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 REPLY BRIEF

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AMENDMENTS TO ORIGINAL SB 844 DID NOT CHANGE THE PURPOSE OF THE BILL AND THEREFORE DID NOT VIOLATE ART. III, SEC. 21 OF THE MISSOURI CONSTITUTION PROHIBITING AN AMENDMENT THAT CHANGES THE ORIGINAL PURPOSE OF A BILL

The trial court erred in narrowly defining the purpose of the original SB 844 as procurement in several respects. The trial court and now Legends confuse the issue by equating "purpose" and subject. There are several problems with this conflation. It fails to give any significant recognition to Art. III, Sec. 21, adopted ten years after single subject provision. It ignores the obvious choice of different terms by the drafters of the constitutions. It ignores the clear dictionary difference between subject and purpose. Finally, it ignores that the drafters of the 1875 Constitution had a clear and stated reason for this additional provision that went beyond the policy objectives of the single subject provision.

The so-called "change of purpose" provision of the present Missouri Constitution first appeared in the 1875 Constitution. Its provisions were part of a wave of constitutional limitations on legislative powers adopted by many states in the latter half of the 19th century, including provisions about special laws and single subject requirements that Missouri first adopted in

its 1865 Constitution. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement,* 48 U. Pitt. L. Rev. 797, 798 (1987) Despite being nearly as old as the single subject provision, the change of purpose clause has been much less discussed in Missouri cases and garnered only limited comment in journals and other scholarly publications.

Respondent's reliance upon *Missouri Ass'n of Club Executives v. State of Mo.,* 208 S.W.3d 885,888 (Mo. banc 2006) is misleading. Although quoting that the purpose is "gleaned from both its earliest title and contents," Res. Brief p. 38, Legends acknowledges in the very next sentence that the bill's title can be changed through the process without violating Art. III, Sec. 21. Legends' next claim is that if the title is changed, then you focus only on the original contents. That analysis is simplistic because it is inconsistent with earlier discussions of this court concerning change of purposes as well as most learned commentary. Nor is *Club Executives* that limiting. In *Club Executives* both the original title and the amended title, as well as the contents of the original bill, had the objective of regulating alcohol related offenses whether traffic or otherwise. *Club Executives* must be limited to its particular facts.

This court's consistent jurisprudence has stated that "purpose" should be broadly defined. The court has consistently rejected a trial court

determination that too narrowly defines the purpose. In *Jackson County Sports Complex Authority v. State,* 226 S.W.3d 156 (Mo. banc 2007) the court said that the general or overarching purpose of the bill as originally introduced was regulation of political subdivisions, not the subject matter of the specific statutes references in the original text. *Id. at 160-161.* See similarly *Trout v. State of Missouri* 231 S.W.3d 140, 144 ("even new matter is not excluded if germane") ("purpose means the general purpose of the bill not the mere details by which that purpose is manifested or effectuated"); *Allied Mut. Ins. Co. v. Bell,* 185 S.W.2d 4 (Mo. banc 1945).

The single subject provision was first adopted in the 1865 Missouri Constitution. Similar, if not identical, constitutional provisions had been or soon would be adopted by nearly every state. These provisions were the consequence of deep distrust of legislatures and legislators who were believed guilty of misleading and devious acts, if not outright corruption. They were intended to discourage or prevent logrolling and the concealment of important legislation from both legislators and the public during the legislative process. *State v. Mathews,* 44 Mo. 523 (1969).

The court has sometimes failed to recognize that single subject and change of purpose are distinct constitutional provisions. As a result "subject" and "purpose" have not always been clearly distinguished. In general usage they are not synonymous terms. "Subject" in the constitutional sense is "the

matter of concern over which something is created" – the subject of the statute, — also termed "subject matter." "Purpose" by contrast is "the objective, goal or end." Black's Law Dictionary p.1250 7th ed. One commentator has noted the different grammatical uses of these terms in single subject and change of purpose clauses. "Perhaps simpler, 'subject' corresponds to grammatical subject and to the 'subject term' of a logical proposition: 'purpose' corresponds to the grammatical logical predicate." Martha J Dragich, 38 Harvard J. on Legislation, (2001) at p. 130. This distinction was recognized in West Virginia where the court said the legislature "undertakes to legislate upon a particular subject for the accomplishment of a certain object." *Kincaid v. Magnum,* 432 S.E.2d 74, 80 (W. Va. 1993).

The distinction is also important because the two provisions have historically been aimed at different evils. The single subject rule protects legislators, the governor, and the public "in the moment of final decision on a bill. It does so by prohibiting the bundling together of unrelated provisions to force the passage of provisions a legislator or governor abhors along with those he favors." Dragich at 114. Together with the clear title aspect of single subject, legislatures are protected from deceptive and hidden legislation along with classic logrolling. Thus the proper analysis of single subject is concerned only with the final bill as passed.

