IN THE
SUPREME COURT OF MISSOURI

No. SC84210

IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS:
STATE TREASURER, NANCY FARMER,

Appellant,

v.

JULIE SMITH, RECEIVER,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,

Respondents.

APPELLANT'S REPLY BRIEF

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STATE TREASURER NANCY FARMER

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I.

Factual Matters

Receiver adds no new relevant facts. She does not dispute that $1,666,527.07 was deposited into the registry of the court, that this money was held so refunds could be made to utility consumers, that she never reported nor delivered the money to the Treasurer after the expiration of the abandonment period pursuant to the provisions of the Uniform Disposition of Unclaimed Property Act (hereafter the UPA), that a total of $317.11 has been refunded to utility consumers since the trial court secured possession of the funds, and that interest income of over $2,000,000 has been paid to Cole County and the Circuit Clerk during that same period.

Receiver states that Judge Kinder "considered the provisions of Rule 68.02 authorizing a circuit court to appoint a receiver to "keep, preserve and protect . . . money . . . deposited in court." Receiver's Brief, (hereafter Rec.Brf.), 19. This reference is interesting because, beyond expending the interest, it appears that the judges expended principal from this fund. The beginning principal of the fund was $1,666,527.07, from which $317.11 should be deducted for claims paid, to arrive at a total remaining original principal amount of $1,666,209.11 that should have been available at all times. L.F. 600, Reply Appendix (Rep.App.), 6. *See also* L.F.71-74, 80, 83, 85 (orders of deposit totaling beginning principal amount). However, the "Receiver's Report for 2001," filed January 14, 2002, after Judge Stuckey's order was entered in this case, shows that for 1997, 1998 and 2000, Judge Kinder and, in one instance, Judge Brown, ordered principal transferred to the Cole County Commission and that respondent complied with these orders. L.F.364, 600, Rep.App., 6.

For 1997, 1998, 1999, and 2000, the "Total Ending Balance Plus Retained Earnings" remaining in the fund is less than the $1,666,209.11 original principal amount that should have been available in the fund. That principal was expended is unsurprising as income for these four years was only $435,195.46, while transfers to Cole County – disregarding all other expenses – totaled $591,519.50. *Id*. The Auditor's report provides information as to where and for what purposes the judges made transfers from the funds. The report notes: "interest income is paid to the Cole County Treasurer, Al Mueller, for deposit into the County's General Fund, and is credited to an account within the General Fund as designated for courthouse improvements." Appellant's Brief (hereafter App.Brf.), App. 3.

II.

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

Receiver engages in a prolonged discussion of the 1944 Constitutional Debates to demonstrate an undisputed proposition: the duties the Legislature may assign to the Treasurer are limited. The only dispute is whether this constitutional limitation prevents the Legislature from assigning her those duties set forth in the UPA.

In her comparatively abbreviated response to that dispute, receiver turns on its head the principle that the construction of a constitutional provision should be broad and liberal rather than technical. *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973). Instead, receiver invokes a hyper-technical construction. She argues that the Treasurer cannot exercise the "collection-related" functions of the Act. But the UPA is intended to be self-executing; holders are required to report and deliver unclaimed property to the Treasurer. Only when holders breach this duty would the Treasurer bring an action to enforce her right to receive unclaimed property. Construing the constitutional provision as required, in a broad and liberal manner, the act of receiving abandoned property, enforcing that right, holding the property, delivering it to its rightful owners, and transferring any surplus to general revenue, is "related to the receipt, investment, custody and disbursement of state funds."[1]

[1] Even if this Court concluded that the statutory duty imposed on the Treasurer to enforce her

Receiver further argues that the property is not state funds because it is property belonging to an "owner" who has a "legal or equitable" interest in the property. Rec. Brf, 40. But there is no suggestion in the Constitution that Missouri must have an exclusive interest in moneys for them to constitute state funds. Here, where moneys are to be deposited in the statutorily-created Abandoned Fund Account and are subject to transfer to general revenue to meet the state's obligations, the state has an interest in the funds superior to all but the actual, and unlocated, owner and that these moneys, while subject to the state's use, are state funds as that phrase is used in the Constitution.

The term "state funds" is not Constitutionally defined, and receiver provides no support for her limited construction. Other constitutional provisions and their constructions provide insight into the proper definition. Art. III, § 36, requiring all revenue collected and money received by Missouri to be deposited in the treasury, should be read to be in harmony with the limitations found in Art. IV, § 15, and has been constructed by this Court. *State ex rel. Thompson v. Regents for Northeast Missouri State Teacher's College,* 264 S.W. 698 (Mo.banc 1924), defined the terms "revenue" and "state money."

