SC91742

IN THE SUPREME COURT OF MISSOURI

LEGENDS BANK AND JOHN KLEBBA,

Petitioners,

v.

STATE OF MISSOURI, ET AL,

Appellants.

Appeal from the Circuit Court of Cole County, Missouri,
The Honorable Daniel R. Green, Judge.

APPELLANT'S BRIEF

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Statement of Facts

The State of Missouri, Missouri Ethics Commission and its members and the Missouri Attorney General ("State") appeal the trial court's judgment on Counts I and II[1]. (Vol. II LF 206) The judgment found that SB 844 adopted by the Missouri General Assembly violated the Missouri Constitution, Art. III, Sec. 23, because it contained more than one subject. (Vol. II LF 211) The court held that the original purpose of SB 844 was procurement and consequently struck the provisions dealing with lobbying, campaign finance, powers of the Missouri Ethics Commission and keys to the Capitol Dome. SB 844 as enacted and signed by the Governor was entitled as a bill "relating to ethics" (Vol. II LF 212) Because of its holding the court did not consider the original purpose claim brought under the Missouri Constitution Art. III, Sec. 21 (change of purpose clause). (Vol. II LF 212)

SB 844 was initially filed with the title"[t]o amend chapter 37, RSMo, by adding thereto one new section relating to contracts for purchasing, printing and services for statewide elected officials." (Vol. I LF 9) After approval in committee it was amended on the floor of the Senate to add a change to Chapter 8 that would provide each member of the general assembly with a key to the capitol

[1] The State raises no issue with regarding to the Court's ruling in favor of Legends Bank on Count III.

dome. (Vol. I LF 9-10)[2] It was then read in the House and referred to House Special Standing Committee on General Laws. (Vol. I LF 10) Eventually a House Committee substitute was reported and passed by the House. (Vol. II LF10) HCS#2 SB 844 did not contain the original provisions in SB 844 dealing with contracts by statewide officials or the added provisions dealing with keys to the dome and bore a new title, "relating to ethical administration of public institutions and officials, with penalty provisions and a contingent effective date for certain sections. (Vol. I LF 11) It also added a number of new and amended provisions to Chapters 105, 115 and 130 (the so-called "new ethics law"). In addition the House Committee substitute added changes to Sections 115 and 116 dealing with elections, Chapter 21 dealing with the initiative process, Chapters 26-30 dealing with succession plans for state officials, an additional amendment to Chapter 34 dealing with biding priority and Chapter 67 dealing with local constructions projects and bidding. (Vol. I LF 11-12)

When the Senate refused to accede to these changes, the two houses agreed to refer SB 844 to a conference committee. Eventually a third conference committee report was adopted by both houses and signed by the governor. The final bill contained the provision from original SB 844 concerning statewide officials' contracts, an additional section regarding purchasing contracts for

[2] Another amendment not relevant here was also added.

other government agencies, the capitol dome provision with some amendments and sections dealing with amendments to Chapter 105 and 115 dealing with public officials compliance with ethics requirements, campaign finance, the Missouri Commission on Ethics and its powers and providing for criminal penalties for certain violations of ethics laws. The title of the enacted bill was a law "relating to ethics". (Vol. I LF 11-12)

The State appeals and seeks this court's determination that the trial court erred in finding that the provisions in original SB 844 were not within the subject "relating to ethics" and alternatively that the court erred in severing the portions of SB 844 dealing with ethics and not those dealing with procurement and keys to the capitol dome that were not within the subject of the title of the enacted bill.

Points on Appeal

I. The trial court erred in entering judgment on the pleadings finding that SB 844 was unconstitutional under Article III, Section 23 because the trial court erroneously interpreted and applied the law in finding that SB 844's provisions relating to competitive bidding were not related to or congruous with the subject of the bill in that the bidding provisions for elected statewide officials were embraced by the umbrella of ethics.

II. The trial court erred in entering judgment striking the ethics provisions of SB 844 as unconstitutional under Article III, Section 23 because the trial court misinterpreted and applied the law in that even assuming that SB 844 had more than one subject, the correct subject of ethics was clearly expressed in the bill's title and the court should have stricken the provisions relating to competitive bidding and the keys to the capitol dome.

