No. SC87063

IN THE
SUPREME COURT OF MISSOURI

RONALD CATES and RICHARD DUNN, et al.

Appellants,

v.

DANIEL SHIPLEY,

Respondent.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Werner A. Moentmann

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

I. Section 10.705 amends § 188.205 and constitutes general legislation.

Shipley declares that the provisions of § 10.705 are merely specifications of the purpose of the appropriation. This statement begs the question: Are the statements of policy, program operation, eligibility, etc. proper subjects for an appropriation? Following Shipley's argument to its logical conclusion, an appropriation could specify what employees to hire, where to locate office space, even hours of operation – all under the guise of ensuring that state funds are spent appropriately. Shipley merely states the central question of the appeal as a declaration. Thus, against the admonition that we should not be "directed to expect or look for anything else in an appropriation bill except appropriations" *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340-341 (Mo. banc 1926), Shipley declares, in essence, that the legislature may insert any provision it

wishes into an appropriations bill, so long as the provision restricts the spending of money.

But in doing so, Shipley forgoes any meaningful discussion of the fact that § 10.705 contains provisions not only specifying the proper expenditures of family planning funds--which are what appropriations contain--but also numerous and detailed provisions that define various programmatic details such as provider eligibility, annual audits, permissible corporate names and corporate affiliations. Provisions such as these were addressed directly by this Court in *Hueller*, cited in the Director's opening brief:

> Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute[.] ... That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not.

Hueller, 289 S.W. at 341 (emphasis supplied). *See* Director's Brief at 21. Section 10.705 is very similar: The legislature chose not to establish the family planning program or any details related to it by statute. Instead, the legislature left it to the agency (MDHSS) to address such details. *Id.* at 340.

It is not disputed here that a state may choose to fund family planning services, but exclude all abortion services. *Planned Parenthood v. Dempsey*,

167 F.3d 458, 461-462 (8th Cir. 1999). But the restrictions and declarations in § 10.705 go much further than simply limiting the spending of funds, even further than flat-out denying funding. Section 10.705 announces policy, details many aspects of a program design, establishes auditing procedures (that extend beyond the one year limit on the applicability of an appropriation), provides restrictions on how corporate providers may be named, and virtually eliminates any connection between a family planning provider and an abortion provider–which is to say that it effectively prohibits affiliation itself. These features of § 10.705 run afoul of both the Missouri and federal constitutions, and Shipley's response is merely to affirm his own premise that restrictions are permissible.

In addition to serving as an amendment to § 188.205, the various provisions of § 10.705 constitute general, substantive legislation. Shipley's response to the Director's discussion of this issue is to refer to the discussion of the constitution of the state of Maryland in a decision that addressed a circumstance bearing no resemblance to the appropriations bill at issue here. *Bayne v. Secretary of State*, 392 A.2d 67 (Md. 1978) involved spending state funds on abortions. As Shipley states, the Maryland court ruled that restrictions on spending can be included in a budget bill (Maryland's equivalent to an appropriations bill). But the terms Shipley claims are restrictions are merely a list of conditions under which abortions will be covered. *Id.* at 563. There were no

long and detailed programmatic directions, restrictions, and qualifications such as appear in § 10.705. Further, the general rule regarding budget bills (appropriations bills) in Maryland is in agreement with the rule in Missouri: The function of an appropriations bill "is to appropriate money, not to legislate generally[.]" *Id.* at 574. *Bayne* sheds no light on this issues in the case at bar.

II. Severance of unconstitutional provisions is the appropriate remedy.

Shipley argues that all provisions of the appropriation must be stricken because severance of anything less than the whole would contravene legislative intent. But Shipley fails to take into consideration that the legislature has already expressed its intent to have portion of the appropriations bill severed if found unconstitutional. While Shipley disagrees with the Director's interpretion of appropriations language, he is here suggesting that this Court ignore it all together.

III. The provisions of § 10.705 that prohibit any manner of sharing of resources or having similar corporate names are vague and ambiguous, and also constitute substantive legislation that restricts provider activities outside of the program.

As pointed out in the Director's opening brief, the word "share" and the phrase "similar name" were vague and ambiguous and required definition. Section 10.705 did not define either of these words. Shipley simply argues that the terms are perfectly clear and required no definition or interpretation. Shipley

concludes with the proposition that a court is not required to defer to an agency's interpretation of law when the law is clear and unambiguous. Respondent's Brief, p. 47. Once again, Shipley's argument begs the question.

The rule, cited by Shipley, that a court need not defer to an agency's interpretation of law is premised on the assumption that the language at issue is clear and unambiguous. Here, it is neither. The Director's discussion of this issue in his opening brief is not addressed to the situation where a court comes to the conclusion that the agency is wrong. It is addressed to the circumstance where, as here, a court and the agency could come to two different conclusions with neither being wrong. The word "similar" presents the most obvious example. There could be a variety of opinions as to whether two corporate names are similar, with no one opinion being clearly right or clearly wrong. Surprisingly, Shipley concedes that the question of whether two names are similar is a question of fact. Respondent's Brief, p. 78. If the legislature had intended to be more specific about the definition, it could have provided one. Thus, while Shipley states that the Director's contracts are not in accord with legislative intent, his supporting argument is that the Director should not have defined the terms at all. Again, Shipley does not address the issue raised by the Director.

IV. The trial judge erred in awarding attorney fees against the state.

Relying on the Eastern District's decision in *Lett v. City of St. Louis*, 24 S.W.3d 157 (Mo. App. 2000), the trial judge concluded that the funds it ordered

Planned Parenthood to pay back to the state created a common benefit from which fees could be awarded to a successful litigant. (L.F. 639). This ruling is erroneous for all the reasons stated in the Director's opening brief, and Shipley's response is without merit on several points.