> By revenue ... is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. No matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the

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receipt of unclaimed property from recalcitrant holders exceeded constitutional limitations, the prior statute, §447.575, conferring this duty on the department director would be reinstated. *State ex rel. SSM Health Care St. Louis v. Neill,* No. SC84092, slip op. at 2 (Mo.banc, June 25, 2002).

respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature.

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

Receiver's cited authority does not support the conclusion that the Treasurer is prohibited from exercising her assigned duties under the UPA. The statutes dealing with funds that do not come into the Treasurer's custody are irrelevant because abandoned property does come into the Treasurer's custody pursuant to the UPA. The only case cited that even considers the Treasurer's duties is *Crowe*, in which this Court did not decide whether Art. IV, § 15 had been violated because the law imposed no duty on the Treasurer. 363 S.W.2d at 608. Receiver also cites an Attorney General Opinion. While the opinion concluded that the legislature could not impose duties upon the Treasurer as set forth in the City Sales Tax Act, Section 6 of that Act specifically stated that the moneys the Treasurer was to deposit and distribute "shall not be deemed to be state funds and shall not be commingled with the funds of the state." 110 Op. Att'y Gen. 3 (January 12, 1970). There is no similar language in the UPA so denominating the money to be received by the Treasurer. Perhaps recognizing these weaknesses, receiver argues that the 1993 statute conferring enforcement powers on the State Treasurer is unconstitutional on clear title and multiple subject grounds. Receiver has failed to preserve this argument. *See Hatfield v. McCluney*, 893 S.W.2d 822, 829 (Mo.banc 1995)(single subject and inapplicable title attack not raised in trial court at earliest opportunity is not preserved for appeal). In any event, receiver's belated argument is meritless because substantially the same provisions were enacted in 1994, in a statute that was devoted to a single subject and had an appropriate title. Laws of Missouri 1994, S.B. 757, p. 1051 ("Ownership and

Conveyance of Property: Lost and Unclaimed Property").

III.

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

A. Introduction. Receiver, conceding that the law has been violated, contends that circuit court judges are not subject to the law. Circuit judges, like all this state's citizens, must follow the law until changed or, willingly suffer the consequences of its violation. *See Maryland Cas. Co. v. Huger,* 728 S.W.2d 574, 581, n. 7 (Mo.App. 1987). Any other conclusion is an invitation to anarchy. As this case readily demonstrates, circuit judges and their receivers may creatively bring disputed questions of law before the courts. While the procedural mechanisms here employed are fatally defective, receiver and the judge could have filed a declaratory judgment action to test the constraints imposed on them by the UPA and §483.310.1. Instead, they chose to silently violate the law for many years and then, only when their misbehavior was exposed, did they seek to establish the invalidity of these laws.

B. Separation of Powers. Receiver does not dispute, and hence concedes, that she never filed reports otherwise required by §447.539, that she never delivered the funds otherwise required by §447.543, that the moneys are being held to make refunds to utility customers (L.F.75), or that the moneys have been held longer than the statutory abandonment period. (Rec.Brf., 18). Thus, receiver concedes that the law has been violated. Nevertheless, receiver argues that, assuming the Treasurer has the authority to enforce her duty to receive unclaimed property, the circuit judge has superior authority to dispose of the funds (including interest thereon) in violation of the law. She cites cases invoking the separation of powers doctrine, but that doctrine is inapplicable here because the UPA does not permit the Treasurer to exercise

powers constitutionally assigned to the judiciary.

Receiver cites *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228 (Mo.banc 1997), in which this Court held that statutes authorizing the legislature to conduct management audits of an executive agency violated the separation of powers doctrine because "the statutes claim for the legislature a power constitutionally entrusted to the executive branch [specifically, Art. IV, § 13 (duties of the State Auditor)]." *Id*. at 234. But there is no constitutional provision entrusting to the judiciary the power to infinitely hold unclaimed property, even if the judge was engaged in a real attempt to find the proper owners.[2]