Standard of Review

Review of a grant of judgment on the pleadings requires examination of the allegations of the petition to determine whether the pleaded facts are insufficient as a matter of law. *State ex rel. Nixon v. Am. Tobacco Co.,* 34 S.W.3d 122, 134 (Mo. banc 2000). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Id.* (internal quotation marks and citation omitted). "The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *Id.* (internal quotation marks and citation omitted). If the pleadings from their face demonstrate that the moving party is entitled to judgment as a matter of law, then the trial court is justified in granting a motion for judgment on the pleadings. *Id.*

There is a strong presumption of constitutionality of laws passed by the legislature and signed by the governor. Courts do not favor procedural limitations to support constitutional attacks on statutes. For an attack on a statute for procedural reasons the challenger must show that the statute "clearly and undoubtedly violates the constitutional limitation." *Jackson County*

Sports Complex Authority v. State of Missouri, 226 S.W.3d 156, 160 (Mo. banc 2007).

Argument

I. The trial court erred in entering judgment on the pleadings finding that SB 844 was unconstitutional under Article III, Section 23 because the trial court erroneously interpreted and applied the law in finding that SB 844's provisions relating to competitive bidding were not related to or congruous with the subject of the bill because the bidding provisions for elected statewide officials were embraced by the umbrella of ethics.

The Error in *Hammerschmidt*

Two of a number of longstanding provisions of Missouri constitutions establishing limits on the General Assembly's procedures in enacting legislation are the "single subject" provision and the "change of purpose" provision. These two are probably the most litigated of such limitations, at least for the last 20 years.

Article III, Section 23 provides: "No bill shall contain more than one subject which shall be clearly expressed in its title . . . ."

Article III, Section 21 provides: The style of the laws of this state shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows. No

law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house."

Beginning with *Hammerschmidt v. Boone County,* 877 S.W.2d 98 (Mo. banc 1994) this court has intermixed the concepts of "subject" and "purpose" from these two constitutional provisions to the point that there is little difference between them or any distinction is difficult to discern and apply. *Hammerschmidt* begat this confusion by ignoring over 100 years of precedent establishing that the subject of a bill is found in its title and that the only title that is important for single subject analysis is the last title (that of the enacted bill.)

This discarding of precedent was accomplished silently and without recognition of the revolutionary way that it changed single subject analysis. It has virtually destroyed the distinction between subject and purpose despite the presence of two independent constitutional provisions.

The State urges the court to reexamine *Hammerschmidt* and correct those sea changes. Legislators have not become more devious or prone to log-rolling or deceptive amendments in the past 17 years since *Hammerschmidt* than they were in the 19th century. It was not the legislative process that has changed but rather this court's interpretation of a constitutional provision that dates to 1865.

History of Single Subject in Missouri

The single subject provision first appeared in the 1865 Missouri Constitution. Art. IV, Sec. 32. As the case law has developed and been applied the effects of violation of its successor, Art. III Sec. 23, have become sometimes illogical, sometimes inconsistent with its acknowledged purposes and sometimes muddled almost hopelessly with its companion provision, Art. III, Sec. 21, the so-called change of purpose clause. From 1884 to 2007 there were 56 decisions considering the single subject provision. Twenty of those cases were from 1997 to 2007. Between 1877 and 1997 only two cases overturned bills on the basis of the single subject provision (and those in 1990 and 1994). From 1997-2007 five bills have been fully or partially struck down. *Tipping Point: Single Subject Provision,* Alexander R. Knoll, 72 Missouri Law Review 1387, 1393-1394 (2007)

Introduction- The Early Cases

Apparently, the first case interpreting this provision was *Hixon v. Lafayette County,* 41 Mo. 39 (1867). There a statute was entitled "an act to provide for appeals in contested election cases." The 8th section of the new statute dealt with appeals in civil cases generally. The court held that the single subject provision was violated and struck only the 8th section stating: "The only subject embraced or expressed in the title is to provide for appeals in contested election cases; it can then only be valid so far as it pertains to appeals arising

out of such cases, and the section which attempts to give the right of appeal in all other cases is void and of no effect."