1. The Director has not waived the right to object to an award of attorney fees against the state.

First, Shipley argues that the Director has somehow waived the right to claim error in this ruling. Shipley cites *Atlantic Brewing Co. v. William J. Brennan Grocery Co.*, 79 F.2d 45, 47 (8th Cir. 1935) and *Sheehan v. Northwestern Mut. Life Ins. Co.,* 103 S.W.3d 121 (Mo. App. E.D. 2002) for the proposition that failure to object to a request that attorney fees be awarded to Shipley against Planned Parenthood waives any claimed error in the trial court's award of fees. This is erroneous for several reasons.

First, both of these cases were jury trials, not judge-tried cases. *Atlantic Brewing* dealt with an evidentiary issue (*Atlantic Brewing*, 79 F.2d at 47-48), and *Sheehan* dealt with the failure to raise an affirmative defense (*Sheehan*, 103 S.W.3d at 128-129). Neither of these cases stands in the same posture as the case at bar.

Second, although the trial court drew a legal conclusion that Shipley "should be permitted to recover" his attorney fees (L.F. 560), this conclusion of law was not made part of the judgment until the judgment was amended (L.F. 639). In the

actual judgment, the trial court merely assessed costs against Planned Parenthood. (L.F. 562).

Third, both parties submitted proposed findings and conclusions, and the Director's position was plainly that Shipley should be denied any relief whatsoever. (L.F. 532-546). The Director denied all requested relief in the answer as well. (L.F. 41-53).

Finally, the Director does not contest any award against Planned Parenthood. The Director's objection is limited to moneys awarded from state funds. If this Court upholds the trial court's order to Planned Parenthood to pay back all family planning appropriation funds to the state, and Planned Parenthood is required to pay Shipley's attorney fees in addition to that, such funds would not be state funds.

2. Shipley is incorrect in asserting that the attorney fees award are to be paid by Planned Parenthood and not the state.

Shipley argues that the rule prohibiting an award of funds against the state does not apply here because these funds are not being paid by the state, but are being paid by Planned Parenthood. Shipley is so emphatic about this point that he underlines it in his brief: "The payment of attorney fees to Shipley is to be made by Planned Parenthood." Respondent's Brief, p. 82. Obviously, the Director would have no standing to assert any claim with respect to an order the Planned Parenthood pay attorney fees. But that is not what the trial court's order says. The judgment states that Shipley is entitled to recover fees from the sums paid "to the State of Missouri by Planned Parenthood[.]" (L.F. 639). This is consistent with paragraphs 8 and 9 of the judgment that orders both Planned Parenthood entities to make full payment to the state. (L.F. 562). Thus, if Shipley gets any money at all, it will have to come directly from the state.

Further, Shipley's argument that the fees are being paid by Planned Parenthood is contrary to the common benefit doctrine. That doctrine is premised on the theory that a single litigant or group of litigants sued and obtained a benefit for other similarly situated persons who did not actually participate in the litigation. *Lett*, 24 S.W.3d at 162-163.

The fees burden is shared by the beneficiaries, not paid by the adverse party.[1] In contrast, there are cases in which an adverse party is ordered to pay the attorney fees of the successful plaintiff, usually provided for by statute. These are typically referred to as fee-shifting cases. *See, e.g., Greenbriar Hills Country Club v. Director of Revenue,* 47 S.W.3d 346, 358 (Mo. 2001). These doctrine are not applicable here.

3. *Lett* does not permit an award of attorney fees against the state.

Shipley continues to rely heavily on the decision in *Lett*, but in that case, the state was not a party, and state funds were not at issue. Shipley suggests that because the Missouri Supreme Court concluded that St. Louis police officers and

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[1]Shipley argues that the state is not a party to this litigation. But the Director is sued in his official capacity, and the relief sought is consistent with that. Shipley cites no law in support of this proposition. *See e.g., Edwards v. McNeill,* 894 S.W.2d 678, 682

(Mo. App. W.D. 1995).

the St. Louis Board of Police Commissioners performed state functions for purpose of determining legal expense fund coverage, that somehow the city can be considered the state. The case cited by Shipley makes no such assertion. *See Smith v. State*, 152 S.W.3d 275 (Mo. 2005).

Although *Lett* may stand for the proposition that the general rule that each party bears their own attorney fees may be changed when a successful litigant creates a benefit common to a group of persons who themselves contributed nothing to the litigation, that is not the situation here, nor has Shipley demonstrated that the common benefit doctrine applies to the state. Here, unlike *Lett*, no one is getting a tax refund or a tax break from Shipley's litigation. The trial judge ordered that Planned Parenthood pay the specific judgment sum to the State of Missouri. (L.F. 562). The judge made no such order with respect to attorney fees. (L.F. 639). Thus, the State of Missouri would presumably be required to pay these fees, and this is contrary to established law as discussed in the Director's opening brief.

In an attempt to rescue his argument from the plainly applicable rule that prohibits an award of attorney fees, Shipley states that several Missouri cases permit fees to be awarded in "unusual circumstances." (Respondent's Brief, pp. 84-85). But none of the cases Shipley cites are cases in which an award of fees was made against the state under the common benefit doctrine, or the common fund doctrine. In fact, the main case Shipley cites in support of his assertion that

the rules in *Lett* can be used against the state is *Lipic v. State*, 93 S.W.3d 839 (Mo. App. 2002). But in that case, a specific Missouri statute permitted such an award of fees – a fee-shifting statute. *See* § 536.087 RSMo.

As written, the trial court's judgment makes an impermissible award of attorney fees against the state and must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

The undersigned hereby certifies that on this 7th day of April, 2006, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2,521 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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