Receiver also cites *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo.banc 1982), in which this Court held that statutes purporting to authorize the Administrative Hearing Commission to render declaratory judgments violated the separation of powers doctrine because "[t]he courts declare the law." *Id*. at 75. But the UPA does not allow the Treasurer to declare the law. Nor does it allow her to exercise powers reserved exclusively by the constitution to the judicial branch. *See Chastain v. Chastain*, 932 S.W.2d 396, 398 (Mo.banc 1996). The UPA does

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[2] The judge here exercised his constitutional powers when he determinated the legality of surcharges and, following his reversal by this Court, ordered the companies to pay refunds. The Treasurer took no part in these decisions. The judge is not exercising constitutional powers decades later, after this case was closed, when he continued to invest funds and expend interest. Instead, he is acting in an administrative capacity, performing functions the clerk normally performs in the absence of judicial intervention. *See* §483.310.2.

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

The power of the legislature to apply unclaimed property provisions to the courts was acknowledged in *State v. Snell*, 950 SW.2d 108 (Tex.Ct.App. 1997). In *Snell*, Texas challenged the trial court's order approving an allocation plan in a class action. Under the trial court's plan, unclaimed funds which would otherwise have been subject to the unclaimed property law, would instead be paid to a charity designated by the trial judge. *Id*. at 110. The Texas Court held that the trial court's order violated the express terms of the Texas unclaimed property statute because "the trial court had no discretion or authority to order any unclaimed property to an escrow agent who would then transfer the funds to a yet unnamed charity." *Id*. at 113. The Court explained: "The disposition of unclaimed property in the State of Texas is not left to the whim of the private citizens or the courts, and rightly so." *Id*. at 112. Instead, "the Texas Legislature has imposed a specific and detailed procedure for identifying, reporting, and tendering, and has further provided for governmental custody and distribution of unclaimed property." *Id*.

Likewise, in Missouri, the disposition of unclaimed property is not left to the whim of the courts. The Missouri Legislature has enacted a law of general applicability, not a law directed to a specific case, which imposes a detailed procedure for identifying, reporting, and tendering unclaimed property. §§447.500-.595. As in Texas, the Missouri law further provides for governmental custody and distribution

of unclaimed property. As the *Snell* Court recognized, the judiciary, "as a third but nonetheless equal branch of government, is charged with the duty to interpret and apply the law as declared by the Legislature, and to give effect to its stated purpose or plan." *State v. Snell*, 950 S.W.2d 108, 112-13 (Tex. Ct.App. 1997). Missouri's UPA clearly mandates that courts and public officers report and deliver to the Treasurer intangible personal property held for the owner by the courts for more than five years. §447.532. The Missouri Legislature has expressly barred the courts and all public officers from retaining unclaimed property in perpetuity or from diverting unclaimed property for a purpose different from payment to the owners. This legislative mandate must be given effect.

C. Supposed Doctrine of Beneficial Ignorance. Receiver argues that the judicial department "has not yet made an adjudication of who is entitled to the funds" and that "one will search the record in vain in trying to find a determination that any particular person or entity has a legal or equitable ownership in any discrete portion of the funds held in this case." Rec.Brf., 80. Over twenty years ago, the Court of Appeals "was informed . . . that the Utilities had prepared lists of consumers and had calculated the amount of refund due each" and that "[t]his information was submitted to and approved by the circuit court." *State ex rel. Utility Consumers Counsel of Missouri v. Public Service Commission*, 602 S.W.2d 852, 856 (Mo.App. 1980). Receiver's assertion that this information is not in the record is a collateral attack on the long-standing representations made to and accepted by the appellate court. The existence of such a list would be expected in light of this Court's preexisting mandate directed to the circuit court. In 1979, this Court directed the circuit court to determine "the amounts due as a result of the surcharge and *to whom*." L.F.66 (emphasis added).

Whether the names of the individuals due these refunds appear in "the record" is of no consequence

— the UPA applies more broadly. After the expiration of the statutory abandonment period, the funds are presumed abandoned[3] and, pursuant to the UPA, are to be reported and delivered to the Treasurer. The report is to include, "the name, *if known*, and the last know address, *if any*" for property valued over $50.00; property valued under that amount can be reported in the aggregate. §447.539.2(3) (emphasis added). That the court's records may not identify the individuals entitled to refunds does not exclude the funds from the Act. §§447.532, 447.539, 447.543. *See Citronelle-Mobile Gathering Inc. v. Boswell*, 341 So.2d 933, 936 (Ala. 1977)(Act applies where owner is unknown, cannot be found or has given an incorrect address). Such exclusion would reward holders who fail to maintain identifying information.

