Sub.App.Br. at 30. Yet, as recognized by the Southern District Court of Appeals in our case and reiterated by the Western District in *Williams*, courts must presume that the 2007 amendment was a meaningful act, effecting a change in the law. *State ex rel. Edu-Dyne Systems, Inc. v. Trout*, 781 S.W.2d 84, 86 (Mo. banc 1989); *Wyatt v. Taney County*, 347 S.W.3d 616, 621 (Mo. App. S.D. 2011). Appellant simply ignores this bedrock rule of statutory construction.

The Child Neglect Investigation Framework

RSMo. §§210.245 and 210.152 (Supp. 2005), as applicable to the 2006 child neglect investigation of Melody Frye, established a simple and straightforward framework for the disposition of complaints. The investigation "*shall"* be completed within 30 days following Division's receipt of the neglect report "*unless for good cause*" *timely documented*, more time is needed; but in any case, within 90 days after receipt of the report, the alleged perpetrator "*shall be notified in writing"* of the Division's *determination*. While good cause, when timely documented, may extend the investigation window beyond 30 days, it cannot extend the 90-day resolution/notice window. Such was the legislative judgment in ***balancing the competing interests*** in this particular

branch of Missouri's comprehensive child protection policy system. *Williams*, Slip Op. at 12. "Although protecting children from abuse and neglect is a significant state interest, it can be fulfilled by means other than depriving individuals of substantial liberty interests." *Jamison*, at 410.

Question Presented

Appellant admits failing to document any good cause for continuing its investigation after June 27[3] and failing to notify Ms. Frye of any determination within 90 days. The dispositive question before this Court is whether, having failed to notify Ms. Frye within the time allowed by law, the Division lost authority to proceed further against her.

Judicial Interpretation of Child Neglect Statutes.

In defense of the untimely branding of Melody Frye as a child neglecter, Appellant says the statutory imperative should be deemed merely aspirational rather than compulsory. The merit of that claim, if any, is presently determined under the standard reiterated by this Court in *Farmers & Merchants Bank v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995): "[w]hether the statutory word 'shall' is mandatory or directory is *a function of context*" (emphasis added).

The *context* for judicial interpretation of child neglect investigation statutes has been declared in *Jamison v. Dep't of Social Services*, 218 S.W.3d 399 (Mo. banc 2007)

[3] For the first time in this Court, Appellant invokes by offhand reference – *sans* commentary – material contained at L.F. 77-80 (App.Sub.Br. at 18, n.6.).

and *Petet v. Dep't. of Social Services*, 32 S.W.3d 818 (Mo. App. W.D. 2000), as well the abeyed opinions of the Southern and Western Districts in *Frye* and *Williams*. These authorities establish that because (1) child neglect investigation subjects hold a Constitutional liberty interest in avoiding prejudicial stigmatization (*Jamison*, at 406-7, 417) and (2) the Division's powers derive wholly from its express legislative grant (*Petet*, at 822), *"shall," in the context of these particular statutes*, is to be taken as mandatory. *Williams*, Slip Op. n. 11.

The Legislative Intent.

In a lengthy discussion at pp. 16-22 of its Substitute Brief, Appellant offers a one-sided policy argument on the pretense of exploring the legislative intent. According to Appellant, reading "shall" in §210.152.2 as merely directory – that is, nugatory – would best serve the State's aim of protecting children from abuse and neglect. But this begs the question. While situations might be conjectured in which a child could be "better protected" by an unlimited investigative power, Appellant wholly ignores the Southern and Western Districts' observation that ***the legislature has already balanced the competing interests*** in devising the statutory scheme, giving full and due weight to the protection of children, but not at the sacrifice of all other values. Indeed, Appellant's entire argument reduces to the claim that, for policy reasons, the legislature should be

understood as having granted the unfettered powers for which the Division has long contended.[4]

Because the Southern and Western District opinions supply full and convincing answers to most particulars of Appellant's argument, Respondent endorses and invites the Court's attention to those opinions without extensive rescription herein. Instead we focus on the overstatements and certain pretenses of Appellant's Substitute Brief itself.

Having failed in both trial courts and both districts of the Court of Appeals, as well as all courts in *Petet* and *Jamison*, Appellant now argues that §210.152.2 and cognate sections were adopted with legislative awareness that (1) courts sometimes hold time limits for agency action to be merely directory; (2) investigation subjects possess no due process rights on account of that status alone; (3) remedial legislation is so construed as to best combat the evil at which it aims. Sub.App.Br. at 13-14. Yet the legislature was also aware that (1) no case holding an administrative time limit merely directory involved

[4] Only since this Court's affirmance of the adverse judgment in *Jamison* has the Division conceded a Federal Constitutional limitation upon its power to "protect children." Until *Petet*, the Division claimed the authority to reopen long-closed investigations at its whim. In view of *Petet*, *Williams*, the instant case, and pending No. WD75693, it is plain that the Division will never hasten its investigations in deference to a merely "directory" time limit.

an exercise of the State's police power;[5] (2) since Ch. 210 itself requires "providing due process for those accused of child abuse or neglect," "it cannot be seriously argued that due process rights are not implicated by child abuse investigations pursuant to Chapter 210." *Williams*, Slip Op. n. 11.