Significantly but without being expressed the court *looked at the title of the bill as passed* to determine the subject and struck only the provision not within that subject.[3] The next case more fully discussed Section 32 and its underlying policy. In *City of St. Louis v. Tiefel,* 42 Mo. 578 (1868) the court considered whether provisions allowing a local board to require a license for water use and establishing a penalty for non-compliance fell within the subject expressed in the title of "An act to enable the City of St. Louis to procure a supply of wholesome water." The court said of Art. IV, Sec. 32:

> It was intended to prevent surprise or fraud upon the members of the legislature by means often resorted to in the provisions of bills, *of which the title gave no intimation*; and also to effectually stop the vicious and corruptive system familiarly know as 'logrolling.'

Id. at 578. (emphasis added) But while condemning these practices the court recognized that Section 32:

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[3] It seems obvious that if the title of the bill was "an act to provide for appeals in civil cases" or an act to provide for appeals (assuming that title was not over inclusive) the entire bill would have been upheld.

> "was not designed to be unnecessarily restrictive in its application, nor to embarrass legislation by requiring a needless multiplication of separate bills. It was only the intention to prevent the conjoining in the same act of incongruous matters and subjects having no legitimate connection or relation to each other."

Id. The court read the constitution as expressly requiring an examination of the title of the bill to determine its subject.

In the next case decided under the 1865 Constitution the court reiterated the principle expressed in *Hixon* that the court look at the *title of the enacted law*[1] and determine whether the challenged provision fell within the subject embraced by the title.[4] *State v. Miller,* 45 Mo. 495 (Mo. 1870) The court held that "the nature and object of the act is clearly defined in the title." *Id.* at 499. Rather than the subject of the bill being warehousemen and wharfingers the

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[4] The title was "*an act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property* by warehousemen, wharfingers, and others." The challenged section criminalized the purchase of goods etc, and the transfer without payment of the seller. *Id.* at 495. (emphasis added). The court rejected the contention that the subject was the warehousemen and wharfingers.

court said the act relates to a "class of offenses of a kindred character, all connected, blended and germain." *Id.* The court emphasized that besides warehousemen and wharfingers the title spoke of "others" as well and the provisions of the act "treat of subjects which have a natural connection." *Id.* The court held ultimately that a glance at the title would indicate that the law potentially covered transfers of property by third parties of sellers' property in violation of their right to be paid from the proceeds. The court also found that a law is not defective because a better title could have been drafted.

The court also reiterated the cautious approach mandated by the underlying policy of Section 32 saying that:

> An exact and strict compliance with the letter would render legislation almost impracticable, and would lead to a multiplicity of bills which would make our statutes ridiculous.

Next in *State v. Matthews,* 44 Mo. 523 (1869) the court said that although "there must be but one subject; but the mode in which the subject is treated, and the reasons that influenced the legislature, cannot and need not be stated in the title according to the letter and spirit of the constitution." *Id.* at 527. Although lauding the wisdom of the constitutional provision the court also said that too "narrow a construction would produce a multiplicity of bills and would cripple, retard and impair the legislation. *Id. Matthews* thus contributes the concept of

a broad view of relationship and congruity to the title subject. If a provision appears to be a method for implementing the title subject it will pass constitutional muster.

Then in 1873 the court stated it most plainly: "if by your title you have not properly pointed out to the public and General Assembly what the act is about, in so far as you have failed in that particular, your act is void. *State v. County Court of Saline County,* 51 Mo. 350. (Mo 1873).

These are the seminal decisions concerning single subject analysis and are important to our analysis because this court has in modern days, despite slight changes in wording in subsequent constitutions, recognized the virtual identity of the provisions dealing with clear title and single subject. *Hammerschmidt,* 877 S.W.2d at101.