D. Statutory Inapplicability. Receiver contends that, as the court has supposedly not identified any utility customers to whom money is specifically owed, no one is an "owner" under §447.503(7). Receiver continues, asserting that until the court identifies those to whom the refunds are due, no one has a legal or equitable interest in the funds. Resp.Brf., 90-91. People possess legal and equitable interests in property long before courts recognize those interests. Courts merely recognize property rights, when disputed, that already exist.

Receiver argues that, because the UPA did not become effective until 1984, the fund is not subject

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[3] The "presumed abandoned" designation is not a rebuttable presumption. Rec.Brf., 87. Property is presumed abandoned after a statutorily designated time period, presumed abandoned property must be reported to the Treasurer at that time, and all property specified in the report shall be delivered to the Treasurer at the time of filing the report. §§447.532, 447.539, 447.543.

to the Act. Rec.Brf., 91. She cites no caselaw for this proposition, relying on cases positing a distinguishable proposition, irrelevant here, in which the limitations period ran prior to the effective date of the act. *Citronelle-Mobile*, 341 So.2d 933 (unclaimed suspense account debts); *Douglas Aircraft Co. v. Cranston*, 374 P.2d 819, 821 (Cal. 1962)(unpaid wages); *County Mutual Ins. Co. v. Knight*, 240 N.E.2d 612 (Ill. 1968) (outstanding, unpaid insurance claims). Under those circumstances, the courts held the section of the Act providing that the bar of such statutes of limitations is inapplicable could only apply prospectively. The courts *did not* hold, as receiver suggests, that the entire Act could only apply prospectively.[4] Receiver does not argue that any limitations period expired, before the effective date of the Act, on the utility consumer's claims to the funds held by the court for their benefit.

Furthermore, §447.547.1 specifically provides that the Act does not affect title to property vested

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[4] Even if the entire Act were to apply only prospectively, the funds in question were still held by the court and presumed abandoned either seven or five years (as applicable) after the 1984 effective date of the Act. Moreover, the Supreme Court of New Jersey has held that its UPA applies retroactively because retroactive application is necessary to achieve its remedial purpose and neither interferes unconstitutionally with vested rights nor results in manifest injustice. *Twiss v. New Jersey*, 591 A.2d 913, 916-17 (N.J. 1991). A similar holding by this Court would not violate Art. I, § 13, prohibiting the enactment of ex post facto laws, because this constitutional provision only "forbids the enactment of a retrospective law which impairs a vested right." *Wilkes v. Mo. Highway and Trans. Comm'n.*, 762 S.W.2d 27, 28 (Mo.banc 1988). Receiver and her judge enjoy no vested right as to this fund, it is held subject to the claims of over-charged rate-payers.

in the holder by operation of a statute of limitations prior to August 13, 1984, nor to unclaimed property held in a fiduciary capacity prior to August 13, 1974. However, even this statutory exclusion of property subject to the Act is of no advantage to receiver and her judge, because this exclusion has no applicability to government holders of property. §447.549.

E. Cy Pres. In Missouri, the doctrine of *cy pres* is limited and none of its requirements have been met in this case. *See State ex rel. Nixon v. Am. Tobacco Co.*, No. ED76054 (slip op. at 10, January 18, 2000)(Rep.App., 16), *aff'd on other grounds*, 34 S.W.3d 122 (Mo.banc 2000); *Levings v. Danforth*, 512 S.W.2d 207, 211 (Mo.App. 1974)(requires charitable trust, impossible to carry out terms of trust, and general charitable intent of settlor). Appellant further incorporates by reference the *cy pres* discussion in Appellant's Reply Brief No. SC84212.

F. Laches and Estoppel. Neither laches nor estoppel apply to the Treasurer's action to enforce delivery of unclaimed property. *See Warren v. Warren*, 784 S.W.2d 247 (Mo.App. 1989)(laches cannot apply as defense to action at law); *Mackey v. Griggs*, 61 S.W.3d 312, 318 (Mo.App. 2001)(laches requires knowledge of facts giving rise to right, excessive delay in asserting right, and legal detriment of other party); *City of Washington v. Warren County*, 899 S.W.2d 863 (Mo.banc 1995)(estoppel does not lie against governmental entities except in exceptional circumstances); *Tinch v. State Farm Ins.*, 16 S.W.3d 747, 751 (Mo.App. 2000) (estoppel requires admission, action in reliance, and injury). Appellant further incorporates by reference the laches and estoppel discussion in Appellant's Reply Brief No. SC84212.

