IN THE SUPREME COURT OF MISSOURI

No. SC87061

CONSECO FINANCE SERVICING CORPORATION., n/k/a GREEN TREE SERVICING, LLC., JOHN C. WREN, JR. and SHANNON ALLEY,

Respondents,

v.

MISSOURI DEPARTMENT OF REVENUE,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Kenneth Romines

APPELLANT'S BRIEF

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Jurisdictional Statement

In this action, Respondents allege that §§ 700.525 through 700.541, RSMo 2000 are unconstitutional in that they violate due process and equal protection. The Circuit Court held that these statutes violate due process and equal protection. Therefore, this action involves the validity of statutes of the State of Missouri, and jurisdiction is proper in the Supreme Court. Mo. Const. Article V, § 3.

Statement of Facts

This is the second time that this case has appeared before this court. The first time, the circuit court granted, on the same day, a motion to file an amended petition and judgment against the Department of Revenue. This Court reversed and remanded to the circuit court to examine standing and other procedural issues. *Conseco Finance Servicing Corp. v. Mo. Dep't of Revenue*, 98 S.W.3d 540 (Mo. banc 2003) [LF 130-144]. On remand, the circuit court reached the merits of Respondents' claims.

As this case has already been before this Court, the relevant facts will be stated briefly.

Respondent Conseco is a lender in the manufactured home industry, and it holds security interests on certain abandoned manufactured homes. It formerly operated under the name Green Tree Finance Servicing Corporation. [LF 10, 85] The Respondents John and Shannon Alley Wren are the former owners of a manufactured home. [LF 85, 89]

The Department of Revenue received an application for an abandoned title to a manufactured home, with the title listing the Respondent Wrens as the owner and Green Tree/Conseco as the lienholder. [LF 95] The application for an abandoned title stated that the home in question was abandoned on property belonging to a corporation, and gave the address. [LF 95]

The Department, on May 22 and June 5, 2000, sent notice of this application to those listed on the title: the Wrens and Conseco. [LF 89, ¶ 19; 95] The Department used the addresses provided by Respondents on the title form. [LF 156, ¶ 8-10, 15] The notices, as required by law, told Respondents of the request for an abandoned title and of their need to assert their interest in the home, or title would pass to the applicant. [LF 95, 162]

Respondents did not assert an interest at that time. The Department issued an abandoned manufactured home title to the landowner, free and clear of any interest of the Wrens or Conseco. [LF 90, ¶ 22; 158, ¶ 19]

Conseco had, in the past, received and responded to notices of applications for abandoned titles sent by the Department. [LF 158, ¶ 21; LF 209, ¶ 6-8] The Department had asked for a stay order; otherwise, an abandoned title would be issued. [LF 158, ¶ 22]

On cross motions for summary judgment, the circuit court found in favor of Conseco, issuing an order on May 18, 2005. [LF 245-246] The circuit court held that the statutes were unconstitutional because they violated constitutional due process and equal protection rights. The circuit court also found a violation of 42 U.S.C. § 1983. The Director filed a timely notice of appeal. [LF 247]

Points Relied On

I. The trial court erred in granting summary judgment, because the abandoned manufactured home statutes, §§ 700.525-.541, RSMo, are not vague, ambiguous, or conflicting, in that the statutes use words of common usage, the only "as applied" claim is based on hypothetical facts, and the statutes can be read in harmony with each other.

State ex rel. Zobel v. Burrell, 167 S.W.3d 688 (Mo. banc 2005)

State v. Self, 155 S.W.3d 756 (Mo. banc 2005)

State v. Ellis, 853 S.W.2d 440 (Mo. App. E.D.1993)

II. The trial court erred in granting summary judgment, because the abandoned manufactured home statutes, §§ 700.525-.541, RSMo, do not violate the due process requirements of the U.S. and Missouri Constitutions, in that the Missouri statutes provide the opportunity for a hearing, provide adequate notice, and are not confiscatory.

Combined Communications Corp. v. City of Bridgeton,

939 S.W.2d 460 (Mo. App. E.D. 1996)

Ferrell Mobile Homes, Inc. v. Holloway, 954 S.W.2d 712 (Mo. App. S.D. 1997)

General Motors Acceptance Corp. v. Crawford, 58 S.W.3d 529 (Mo. App. S.D. 2001)

III. The trial court erred in granting summary judgment, because the abandoned manufactured home statutes, §§ 700.525-.541, RSMo, do not violate the Equal Protection Clause of the U.S. and Missouri Constitutions, in that the statutes do not involve a suspect class, do not treat any similarly situated persons differently, and do not impermissibly impinge on the right to property. The trial court erred in granting summary judgment, because the abandoned manufactured home statutes, §§ 700.525-.541, RSMo.