The Trial Court Did Its Analysis in Reverse

These principles help demonstrates the error by the trial court in this case. The title of enacted SB 844 was "relating to ethics". The provisions struck by the trial court *were those dealing with ethics.* Erroneously the trial court first looked to the subject of the *original* bill[5] and totally ignored the title and subject of the enacted law. The court seemed to ignore that the title of the bill

[5] The state does not concede that the trial court correctly determined the subject of the original bill or its purpose.

had changed. No clearer expression of identity of subject, title and specific provisions can be found in SB 844 than those relating to ethics. The stricken ethics provisions were clearly embraced within the final title. At least as far as the ethics provisions were concerned that should have been the beginning point of the trial court's single subject analysis. Instead the trial court turned to an analysis of purpose of the original bill. But purpose analysis has no place in the discussion of single subject.

This failure by the trial court also ended up frustrating and contradicting the very policy purposes of the single subject constitutional provision. If we ask whether someone looking at the final title would be fair warned or would get some intimation that a bill titled "relating to ethics" might contain some provisions relating to campaign filing, candidates, contributions, lobbyists and powers of the Missouri Ethics Commission, the answer is obvious. Of course they would. What might not be intimated is that keys to the capitol dome were included. Thus that provision would be a different subject. And even if the original bill "relating to procurement by statewide officials" is considered not related to ethics by public officials in its broadest sense it would be that portion of the bill that was a different subject, not the ethics provisions. But the trial court did not follow that logic.

The Court Asked the Wrong Question

The trial court's analysis is also flawed by asking the wrong question. In effect it appears that the trial court asked itself if someone reading the title of the original bill concerning procurement would be put on notice that the bill might include provisions relating to ethics. But the trial court's approach, besides being unsupported by the cases, totally ignores the legislative process. It takes no citation to authority to understand that it is the title of a bill that is voted on that is important to alerting legislators of the subject matter, not some title abandoned or changed earlier in the process. The original title had disappeared well before final passage by the legislature. The legislature was dealing with a different bill and different title (which may have shared only a bill number). The evil intended to be prevented by the single subject provision was that legislators be misled or tricked so that they would not know the final bill related to ethics. Clearly they were not and could not have been unless illogically one would assume that the legislators only look at the original titles of bills and not subsequent changes to titles.

The Conflation of Subject and Purpose

These principles from the early cases remained consistent through two additional constitutions and the cases that applied then until the decision in *Hammerschmidt v. Boone County,* 877 S.W.2d 98 (Mo. banc 1994). There this

court conflated the "concept of subject" of a bill and the concept of "purpose" as used in a different part of the constitution, Art. III, Sec. 21, the "change of purpose" clause. ("We conclude that a "subject" within the meaning of Art. III, Sec. 23, includes all matters that fall within or reasonably relate to the general core purpose of the legislation. To the extent the bill's *original purpose* is expressed in the title to the bill, we need not look beyond the title to determine the bill's *subject"*) *Hammerschmidt* at 102. (emphasis added) The difficulty with this mixing, although not recognized, has become apparent in later cases.

To apply the statement from *Hammerschmidt* logically and consistently the single subject analysis must look only at the bill as originally introduced (to determine the original purpose). But then what bill title is looked to? The original title or the title as passed? It would seem one must look at the original title. But that approach is inconsistent with a hundred years of decisions concerning "single subject", may not accomplish any intended purpose of the constitution and may frustrate a perfectly proper and constitutional procedure. "Purpose" simply is irrelevant.

This court has long held that there is nothing inherently wrong with changing the title of a bill. *Westin Crown Plaza Hotel v. King,* 664 S.W.2d 2, 6 (Mo. banc 1984). Title changes facilitate an organized and more efficient approach to the consideration and passage of legislation. Id. Title changes can help avoid piecemeal legislation. They also recognize that placement on the

calendar may have much to do with the prospect of passage and significant and important legislation sometimes needs a vehicle. Title changes can broaden the subject of a bill to include more topics. Applying *Hammerschmidt* literally also conflicts with the long standing rule that the subject of a bill is determined by looking at what is embraced in the final title. The *Hammerschmidt* approach leads to just what the trial court did here. It simply looked at the title of original SB (to determine "purpose" (the same as "subject" according to *Hammerschmidt*), compared it to the title of the final SB 844 and determined that they were different. Its formulation of the analysis was simply wrong.