IV.

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

As receiver cited to an Attorney General's Opinion, Rec.Brf., 72, it seems appropriate to direct the Court to an opinion directly relating to this point, issued more than a decade ago by the previous Attorney General. Question: "Who controls the expenditure of such funds [funds generated under the authority of §483.310.2]; the Presiding Circuit Court Judge under the general superintending authority of the Court, or the Circuit Clerk under the provisions of the Statute?" 91 Op. Att'y Gen. 32 (May 15, 1991) at 1, Rep.App., 19. The answer was clear. "Section 483.310.2 provides that 'the income derived therefrom may be *used by the clerks'* for the enumerated purposes. Based on the plain meaning of this provision, we conclude that the Circuit Clerk controls the expenditure of such income." 91 Op. Att'y Gen. 32, at 4, Rep.App., 22 (emphasis in original).

Ignoring the plain language, receiver argues that expending over $2,000,000 in interest generated by money that is being "held and administered so that refunds may be made therefrom to utility customers," L.F.75, does not violate §483.310, because the judge's Order permits it. Rec.Brf., 93. But such an order violates the statute.[5]

[5] Receiver asserts that the Treasurer cannot attack the provisions of this Order because "[a]ny

Respondents Cole County and the Circuit Clerk misconstrue the Treasurer's argument regarding interest on the funds. The Treasurer is not arguing that the court cannot appoint a receiver or that the circuit clerk and only the clerk can manage funds paid into the registry of the court. The Treasurer is also not arguing that §483.310 requires the court to make an order directing funds paid into the registry of the court to be invested. *See* §483.310.1("court *may* make an order directing [investment]").

What the Treasurer *is* arguing is that, once the court makes an order directing the investment of funds, the court must follow the dictates of 483.310.1, including the mandatory language that income from investment, excluding necessary costs, "shall be added to and become a part of the principal." §483.310.1 applies here because (1) the court entered an order (2) based upon the court's own finding (and after application by one of the parties) (3) that the funds could reasonably be expected to remain on deposit for a period sufficient to provide income through investment and (4) the court directed the funds to be invested. None of these factors apply to §483.310.2, on which receiver relies to justify the expenditure of the

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action to modify the provisions of the Orders Appointing Receiver must be done by a proper party in the proceedings below who has standing to seek modifications of those Orders." Rec. Brf., 94. This argument ignores that the proceedings below are closed, receiver is not a party, and the other parties have secured final relief. It also ignores receiver's assertions that the Treasurer has no claim to the funds, the electric companies have no right or interest in the funds (Rec.Brf.,82), and there are no "owners" who have a legal or equitable interest in the funds (Rec.Brf., 91). In short, receiver suggests there is no one who can right the wrong here committed. Thus, receiver's argument seems to support the need for quo warranto relief sought elsewhere.

interest.

Cole County argues that the legislative intent of 483.310 is to "use the interest generated to achieve a public good." Cole County Brief, 24. This cannot be the intent of subsection 1 because it does not allow the interest to be "used" at all, but requires that the interest "be added to and become a part of the principal." §483. 310.1.

The orders expending interest also violated the Court of Appeals mandate with regard to the fund. On appeal of the order regarding payment of interest to utility customers, L.F.65-66, the Court of Appeals agreed that interest was due on the refunds, but concluded that, in order to make the utility customers whole, interest was required to run from the date the improper charges were collected "until paid." *Utility Consumers Council* , 602 S.W.2d at 855.

The orders expending interest income also violated federal law. About one year before the first (of many) withdrawal orders, the Supreme Court issued *Webb's Fabulous Pharmacies v. Beckwith*, which held that a county had no right to take the interest from moneys deposited into the registry of a court. 449 U.S. 155, 165 (1980). The Supreme Court held that such behavior violates the Fifth and Fourteenth amendments to the Constitution. *Id*. at 164-65.

In explaining its holding, the Court identified the disincentive created for a court to give up control over funds generating substantial interest income:

> Indeed, if the county were entitled to the interest [on funds deposited to the registry of the court], its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

Id. at 162. Unfortunately, the very concern expressed by the Supreme Court in *Webb's* has manifested here. *See also, Phillips v. Washington Legal Foundation,* 524 U.S. 156, 172 (1998)(Court invalidated taking interest generated by attorney IOLTA accounts, where interest earned was statutorily directed to public-benefit legal foundation; as "interest follows principal," it necessarily follows that "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal.")