United C.O.D. v. State, 150 S.W.3d 311 (Mo. banc 2004)

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771 (Mo. banc 2003)

IV. The trial court erred in granting summary judgment, because there was no evidence of any violation of Respondents' federally protected rights, in that 42 U.S.C. § 1983 creates no substantive rights and is merely a vehicle for seeking a federal remedy for violations of federally protected rights.

Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Circuit 1999)

42 U.S.C. § 1983.

Standard of Review

This Court's review is *de novo* and the criteria for testing the propriety of summary judgment are the same as those employed by the trial court to determine the motion initially. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). Therefore, this Court reviews the entire record presented in connection the motion for summary judgment. This Court first determines if there is any issue of material fact, and if there is none, then this Court examines whether the moving party was entitled to judgment as a matter of law. *Dial v. Lathrop R-II School District*, 871 S.W.2d 444, 446 (Mo. banc 1994).

In reviewing a vagueness challenge, this Court presumes that the statutes are constitutional and the burden to show otherwise rests with the challenger. *Suffian v. Usher,* 19 S.W.3d 130, 134 (Mo. banc 2000). This Court will not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Smith v. Coffey,* 37 S.W.3d 797, 800 (Mo. banc 2001) (internal citations omitted).

This Court has also stated that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect." *State v. Duggar,* 806 S.W.2d 407, 408 (Mo. banc 1991).

ARGUMENT

The circuit court held that Missouri's abandoned manufactured home title statutes are unconstitutional as they are confiscatory and violate the due process clause of the U.S. Constitution, both on their face and as applied. Specifically, the court found that the statutes do not provide proper notice and an opportunity to be heard, thereby depriving both owners and lienholders of due process of law. The court further held that the statutes are unconstitutionally vague and violate the Equal Protection Clause.

In the previous appeal of this case, this Court noted that a statute is presumed constitutional, and will not be invalidated "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue*, 98 S.W.3d at 542. The abandoned manufactured home laws pass constitutional muster.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BECAUSE THE ABANDONED MANUFACTURED HOME STATUTES, §§ 700.525-.541, ARE NOT VAGUE, AMBIGUOUS, OR CONFLICTING, IN THAT THE STATUTES USE WORDS OF COMMON USAGE, THE ONLY "AS APPLIED" CLAIM IS BASED ON HYPOTHETICAL FACTS, AND THE

STATUTES CAN BE READ IN HARMONY WITH EACH OTHER.

The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 692 (Mo. banc 2005).

Respondents made two vagueness claims to the circuit court. The first was a claim that the definition of "abandoned" in the abandoned manufactured home statutes is vague. The second was that the statutory language contains conflicting provisions as to a security interest. An examination of each argument reflects that summary judgment was not appropriate on either issue.

A. The definition of "abandoned" is not vague.

Respondents' vagueness argument as to the statutory definition of "abandoned" was based on a hypothetical set of facts: that a homeowner going on a two week vacation technically had abandoned their home under the statutes. [LF 195] But the statutory definition of "abandoned" in § 700.525(1), RSMo. dispels that claim:

> "Abandoned," a physical absence from the property, and either: (a) failure by a renter of real property to pay any

> required rent for fifteen consecutive days, along with the discontinuation of utility service to the rented property for such period; or
>
> (b) indication of or notice of abandonment of real property rented from a landlord.

There is no evidence in this case that any owner went on vacation and had their home declared abandoned. There is no claim by Respondents that the home in question was not "abandoned" as that term is used in the statutes. Instead, Respondents put forth only a hypothetical state of facts.

A vagueness challenge cannot be based on some on hypothetical application to others, when Respondents have provided no evidence that the statute is unconstitutionally vague as applied to their situation. *State v. Self*, 155 S.W.3d 756, 761(Mo. banc 2005). If a statute can be applied constitutionally, the challenger "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v. Ellis,* 853 S.W.2d 440, 446 (Mo. App. E.D.1993).

There is no evidence in the record that the definition for "abandoned" is so indefinite in its language that it unconstitutionally vague. Therefore, the facial constitutional challenge fails. The as applied challenge also fails, as it is based on

only hypothetical facts. This Court should reverse that portion of the judgment.

B. The statutes do not conflict, and are not vague.

The Respondents' other vagueness claim is an alleged conflict in the statutes. It is well established that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect." *State v. Duggar,* 806 S.W.2d 407, 408 (Mo. banc 1991). Applying this maxim here demonstrates no conflict, and no vagueness.