The problems created by this approach should be apparent. Although the principal goal of the "single subject rule" is to avoid surprise, a title in a final bill may be perfectly informative. (such as "relating to ethics") Despite provisions constituting over 95 % of a bill and that are obvious, the final title may be held to run afoul of the constitution because the limited purpose found in the original bill is not closely enough related. This error in *Hammerschmidt* analysis also defeats one of the very purposes of the constitutional requirement-preventing logrolling. This *Hammerschmidt* analysis likewise may strongly support a successful "change of purpose challenge"- a result which prompts the question of why both provisions are necessary at all.

Subsequent cases have been less clear about their view of *Hammerschmidt's* mixing of subject and purpose analysis. In *Carmack v.*

Director of Agriculture, 945 S.W.2d 956 (Mo. banc 1997) this court again approved looking at the title only if the original purpose is expressed in the title. *Id.* at 959. But whether it was only the original title is unclear because the title of the bill never changed except for the addition of statutory section numbers being amended or added. *Carmack* does suggest, however, that the process of determining the subject of a bill is different if there is only a single subject but no clear title challenge. *Id.* at 960. The court said that if a clear title challenge is involved you look only to the title of (presumably) the final bill. But where there is only a subject challenge the court can determine the subject either by looking at the topical organization of the constitution itself or examining the "contents of the '*bill originally filed*' to determine its subject." *Id.* (emphasis added). The court concluded that "the primary, core subject of H.B. 566 is laws relating to programs administered by the department of economic development.[6] This approach simply cannot be reconciled with the clear language of Art. III, Sec. 23.

Again, in *Rizzo v. State of Missouri,* 189 S.W3d 576 (Mo. banc 2006) the court treated "subject" and "purpose" as synonymous. *Id.* at 579. There again,

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[6] Apparently a bill would be unconstitutional if the legislature put a provision relating to economic development into some other department's authority.

the title never changed from introduction to passage, remaining "relating to political subdivisions". Rizzo does add to the broad interpretation favored in early cases the useful description that the subject may permissibly be a "broad umbrella". *Jackson County Sports Complex Authority v. State of Missouri,* 226 S.W.3d 156 (Mo. banc 2007) continued the conflation of purpose and subject (and the umbrella analogy) speaking of a bill having multiple and diverse topics that were part of a single overarching subject. *Id.* at 161. *Jackson County*, however, was only a clear title and a change of purpose challenge.

In *Trout v State of Missouri,* 231 S.W.3d 140 (Mo. 2007), decided only a month after *Jackson County,* the court addressed for the first time in some years a challenge based on both single subject and change of purpose. H.B. 1900 was originally titled an act . . . to enact . . . seven new sections relating to campaign finance." During the subsequent legislative process various amendments were added and the title was eventually changed to "relating to ethics." *Trout* then introduces a new twist to the treatment of subject and purpose as synonymous. Reciting that original purpose analysis emphasizes "*a general overarching purpose*" the court said that single subject analysis turns on the "*general core purpose of the legislation.*" *Id.* at 146. What the difference is, if any, in "overarching" and "core" purposes is left unexplained. In application, however, it seems clear, though not clearly stated, that for single subject analysis the "core purpose" should be expressed in the title. If that is not the clear rule then

there is no meaningful distinction between the "change of purpose" and "single subject provisions" of the constitution except that the subject (core purpose) must be expressed in the original title.

There should be no situation where a proper clear title and single subject analysis could obtain a different determination of the subject of the bill. It is well accepted that "whether a bill violates the single subject requirement is a determination made as to the bill as finally passed." *Stroh Brewing Co. v. State,* 954 S.W.2d 323, 327 (Mo. banc 1997). In theory it would seem that the if the subject of the final bill is not under inclusive or amorphous then that is the subject for purposes of single subject analysis and no further analysis is required to determine the subject of the final legislation. First *Hammerschmidt*, however, and then *Carmack* undermine that logic. In the former the court said it did not need to consider whether the title clearly identified the subject because it would decide the case on the single subject provision. *Hammerschmidt,* 877 S.W.2d at 98 fn.2. It seems axiomatic that to determine whether a bill has more than one subject the court must first determine *what* the subject of the final bill is. *Id.* What are we comparing the other claimed subjects to? The constitution says to look for it in the title. But *Hammerschmidt* suggests that if a title is amorphous and therefore "too broad to inform the public and legislature of the subject of the bill" that the court can proceed to determine the subject of the final bill in the presence of an overly vague title. 877 S.W.2d at 102, fn. 3. (If

"the bill's title fails to express the subject of the bill with reasonable precision we look to the Constitution as a whole"). But if the title fails to describe the subject with sufficient clarity then the bill should be unconstitutional without any further discussion of subject.