Change of purpose provisions are aimed, however, at the legislative process itself. They help enforce other constitutional provisions on the legislature. Norman J. Singer, 1A STATUTES AND STATUTORY CONSTRUCTION, at 580 (5th ed. 1992). This seems obvious when you note that the provision that also addresses change of purpose also includes the requirements of the style of a bill, that legislation can be enacted only by bill, and the requirement that every bill be read by title on three different days in each house. It prevents legislators from evading the time requirements for filing legislation and avoiding the committee system by inserting into pending bills completely new legislative proposals. The drafters of the 1875 Constitution well understood this purpose. "To afford security against hasty legislation and guard against the possibility of bills becoming laws, which have not been fairly and considerately passed upon, wholesome restrictions are thrown around the lawmakers and greater particularity required in the enactment of laws than heretofore." Address to Accompany the Constitution, Vol. II, Journal (Loeb-Shoemaker), Missouri Constitutional Convention of 1875, p. 878. (cited favorably by this court in deciding a change of purpose case in *Allied Mut. Ins. Co. v. Bell,* 183 S.W.2d 4 (Mo. banc 1945)).

Because the single subject and change of purpose were adopted at different times, use different language and are aimed at different legislative evils, they should be applied independently and with an analysis that reflects

those distinctions. The constitutional language is not honored when the title alone of the original bill is overemphasized. "Title" is peculiarly in most instances an identifier of the "subject" of the bill — what it's about — both because of the language of the constitution, common meaning and virtually all precedent from this court and other states. Likewise it must be different because single subject analysis must look at the subject of the bill as enacted and change of purpose must compare the original bill and the enacted version. Purpose and subject should not be equated.

What is at issue when considering original purpose analysis is the objective of the legislation, not the specific manner of implementation. The intended result of a bill — its objective — can best be found in its contents, although it may, in some cases, also be discernible in its title. The objective (purpose) of a bill is seldom explicitly expressed in the bill itself.

The important question is how broadly or narrowly purpose is determined when Art. III, Sec. 21 is invoked. Many cases have referred to the "overarching purpose" of the bill - obviously a broader concept. A broader consideration of purpose is justified by both practicality and the evils the constitutional provision addresses. Procedural attacks on the legislative process are not favored. Constitutional procedural limitations are not intended to be technical traps for the legislature or to engage the courts and legislative bodies in a perpetual tug-of-war where the boundary line is

constantly shifting and can not be predicted. This has resulted in substantial deference to legislative actions.

Legends' view of the purpose of SB 844, was adopted by the trial court finding that the purpose was procurement, is too narrow. Procurement, of course, is not an objective, it is at most a subject. Procurement, or in the State's view competitive bidding by statewide elected officials, is a tool for the achievement of some goal or intended result. Legends does not address or suggest any goal or objective of SB 844. The state posits that the purpose of original SB 844 was the promotion of ethical conduct by statewide elected officials. This conduct was to be promoted through the purchasing of outside services and materials. It provides a vehicle for the purchase of such services to be done by competitive bidding and without the political involvement of elected officials.

Legends agrees that change of purpose analysis requires comparison of the purpose of the original bill and that of the final bill. Legends concedes that if the original purpose of SB 844 was "ethics" (in the state's view a subject not a purpose), that there was no change of purpose between original SB 844 and the enacted ethics provisions in the final SB 844. That should, in itself, be enough to reject the change of purpose claim by Legends. But Legends also argues that the capitol dome amendment was a different purpose and that, therefore, the new ethics provisions should be stricken.

There are a number of fallacies with this argument. There is no constitutional prohibition from a bill having more than one purpose – and most bills do. And keys to the dome is a question of multiple subjects, not change of purpose. What ever purpose the original SB 844 had, it was not changed by the dome amendment. Nor does Legends advance any argument that the keys amendment in any way was the purpose of the final bill. The keys amendment is taken care of by the single subject analysis; there is no need to try to shoehorn it into the change of purpose analysis. Moreover, even in Legends' view of procurement as the original purpose there is a mirroring of the ethical considerations of public procurement in the final bill that enacted Sections 105.456, which limits the activities of legislators and statewide officials, directly or indirectly, in contractual dealings with the state unless by competitive bid.

Any analysis of the constitutionality of a bill under Art. III, Sec. 21 should consider the legislative evil that occurred and whether that evil is addressed by the constitutional attack. Legends demonstrates how an overly narrow and strict view not only fails to address any evil but creates a new one. It acknowledges that one senator has vowed to attach the keys to the dome provision to virtually every piece of legislation until he gets it passed. For a senator of any power, and particularly committee power, the amending is not overly difficult. But the net result of this logic is that one senator can

place a poison pill in virtually any bill, leaving it subject to change of purpose attack. That cannot have been the intent of the constitution's drafters. Nor could it have been the intent to discourage amendments to bills or unduly restrict the legislative process.