The Respondents' contention is that the provisions of §§ 700.527.1 and .530 conflict with §§ 700.533, .535 and .537. But there is no conflict. Subsection 527 states that the landowner may seek possession of and title to an abandoned manufactured home, "subject to the interest of any party with a security interest in the manufactured home." Similarly, § 700.530 states that the abandoned home statutes "shall not affect the right of a secured party to take possession of, and title to, a manufactured home." Both statues preserve the rights of secured parties like Conseco.

Under § 700.533, the owner or lienholder may claim title to the home, against the landowner seeking an abandoned title, by proving their ownership or the security interest and paying all reasonable rents due and owing. Section 700.535 permits the home owner or the lienholder to voluntarily relinquish any claim by affirmative

notice, or by failing to respond to the notice sent under § 700.531. Section 700.537 concerns the procedure for a secured party to repossess the home.

Again, there is no conflict; the statutes herein can be read in harmony. Sections 700.527 and .530 permit an abandoned title to be sought subject to the interest of any secured party, although the secured party is able to repossess or seek title to the home. On the other hand, the alleged conflicting statutes state how the landowner or lienholder may claim title to the home, § 700.533; and that the lienholder may seek repossession of the home, § 700.537. Section 700.535 permits the owner or lienholder to voluntarily relinquish any claim to the home by affirmative notice, or by failing to respond to the notice sent under § 700.531.

The statutes are straight-forward: If a landowner seeks an abandoned manufactured home title, the owner and the lienholder may prevent the issuance of the title, but they must take steps to protect their interests – if they want to. So read, the statutes are in harmony.

The statutes state what actions an owner or a secured party must do to retain his interest. After a landowner applies for an abandoned title, the Department notifies the owner and a secured party. The secured party then has 30 days to notify the Department whether it is claiming its security interest. If the lienholder notifies the Department within 30 days, the abandoned home title will be subject to the security

interest as the statute provides. The statutory scheme only affects the notation of a security interest when a secured party relinquishes that interest through affirmative statement or through non-action. § 700.535. An owner may also claim his title from the landlord upon proof of ownership and payment of all reasonable rents due and owing. § 700.533. The statutes permit the owner and the secured party to relinquish their rights by an affirmative statement. § 700.535.

The statutes thus describe how a party may apply for an abandoned title, what notice is to be sent, what steps must be taken by the owner and the secured party, and what other actions may be taken by the owner or secured party to disclaim any interest, or to repossess the property. In no respect are the statutes vague. Summary judgment was inappropriate, and that portion of the judgment should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BECAUSE THE ABANDONED MANUFACTURED HOME STATUTES, §§ 700.525-.541, DO NOT VIOLATE THE DUE PROCESS REQUIREMENTS OF THE U.S. AND MISSOURI CONSTITUTIONS, IN THAT THE MISSOURI STATUTES PROVIDE THE OPPORTUNITY FOR A HEARING, PROVIDE ADEQUATE NOTICE, AND ARE NOT CONFISCATORY.

The Department sent notice and Respondents took no steps to seek a hearing or to prevent issuance of an abandoned title. Respondents contend that the statutes

contain no provision for a predeprivation hearing, and that such a hearing is required before extinguishment of their property rights. The circuit court held that the statutes violate the due process clause, finding the statutes to be confiscatory, and providing inadequate notice and an opportunity for a hearing.

Property rights protected by due process are not created by the Constitution. *McIntosh v. LaBundy*, 161 S.W.3d 413, 416 (Mo. App. W.D. 2005). "Such property interests and protected rights are created, and their dimensions defined, by existing rules or understanding that stem from an independent source such as state law." *Id.*

Therefore, while the constitutions may recognize the right to property, the parameters of such interests are defined by state law. A person's interests are subject to the conditions created by state law, and state law defines both the scope and the procedure to be followed in acquiring, and losing, those property interests. Here, Respondents' rights, as defined in state law, were protected.

A. The statutes are not confiscatory.

Missouri courts look to the purpose of the statute, and seek a construction, where the language permits, that tends to avoid unjust, absurd, unreasonable, confiscatory or oppressive results. *ARO Systems, Inc. v. Supervisor of Liquor Control*, 684 S.W.2d 504, 508 (Mo. App. E.D. 1984). Here, the statutes are not confiscatory unless they cause a taking of the property interest without due process.

See, *Combined Communications Corp. v. City of Bridgeton*, 939 S.W.2d 460, 464 (Mo. App. E.D. 1996). Because the statutes provide due process, as shown below, they can not be confiscatory.

This is not a situation where the statutes automatically authorize the taking of property, nor does the Department end up with the property. Rather, the statutes give notice to the owner and the lienholder that if they do not take certain actions to protect their interests, versus the claim of landowner for an abandoned title to the property, their interests could be lost.