Despite this language, what the court actually did was to determine what the subject of the alleged non-germane matters was, not the subject in the final bill and the title. In *Carmack* the court added in addition to constitutional organization that the "Court may examine the contents of the bill originally filed to determine its subject. 945 S.W.2d at 960. None of these statements would be problematic if limited to a discussion of the subject of various provisions in the final bill that are challenged as not being within the title. But in *Carmack* the court again went on to express that in the presence of an amorphous title the court could look to the constitution and/or contents of the final bill to determine its subject. As a result, the court suggested that the bill violated the clear title requirement by a title relating to "economic development" but nevertheless the court would consider that (economic development) was the subject of the final bill to be compared to a another provision governing reimbursement of killed elk for single subject analysis. How a bill title could violate the "clear title requirement" as too amorphous and yet be definite enough to be the subject of the final bill for comparison to other provisions of the bill is unexplained. The only apparent reason is that no clear title challenge was made.

The Trial Court's Error from Reading *Hammerschmidt*

The trial court erred by looking only at the title of original SB 844 to determine satisfaction of the single subject requirement. The subject of the bill as passed was "relating to ethics" and that remains unchallenged. The trial court skipped a step in the proper analysis to determine if the final bill and the original contained more than one subject. Instead, it looked solely at the purpose of original SB 844, determined narrowly that its subject was "procurement" and proceeded to a severance analysis. It ignored the analysis set forth in *State, on Inf. Of Dalton v. Land Clearance for Redevelopment Authority of Kansas City,* 270 S.W.2d 44, (Mo. banc 1954) that requires the court to examine whether the original provisions of SB 844 related to, were connected with and were incident to or merely a means of enforcing the provisions of the final subject "relating to ethics". A proper analysis of original SB 844 would have been that it dealt with "statewide elected officials". The court's next step should have been to determine whether statewide elected officials' methods of bidding for outside services was related to or had a natural connection in any way to the subject of ethics. These steps were never taken.

Bidding by Statewide Elected Officials Has a Natural Connection to Ethics

The Office of Administration has traditionally served executive branch agencies under the oversight of the governor in doing competitive bidding for

goods and services those agencies require. RSMo. 2000 Section 34.040 requires a competitive bidding of contracts over $3000 for the purchase of printing and other services by executive agencies. In *O.J. Photo Supply, Inc. v. McNary*, 611 S.W.2d 246, 248 (Mo.App. E.D.1980) the court said of competitive bidding:

> It is generally held that the purposes of such legislative requirements 'are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers . . .

The policy preference is so great that over 80 statutes deal with competitive bidding in some fashion by both state and local government agencies.

Statewide elected officials are potentially subject to the same suggestions of favoritism, improvidence, fraud or corruption in awarding contracts to outside vendors, particularly if those vendors are also political contributors. See, for example, the allegations of conflict of interest and favoritism made against the former attorney general concerning attorney's fees for special assistants hired by non-competitive contract by the attorney general. *Kinder v. Nixon,* WL 684860 (Mo. App. May 30, 2000).

Original SB 844 allowed statewide officials to use the non-partisan process

of determining winning bidders without allegations of favoritism to friends and supporters. Thus the original bill at the very least enabled statewide officials to make purchasing decisions with lessened fear of ethical complaints and reduced the likelihood of alleged violations of informal and formal ethics rules and principles. This principle is closely tied to the requirements for financial disclosures by many state officials, including elected officials, lobbyists and campaign contributors. It is clear that competitive bidding for lucrative contracts free from political considerations and influence is as naturally related to ethics as the varying provisions in *Trout*.