Appellant further seeks credit for its response to the anonymous accusations against the Fryes, in having "protected" Jaycee Hardin's siblings with "a safety plan, written service agreement, home visits, supervised visitation, parenting classes, and counseling" (Sub.App.Br. 17-18, n. 5). Yet this highly intrusive "protection" fragmented the family unit and turned out unwarranted. The charges that Joseph Frye abused the other children, and that Melody neglected their safety, were unsubstantiated, and the criminal proceeding against Joseph for causing Jaycee's death was dismissed for lack of evidence. Melody's children might better have done without the "protection" of maternal access conditioned on the sufferance of a social worker.

Enacting laws to protect children from abuse and neglect is a good thing, and empowering an arm of the state to enforce them, a necessary one. But left unmonitored by the judiciary, such an arm will strengthen itself and soon mistake its muscularity for

[5] *Farmers & Merchants Bank*, *supra*, involved taxpayer refund requests. *Citizens for Environmental Safety* involved landfill permits. *Seeley v. Anchor Fence* involved awards of worker compensation. *Hedges v. Dep't of Social Svcs* involved notice of extended probation to at-will employees. Cases involving orders of protection and juvenile court jurisdiction are discussed in detail *infra*.

its mission. It will claim, as here, that all actions taken in the name of protecting children do in fact protect them, even when the evidence, objectively viewed, reveals the very opposite, as Respondent has alleged throughout.[6]

Statutory time limits restraining the exercise of the police power against citizen rights, such as RSMo. §210.152.2, are invariably held mandatory.

As pointed out above (n. 4), the various regulatory and statutory time limits analogized by Appellant have no bearing on interpretation of the 90-day notice rule at bar, because neither the state's police power, nor any liberty interest such as family relations[7] , was implicated in those cases. The only arguably relevant authorities cited by Appellant are those arising under the Adult Abuse Act and the Juvenile Code, which we examine below.

In *Jenkins v. Croft*, 63 S.W.3d 710 (Mo. App. 2002), the court issued an ex parte order of protection keeping respondent away from his mother-in-law pending hearing upon her petition for a full order. Although the hearing was not conducted within the 15 days prescribed by statute, the court retained jurisdiction to hear it at a later time, because to accord "due process before [deprivation] of liberty and property interests, the maximum period of time an ex parte order can be effective without hearing or a valid continuance is fifteen days." *Grist v. Grist*, 946 S.W.2d 780, 782 (Mo. App. E.D. 1997)

[6] Respondent's prayer for *de novo* review on the merits would remain pending even were the instant judgment in her favor to be vacated. Petition, L.F. 9-10.

[7] *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 831-2 (Mo. banc 2011).

(emphasis supplied). In other words, the Adult Abuse Act does provide a consequence of noncompliance, expiration of the interim order, and it is precisely this statutory safeguard of the respondent's pre-hearing due process rights which renders the 15-day limit nonjurisdictional.

Appellant also invokes *In re P.L.O.*, 131 S.W.3d 782 (Mo. banc 2004), a termination of parental rights case arising from a multi-year juvenile court proceeding after reconciliation with the mother was ultimately abandoned. During the course of reconciliation efforts, statutory and regulatory timelines for service plans, status reports, and review hearings were exceeded. Mother argued on appeal of the termination that these delays deprived the court of further jurisdiction. Yet mother had consented to continuing jurisdiction over the children, never availed herself of the protest and rectification opportunities provided by the juvenile code and regulations, and these events occurred **before** formal TPR proceedings were instituted. Because ongoing juvenile proceedings, unlike child neglect investigations, occur under the direct supervision of a judge and afford the parent a right of complaint at all times, acquiescence effectively waives any procedural defects not raised prior to the dispositional phase of proceedings. *Id.* at 788.

Among juvenile court cases, the most analogous to the matter at bar is *In re A.H. (Y.O. v. Barton Co. Juvenile Office)*, 169 S.W.3d 162 (Mo. App. S.D. 2005), where the court held the 30-day pre-TPR meeting requirement of R.S. Mo. §211.455.1 to be mandatory, not directory, despite the absence of any specified consequence of noncompliance. *Id.* at 157. The juvenile code demands "strict and literal compliance with

the statutory authority from which [the court's power] is derived." *Id.* at 158. Accordingly, the 30-day meeting requirement was deemed jurisdictional, and a judgment terminating parental rights was vacated where the meeting had never occurred.

Although official branding as a child neglecter is not in itself a termination of parental rights, it can be tantamount thereto. Juvenile courts are empowered to restrict parental rights on the grounds of the parent's listing within the Central Registry. RSMo. §211.031.1(1)(a). Hence, as *In re A.H.* amply shows, where the state's police power directly collides with parental rights, our courts invariably demand strict literal compliance with time limits couched in mandatory language, although no "consequence of noncompliance" is expressly specified. Parental prejudice, for its part, is presumed from the very existence of the time limit.