Finally, neither subsection 1 nor 2 of §483.310 provide a safe harbor for receiver, acting under orders issued by the judge, to invade the principal of the fund. No judge holding property his own orders demonstrate is held for others, may use that property to engage in discretionary spending to beautify his own surroundings.[6] This situation imperils the public's confidence in the judiciary and could undermine the willingness of litigants to resort to the courts as a method for resolving disputes in an era when mediation and arbitration services are readily available.

[6] *See,* Auditor's Report, interest is transferred to a specific account dedicated to courthouse improvements. App.Brf., App. 3.

V.

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

Receiver does not dispute that the Treasurer did not file an answer. Instead, receiver appears to argue that there were lots of pleadings filed by lots of other people, and all these filings somehow cure the defect created by the non-closure of the pleadings. Receiver also argues that, assuming as true the "facts put in issue by the Appellant State Treasurer," the Treasurer "does not have any interest in this case nor is she entitled to any relief." Rec.Brf., 96. But the Treasurer did not answer, so no facts were put in issue, and the Treasurer's objections and suggestions in opposition do not justify a holding that she has no interest in the funds and is entitled to no relief.

Finally, receiver argues that her motion for judgment on the pleadings could be considered a motion to dismiss, citing *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676 (Mo.App. 1997). A critical distinction between receiver's situation and *Bramon* is that there the moving party was the defendant. Receiver is not. Granting dismissal here would be the equivalent to dismissing receiver's "claim" for relief. To this, the Treasurer has no objection.

VI.

The trial court lacked personal jurisdiction over the Treasurer necessary to enter any order directed toward her because she was never a party to the proceeding and has never been served with summons or with a petition seeking relief and, thus, no order could be directed to her or judgment entered against her. (Partially Addressing Respondent's Point VI.)

Receiver argues that under Rule 52.07, the court had authority to require the Treasurer to assert any claims she might have to the fund and the interest thereon in the Ancillary Proceeding. Rec.Brf., 101. Rule 52.07 states: "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." Here there is no plaintiff, no competing claims, and no exposure to double or multiple liability.

Receiver is not a plaintiff. Receiver has never been a party to the proceeding. Receiver did not even notify the long-satisfied parties to the underlying action of her "Motion and Petition." Additionally, there are no competing claims. The Treasurer seeks to hold the money for the benefit of the same persons for whom the court should be holding the money. Receiver asserts that the competing claims are 1) the demand of the Treasurer for the funds and 2) the trial court's Order Appointing Receiver precluding delivery of those funds. Rec.Brf., 101-02. But a restriction on how receiver can dispose of the money is not a "claim" on the money. The judge has no "claim" to this money. The judge, through his receiver, held and controlled the property without any claim of right, but instead "so that refunds may be made therefrom to utility customers." L.F.75. Pursuant to the UPA, upon expiration of the abandonment period, the court's custody of the property now presumed abandoned ceases and the property is delivered to the

protective custody of the State. §§447.532, 447.539, 447.543. Further, this delivery will not subject receiver to multiple liability because the UPA provides: "Any person who pays or delivers abandoned property pursuant to sections 447.500 to 447.595 *is relieved of all liability for any claim* which then exists or which thereafter may arise or be made in respect to the property." §447.545 (emphasis added). Thus, receiver cannot be deemed to have a "good faith fear of adverse claims" upon which the right to interpleader depends. *Roosevelt Federal Savings & Loan Assoc. v. First National Bank of Clayton*, 614 S.W.2d 289, 291 (Mo.App. 1981).

Receiver admits that she did not serve the Treasurer with process pursuant to Rules 54.01, 54.02, and 54.03 to 54.22. Instead, she argues that the judge's July 20 order constituted a summons under Rule 54.02 and/or that the order constituted "other process" under Rule 54.01. Rec.Brf., 102. But an order against a non-party is invalid (*State ex rel. American Family Mutual Ins. Co. v. Scott*, 988 S.W.2d 45, 49 (Mo.App. 1998)) and thus, cannot constitute summons or "other process." Further, under Rule 54.01, it is *the clerk* who must issue "the summons or other process." The only document the Treasurer received from the clerk was an initialed memo referencing the enclosed "motion and petition" and "order." L.F.403. This memo was not signed or dated and does not contain the names of the parties or their attorneys, the time and place where the Treasurer must appear and defend or notice that upon failure to do so judgment by default would be entered against her. As such, it does not comport with Rule 54.02. Finally, "a proper summons is jurisdictional and is absolutely essential to the validity of the proceeding. Jurisdiction is not acquired merely because the defendant acquires information as to his required appearance from a source other than the summons." *Yankee v. Franke*, 665 S.W.2d 78, 79 (Mo.App. 1984). Here no valid summons issued, hence the Court acquired no personal jurisdiction over the

Treasurer and the judgment on the pleadings entered against her is void.