In *Trout* the title of the final bill was "relating to ethics". The original title was "relating to campaign finance". The bill title was changed as various amendments were added. One amendment disqualified persons from running for office who were delinquent on certain taxes or who were felons. A challenge was brought to the candidate disqualification provision and the challenger argued that the bill's subject was campaign finance. This court rejected that narrow interpretation and held that the subject expressed in the title was "ethics". Although as discussed above the court muddied the waters when it began to discuss "the general core purpose of the proposed legislation" *Id* at 146 it eventually held that the general core purpose was the very subject expressed in the bill, i.e. ethics. The court then determined that candidate disqualification provisions fit "well within the core subject of ethics." *Id*. Regulation of

candidates was, the court said, related to the "regulation of the ethical conduct of lobbyists, public officials and candidates." *Id* at 145. In the same way original SB 844's provision for competitive bidding of contracts by elected statewide officials was a means for advancing the goals of ethical conduct and public transparency that underlay the ethics provisions added to SB 844 during legislative deliberations. Similarly in *Jackson County Sports Authority* the court found that the title "relating to the regulation of political subdivisions satisfied the clear title requirement (and presumably a provision requiring competitive bidding for a county sports complex authority fell within that title subject because it too dealt with the regulation of political subdivisions because the Sports authority was a political subdivision.)

The trial court concluded that the subject of original SB 844 was "procurement" and not even procurement by statewide officials or even the conduct of statewide officeholders. In doing so the trial court took a position of narrowly defining a subject which has frequently been rejected by this court. *And more over it was not the subject it should have been looking at.* The single subject provision of the constitution is not intended to be a technical procedural trap for the unwary but to protect the legislative process from perceived abuses of "hidden amendments", totally unrelated matters, and log-rolling. It was not intended to impede or obstruct the process and certainly not to prevent bills containing multiple topics. And none of those abuses is even arguably involved

in this case. There is absolutely no reasonable argument that a lengthy bill dealing with ethics would not have passed except for its inclusion with a competitive billing bill for state officials.[7] (log-rolling) And if anything was hidden from legislators by the final bill it was the very "procurement" clause that the trial court allowed to stand.[8] Finally the process followed by SB 844 was far different than is usually present in single subject challenges. In all of the reported cases found by the state, the title remained consistent or was only broadened slightly during the process. The challenged provisions were generally added by amendment, were fairly insignificant in terms of length and were not *the umbrella subject* of the final bill. The trial court's decision with respect to the severance issue discussed in point II below would virtually per se prevent an early filed bill with a high spot on the calendar from every becoming the vehicle for significant legislation even though the subject of the added legislation has become the very subject of the bill.

II. The trial court erred in entering judgment striking the ethics provisions of SB 844 as unconstitutional under Article V, Section 23

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[7] In fact that same provision passed both houses and was signed by the governor as a stand alone act. HB 1868 Laws 2010

[8] Apart from the keys to the capitol dome provision which the state does not defend.

because the trial court misinterpreted and applied the law in that even assuming that SB 844 had more than one subject the correct subject of ethics was clearly expressed in the bill's title and the court should have stricken the provisions relating to competitive biding and the keys to the capitol dome.

Even assuming that the competitive bidding provisions are not related to ethics the trial court imposed the wrong remedy. It should have stricken all the provisions it felt unrelated to ethics (keys to the dome and competitive bidding). In part this may be a result of the confusion discussed above engendered by *Hammerschmidt's* terminology concerning the original core purpose. In any event, the trial court's severance analysis was completely inconsistent with the very purpose and rationale for the "single subject" provision of the constitution. The result of the trial court's severance findings was that the very provision the court let stand (competitive bidding) was not expressed in the title or (in the trial court's view) in any way related to the subject of ethics. Now that is a surprise and fraud upon the legislature who the trial court has deemed put on notice that the competitive bidding provision is under the title "relating to ethics "even though the court sees no connection! The trial court's judgment also invalidates the only parts of the law that **were** expressed in the title and of which the legislature was well aware.