There have been far fewer change of purpose attacks than single subject, and even fewer successful ones. A review of some of the cases gives some hint of the reasons for that scarcity. One of the first cases of a successful attack was *Allied Mutual*, 185 S.W.2d 4. There the original bill would have eliminated a reduction of premiums paid for reinsurance in computing gross premiums tax. The final version imposed a new tax on premiums and did not include the original provision. *Allied Mutual,* 185 S.W.2d at 6. One commentator has observed that a change in direction is fundamental in finding a change of purpose analysis. Dragich at 113. She further suggests that this contradictory feature (from tax reduction to tax increase) between original and amended is reflected in *Allied Mutual* and successful change of purpose attacks in other states. *Id.*

Properly viewed, original SB 844 had the purpose of regulating the ethical conduct of statewide elected officials; the provisions adding amendment to Chapters 115, 130 and 105 were related and germane. No change of purpose violation of the constitution occurred.

IT WOULD BE IMPROPER TO LOOK TO THE ORIGINAL PURPOSE OF SB844 IN DETERMINING WHAT PORTIONS OF A BILL SHOULD BE SEVERED IF THERE IS A VIOLATION OF THE SINGLE SUBJECT PROVISION

Regarding the severability analysis, Legends claims that *Hammerschmidt,* by reliance on *Missourians to Protect the Initiative Process,* mandates that this court look for the central purpose of SB 844. Legends claims that because of the language in both cases, we do not consider the title[1] of the bill when considering severability. *Hammerschmidt's* reliance on *Missourians to Protect the Initiative Process* is misplaced. Not only was *Missourians to Protect the Initiative Process* based on Art III, Sec. 50, not 23, of the Constitution, but it involved an initiative petition to amend the Constitution, not to enact a law. This is significant because Sec. 50 has different clauses dealing with single subject for constitutional amendments and the enactment of laws. An initiative petition dealing with the enactment of a law "shall contain not more than one subject ***which shall be clearly expressed in the title.***" A proposed constitutional amendment does not require that the subject be expressed in the title. *Missourians to Protect the Initiative Process* thus was not concerned with the title of a bill. It seems

[1] In addition to the equating of subject and purpose.

illogical and incongruous that severability in a multiple subject attack under Sec. 23 would not consider the title of the bill. But if a proper severability analysis is applied, the Legends claim fails because the court would look at the title of the final bill in considering severability.

Seemingly aware but not acknowledging this conundrum, Legends argues that *any severability* is not consistent with the constitution. To do so, Legends must do two things. First, it must discredit reliance upon the severance principles in RSMo. Sec. 1.140. Second, it must convince this court that severance is not good policy and betrays the principles embodied in the constitution. Neither is correct.

Legends' only response to the state's argument about Sec. 1.140 is that it refers to a law and Sec. 23 of the constitution refers to a bill. Legends seems to suggest that because a bill is not a law, the answer is obvious. But it is just as obvious that an enacted and signed law started out as a bill and, if it was never enacted and signed, that this court would never consider whether the unpassed bill had multiple subjects. In other words, it is not evaluated and analyzed for constitutional deficiencies until it becomes a law. Legends suggests no real reason why Sec. 1.140 should not apply.

Again, perhaps recognizing but not acknowledging the weakness of this argument, Legends argues that this court should finally take the step of holding all bills that have multiple subjects *per se* unconstitutional. Only

then, it argues, can the court give the constitution its proper due and teach the legislature that they must follow the constitution. As attractive as the position may initially seem, it does not hold up to more thorough examination. How is constitutional principle recognized if a bill is per se unconstitutional but, in effect, only if someone challenges it? And what constitutional principle is supported when one legislator could intentionally, or even mistakenly in good faith, insert a poison pill or unintended different subject into some piece of legislation? No principle is served and no respect given the legislative branch if single subject enforcement becomes a game of "gotcha" asserted by some group opposed to a piece of legislation and aided by this court. It is not as if this court's precedent is so clear that it is easy for every legislator to see a violation of the single subject provision and that the court should conclude that every violation was intentional at best and chicanery at worst.

There is, however, a possible bright line test for severability that honors the constitutional principle, maintains the separation and mutual respect of both legislative and judicial branches and does not require the court to engage in what some call speculation about the legislature's purpose. It is, in fact, the test that was in the original 1865 version of the constitution's single subject provision, one that is used by many other states and was thought proper by the most renowned early state constitution

scholars. *A Treatise on Constitutional Limitations,* Thomas McIntyre Cooley, 7th ed. at page 211 (1903) It is to simply strike any subject that is not within the subject expressed in the title. The legislators knew, because of the title of final SB 844, that they were voting on an ethics bill. They may or may not have known that the bill also included a provision for keys to the capitol dome, a provision regarding state printing or a provision dealing with competitive bidding by state officials. This severability test would avoid the game of "gotcha" sometimes played by a legislator or lobbyists. A poison pill could not kill legislation and the legislature would be less likely to cross the line by mistaken prediction as to how this court will rule. Such a rule would protect all of the principles underlying Sec. 23, allow the legislature to operate with optimal efficiency, and avoid many, if not most, of the difficulties and concerns this court now encounters in applying the single subject rule.

CONCLUSION

For these reasons the State asks this court to reverse the trial courts judgment and order stricken the provisions of SB 844 dealing with keys to the capitol dome and state printing.

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 3,353 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. I hereby certify that a true and correct copy of the foregoing was filed electronically via CaseNet on October 11, 2011, to:

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