VII.

Receiver's brief fails to respond to the Treasurer's point and argument asserting that the trial court violated the separation of powers by directing the Treasurer to appear and participate in a lawsuit against hand picked defendants on issues chosen by the court (Appellant's Point VI) and failed to respond to the Treasurer's argument that receiver, as a non-party, could not file the motion and petition she presented to the court (Appellant's Point VII).

It is not a great surprise that receiver would have some difficulty defending a trial court's decision to direct a constitutional officer of the executive branch to engage in litigation against particular defendants on issues restricted to those chosen by the trial court. This course of conduct so interferes with the executive's decision-making process concerning the exercise of the official's discretion that the intrusion by the judicial branch into the executive's prerogative is as obvious as it is inappropriate.

Recently, the Treasurer discovered additional information suggesting a previously unimaginable explanation for Judge Kinder's desire to restrict this proceeding to only the three questions posited by receiver. The last page of receiver's 2001 Annual Report, filed on January 14, 2002, after the trial court entered judgment, provides a compilation of activity in this fund and suggests that Judges Kinder and Brown have expended principle from this fund. Note thereon that Total Principal Plus Retained Earnings for the Years 1997, 1998, 1999 and 2000 are all less than $1,666,209.96 (the Beginning Principle, meaning original principal minus claims paid). L.F.600, Rep.App., 6. Even if the Treasurer could have discovered this fact prior to entry of the judgments in this matter, the facts suggested by this document could not have been litigated as they were not included in the issues identified by receiver. The Treasurer cannot,

consistent with the scope of power set aside to the executive branch, be required to participate in a lawsuit restricted as this one was by the judiciary.

Receiver also fails to address the Treasurer's argument that receiver, as a non-party, lacked standing to assert her ancillary questions. While a respondent is only required to support the trial court's judgment, "[i]n so doing, [the] respondent must respond to the points presented and argued by the appellant to seek reversal of the trial court's order." *Boyer v. Grandview Manor Care Center*, 793 S.W.2d 346, 347 (Mo.banc 1990). As receiver did not, it must be concluded that she could discover no law justifying her action in presenting this matter to the trial court.

VIII.

The circuit judge lacked subject-matter jurisdiction to enter the July 20 order in that a final, unappealed, judgment had long-since been entered in the case. (Partially Addressing Respondent's Point VI.)

Receiver argues that the circuit court continues to have jurisdiction over the funds held in this matter. She asserts that "[t]he *res* is held in this case by the Circuit Court" and the circuit judge "has exclusive jurisdiction to determine all legal issues relative to the disposition of such funds." Rec.Brf., 97-98. But the underlying case was not an in rem proceeding. It was a Petition for Writ of Review of Decision of the Public Service Commission of Missouri, pursuant to §§386.510 and 386.520. All the issues raised by the parties in that original lawsuit have long since been litigated to full and final resolution. If court's jurisdiction is based on the res, it ended when the statutory abandonment period elapsed and the property was required by law to be delivered to the Treasurer.

The *Sullivan* case, cited by receiver, provides no support for her position. *Sullivan* does not state the "proper procedure" for filing an action to enforce delivery of unclaimed property held by the courts. That procedure is set forth in §447.575 (treasurer shall bring an action in a court of appropriate jurisdiction). *Sullivan* holds that a court of coordinate jurisdiction cannot enjoin a receiver previously appointed by another court and appoint its own receiver to take charge of a company's property and settle its business. *State ex rel. Sullivan v. Reynolds*, 107 S.W. 487, 492 (Mo.banc 1908). This is not the effect of the Treasurer's claim. Receiver also claims this case is similar to *Neun v. Blackstone Building & Loan Assoc.*, 50 S.W.436 (Mo. 1899), and that the Treasurer's "threats" against receiver made without filing motions seeking relief border on contempt of court. Rec.Brf., 99-100. The Treasurer

notified receiver that she intended to file an action (pursuant to statutory authority granted her by the legislature) to recover unclaimed property in the hands of receiver. To suggest this "borders on contempt of court" borders on the absurd.