Likewise, in other cases pitting the police power against the citizen's rights, the "no consequence, no mandate" nostrum falls away. *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009), involved the §558.021 requirement that prior offender status "shall" be pleaded and proven before submission of the case to the jury. Again this Court held "shall" to be mandatory and its nonobservance prejudicial, *Id.* at 262, rejecting the contention that where defendant is *in fact* a persistent offender, violation of his procedural rights is harmless error.

Indeed, where due process interests are involved, "shall" is deemed mandatory even though the legislature has specified otherwise. In *Garzee v. Sauro*, 639 S.W.2d 830 (Mo. 1982), this Court held the RSMo. §141.440 requirement of mail notice of foreclosure to be mandatory rather than directory, since a directory reading of the statute

would violate the property owner's due process rights. *Id.* at 832-3. The statute not only specified no consequence of violation, but expressly provided "[t]he failure of the collector to mail the notice . . . shall not affect the validity of any proceedings." Despite this unambiguous legislative declaration that mail notice not be deemed requisite, this Court so deemed it anyhow, because the alternative – unconstitutionality – was unacceptable.

A mandatory reading of the 90-day time limit follows the default decision rule adopted by American courts whenever the state's police power confronts citizen rights. Indeed, such a rule is implicit in the very concept of popular sovereignty. To hold, as Appellant urges, that statutory time limits restraining the police power are toothless absent specified penalty or palpable prejudice, is to endorse a default rule otherwise uniformly rejected.[8] This Court should accept the Southern District's invitation[9] to declare that "shall" is mandatory whenever expressed as a statutory restraint upon the state's police power against the individual, family, or association. After all, "[t]he ordinary meaning of 'shall' is mandatory." *State ex rel. Vee-Jay Contr. Co. v. Neill*, 89 S.W.3d 470, 472 (Mo. banc 2002).

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[8] As expressed in the maxim "better ten guilty freed than one innocent punished;" the presumption of innocence itself; the "rule of lenity," etc.

[9] "The dictionary definition of 'shall' . . . [as] what is mandatory . . . should end discussion on the interpretation of 'shall' as it pertains to section 210.152." *Frye*, Slip Op. at 9.

Finally, even where the police power is not exercised nor fundamental rights implicated, administrative powers are constrained by the time limits ordained by the legislature. **"[T]he rule that time limits imposed by statute on an administrative agency are jurisdictional and cannot be enlarged … is indeed sound, and the decisions cited authoritative**. See *State ex rel. Atkins v. Missouri State Board of Accountancy*, 351 S.W.2d 483, 489[5, 6] (Mo. App. 1961); *R.B. Industries, Inc. v. Goldberg*, 601 S.W.2d 5, 7[1, 2] (Mo. banc 1980); *PIA Psychiatric Hospitals, Inc. v. Missouri Health Facilities Review Comm.*, 729 S.W.2d 491, 493 [2, 3] (Mo. App. 1987)." *West County Care Center, Inc. v. Missouri Health Facilities Review*, 773 S.W.2d 474, 479 (Mo. App. 1989) (emphasis supplied).

The Division's noncompliance with statutory time limits is prejudicial to investigation subjects including Melody Frye.

Appellant asks this Court to vacate the judgment below. The effect of such a ruling would be to reinstate Ms. Frye's name on Central Registry of child neglecters. As this Court acknowledged in *Jamison*, the listing of a professional nurse's name on the Registry is effectively "an occupational death sentence," *Id.* at 407. Ms. Frye is a nurse licensed by the State of Missouri. If "[a] doctor has a property interest in his license to practice medicine protected by both procedural and substantive due process," *LaRocca v. State Bd. Of Reg. For The Healing Arts*, 897 S.W.2d 37, 42 (Mo. App. E.D. 1995), then so does an LPN. RSMo. §335.016(12).

As for the investigative process alone, it would be naïve to suppose that an official governmental child neglect investigation of an LPN employed at a town's only hospital,

continued indefinitely at the unexplained and unchecked whim of Division officials, would not adversely affect her career, or that her employer would be mollified by assurances that her lawyer is seeking a writ of mandamus. The Division maintains the summary judgment record does not contain Ms. Frye's evidence of prejudice. This assertion is belied by agency records documenting the familial hardships imposed upon Melody from initiation of the investigation through listing in the Registry. This myopic disregard is further proof that an indefinite power to investigate means an indefinite limbo for investigation subjects. No one can seriously contend that such was the legislative intent in Ch. 210 at the time of the investigation here.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent respectfully suggests that the judgment below be in all particulars affirmed.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that the Substitute Brief of Respondent Melody Frye with included Appendix was filed electronically and served via Missouri CaseNet this 23rd day of September, 2013, upon Gary Gardner, attorney of record for Appellant.

I further hereby certify that I signed the original of this brief and that it contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 (b), and contains 4,723 words with no single spacing, exclusive of cover, signature block, and certificates.

/s/ Chrys Fisher