The 1865 version of the "single subject" provision explicitly set forth the remedy. It had a second clause "but that if any subject embraced in an act should not be expressed in the title, **such act should be void only as to so much thereof as was not expressed."** (emphasis added) The 1875 constitution did not contain this clause. But as observed by Hon. Thomas M. Cooley of the Michigan Supreme Court and one of the first professors of the Michigan Law School the 1875 and 1945 constitutions did not need such a clause because when the act is broader than the title the matter not included must be stricken under common law rules. He explained that the special clause was unnecessary because the general rule already was that only so much of act as is unconstitutional, should be stricken if the remainder can stand alone. *A Treatise on Constitutional Limitations,* Thomas McIntyre Cooley, 7th ed. at page 211 (1903). The only reasonable and logical result in equity is to strike the provision not expressed in the title. In other words it need not be stated.

This remedy clause from the 1865 constitution is identical to language still contained in the constitution of Indiana. And even at the time of the 1865 constitution virtually the same concept when considering remedies for partially unconstitutional laws was well engrained in the common law. *County Court of St. Louis County v. Griswold,* 58 Mo. 175, (Mo. banc 1874). (an act may be good in part and bad in part) And finally the concept was codified in RSMo. Sec. 1.140 after the 1945 constitution. But in *Hammerschmidt,* 877 S.W.2d at 103,

the court changed the direction of this analysis by relying on the discussion of severability in *Missourians to Protect the Initiative Process v. Blunt,* 799 S.W.2d 824, 832 (Mo. banc 1990) rather than applying the traditional analysis codified in Section 1.140. In *Initiative* the court considered the "single subject" provision of Art. III, Sec. 50 of the Mo. Constitution dealing with constitutional amendments by means of initiative petitions. Equating constitutional amendments by initiative with legislative action on bills, the *Hammerschmidt* court said; "Where the Court is convinced that the bill contains a 'single central [remaining] purpose' we will sever that portion of the bill that contains the additional subject[s] and permit the bill to stand with its primary core subject intact. In determining the *original, controlling purpose* of the bill for purposes of determining severance issues, a title that 'clearly' expresses the bill's single subject is exceedingly important." (emphasis added). The *Hammerschmidt* court's error in relying on *Initiative* was that Art. III, Sec. 50 has no requirement that the subject appear in the title as does Art III, Sec. 23. In *Hammerschmidt* this made no difference to the result because although the title was modified throughout the legislative process it always said "relating to elections". The problem with the reliance on *Initiative* comes, as here, where the title has changed substantially and been broadened.

The trial court here erroneously interpreted the law and held that the subject of SB 844 was procurement because it believed that was its overarching

original purpose. Logically but erroneously it then determined that for severance purposes it could ignore the title of the enacted bill. For severance analysis in a "single subject case" the court simply cannot look to the original version of the bill (or its title). In many cases since *Hammerschmidt* this incorrect approach simply made no difference. But here it severely and unjustifiably restricts the legislature's ability to change the subject and title of a bill during the legislative process. Yet it furthers none of the goals of Art. III, Sec. 23. The trial court's analysis with some arguable support in this court's precedents also rewrites the constitution to say in effect, *no bill shall have more than one purpose which shall be the one in the original bill.* This was not a case (except perhaps with the keys to the dome) where some small but significant provision was quietly slipped into a larger bill unnoticed and unhidden to the legislator's eye. In fact the very portion struck by the trial court was heard in committees, debated on the floor of both houses and explicitly referred to in the title. "Single subject" challenges should not become the means by which unsuccessful legislative opponents gain a judicial veto over legislation. This court has repeatedly said that it does not favor procedural attacks on enacted laws and although the provisions of Art. III, Sec. 23 are mandatory and must be enforced they should not be applied in a mechanical manner that does not consider the purposes it was intended to serve and embarrasses legislation.

Conclusion

For these reasons the State requests this Court to reverse the judgment below and strike only keys to the dome provision or alternatively the keys to the dome and competitive bidding provisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that it contains 7,491 words exclusive of the cover, this Certificate of Compliance and of Service and the signature block, as determined by the Word Count feature of the software in which it was prepared, WordPerfect 2007;

2. The disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free, and;

3. Two true and accurate copies of the foregoing Appellant's Brief were served today, via First Class United States Mail, sufficient postage prepaid, upon the counsel for the Plaintiff, at the addresses listed below, this 22nd day of August, 2011.

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