Receiver claims that the Treasurer's demands to turn over the funds "are even more flagrant when one considers that receiver would be violating the Circuit Court's Orders Appointing Receiver if she did so." Rec.Brf., 100. But receiver was not prohibited from indicating that she would, but for the order, turn over the fund; receiver was not prevented by the order from filing the report required by §447.539; receiver was not prohibited from resigning; and she was not prohibited from engaging independent counsel.[7] She did none of these.

Receiver further argues that the judge had the power to order a separate trial under Rule 66.02 and cites numerous cases in which ancillary proceedings have been held. Rec.Brf., 103-05. None of these cases support an ancillary proceeding in a closed case upon motion of a non-party receiver requesting relief against other non-parties, without serving or hearing from the parties.

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[7] Alex Bartlett, receiver's counsel herein, was authorized by court order to represent Judges Kinder and Brown and did so in the unsuccessful Writ of Prohibition filed in the Western District Court of Appeals. L.F.775-76. Additionally, Mr. Bartlett appeared at the hearing and argued against the preliminary writ of quo warranto entered against Judges Kinder and Brown on June 28, 2001 in the quo warranto case now before this Court in SC84301.

IX.

Judge Kinder was disqualified by Rule 51.07 from issuing the July 20 order in that he had a substantial interest in the outcome and a close interest in or relationship with the movant. (Partially Addressing Receiver's Point VI.)

Receiver argues that Judge Kinder, who disqualified himself immediately after entering the ex parte order creating these proceedings, had no reason to disqualify himself before entering that order. But the reasons for his disqualification were the same before and after his entry of the order.

Receiver argues that Judge Kinder had no financial interest in the proceedings. At the same time, receiver incongruously argues that Judge Kinder has judicial immunity from any monetary claims made by the Attorney General or the Treasurer.[8] The fact that Judge Kinder has asserted judicial immunity to the Attorney General's and Treasurer's claims in other cases undermines the assertion that he has no financial interest in the proceedings.

Receiver next argues that Judge Kinder is not related to receiver, a party to these proceedings. But Judge Kinder begat receiver and, in his order appointing receiver, described receiver as "someone in

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[8] Receiver also argues that the Attorney General's quo warranto proceeding against Judge Kinder is "fatally flawed" and that Judge Kinder has immunity from this claim. The merits of the quo warranto proceedings and of Judge Kinder's defense to it are not issues in this case. These issues will be decided in the quo warranto proceedings. In any event, Judge Kinder apparently believed the quo warranto proceeding was problematic enough that he recused himself from these proceedings *after* he had entered the ex parte order creating them.

who this court has complete confidence" and who is readily available to the court. L.F.76. Receiver was represented by the very counsel who represented Judge Kinder in the related Writ of Prohibition case. Such persons would undoubtedly exercise "undue" influence over him pursuant to §508.090.

Finally, receiver argues that Judge Kinder's order was procedural and made no determination as to the merits of this case. But Judge Kinder's order created this case, limited the scope of these proceedings to three specific questions identified by receiver, directed against whom the Treasurer could assert her claim (not Judge Kinder) and determined that he could continue to hold and invest the funds during the pendency of the case. In so structuring the case, Judge Kinder's order was far more than a mere procedural exercise – it had significant substantive implications.

Perhaps not surprisingly, receiver fails to respond to the Treasurer's assertion that Judge Kinder in the present instance had a dramatic "appearance" of impropriety, whether or not he was actually prejudiced. Because of this undisputed appearance of impropriety, Judge Kinder had a duty to recuse himself. *Robin Farms v. Bartholome*, 989 S.W.2d 238, 247-250 (Mo.App. 1999)(appearance of impropriety is separate issue from actual bias and prejudice and if the record demonstrates a reasonable person would find an appearance of impropriety, the canon compels recusal). The order he entered should have been vacated and the trial court's holding otherwise should be reversed.

Conclusion

For the reasons set forth above and those expressed in Appellant's Brief, the Treasurer requests that the Court reverse the judgment entered by the trial court and dismiss this proceeding or grant Appellant such other relief to which she has shown herself entitled.

Respectfully submitted,

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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 7,682 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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James R. McAdams

APPENDIX

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