For secured parties, the statutes specifically recognize two different possible legal actions. Section 700.530, RSMo states that the provisions of §§ 700.525 to .539 do not affect the interest of lienholder to take possession under § 400.9-503 or § 700.386, RSMo. Section 400.9-503 grants a secured party the right to take possession after default. The reference to § 700.386 is inaccurate, as that section does not exist, but a secured party is specifically granted repossession rights under § 700.385, RSMo.

It is not a deprivation of a property interest to require an owner or secured party to protect their interest. The requirement to pay back rent or, similarly, towing charges on motor vehicles, is permissible according to the courts. *Ferrell Mobile Homes, Inc. v. Holloway*, 954 S.W.2d 712 (Mo. App. S.D. 1997) (mobile home park

owner's right to back rent, under § 700.533, is dependent upon compliance with the application requirements of § 700.527); *General Motors Acceptance Corp. v. Crawford*, 58 S.W.3d 529 (Mo. App. S.D. 2001) (before replevin of an abandoned vehicle, lienholder must pay all reasonable towing and storage charges).

Like the abandoned motor vehicle statutes, the Abandoned Manufactured Home Title statutes provide a statutory mechanism for the removal of abandoned property. To facilitate removal, the statutes compensate the party physically possessing the abandoned property: For an abandoned vehicle, the towing company is compensated; and for an abandoned mobile home, the mobile home park owner is compensated. § 304.155.8 (payment of reasonable towing and storage charges);
§ 700.533 (payment of reasonable rent).

Missouri's statutes on abandoned homes are not unique. Other states have similar statutes that require the payment of back rent and create a superior statutory lien in favor of the mobile home park owner. *Gulf Homes, Inc. v. Bear*, 599 P.2d 831 (Ariz. App. 1979) (park owner is entitled to 60 days' rent and utilities from lienholder if park owner gives notice to lienholder); *Cabre v. Brown*, 355 So.2d 846 (Fla. App. 1978) (mobile home landlord's statutory lien was superior to lien of secured party).

The Respondent Conseco, when it operated under the Green Tree name, has in

fact found itself on the losing end of a similar dispute over its security interest in a mobile home. In *Green Tree Financial Servicing Corp. v. Young*, 515 S.E.2d 223 (N.C. App. 1999), the court held that a company that towed and stored a mobile home had a statutory lien on the mobile home that was superior to Green Tree's prior perfected security interest. The North Carolina court noted that its state had similar laws for abandonment of motor vehicles, *Id.* at 225, as does Missouri.

B. The statutes meet the due process requirements for notice.

The Department sent notices to the homeowner and secured party. But Respondents contend that the notice sent by the Department does not comply with the Fourteenth Amendment, citing the holding in *Lambert v. California*, 355 U.S. 225, 229 (1957). *Lambert* involved notice of a registration requirement for convicted felons. There, the Supreme Court noted that the person had no actual notice of the ordinance, and that the failure to register carried a criminal penalty. The Court found a due process violation, holding that actual knowledge of the law, or proof of the probability of such knowledge, were necessary before a criminal conviction could be sustained. *Id.* at 229.

As *Lambert* was a criminal case, of particular interest here are the prior civil holdings on notice cited therein: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice in newspaper incompatible with Fourteenth Amendment

where substantial property rights were involved and persons' whereabouts were known); and, *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (newspaper publication of condemnation proceeding, against a landowner known to the city and who is on its official rolls, violates the Fourteenth Amendment). In each case, the court recognized that notice should be sent to the interested person's address, where known.

Here, the Respondents complained to the circuit court that the notice for the homeowner was sent to the abandoned home site, and that this violates due process. [LF 192] But the notices were sent by the Department to the addresses given to it by the owner and lienholder. They should not complain that notice was sent to the address that they provided. The obligation should be on those parties to keep their address current, or to have their mail forwarded.

Sending notice to the last known address for foreclosure or tax sales has already been reviewed and found adequate by this Court and one district of the Court of Appeals: *Collector of Revenue of City of St. Louis v. Parcels of Land*, 585 S.W.2d 486 (Mo. banc 1979) (notice of foreclosure authorized by Municipal Land Reutilization Law through publication and a letter to last known property owner of record does not violate due process); *Truong v. Collector of Revenue*, 46 S.W.3d 589 (Mo. App. E.D. 2001) (notice of tax sale at the address shown on the records of the

St. Louis Assessor was given in compliance with statutory and due process requirements).

Those holdings are consistent with the requirement of the due process clause of the U.S. Constitution that notice must be reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). When the government can reasonably ascertain the name and address of an interested party, notice by publication is not sufficient, *Mullane,* 339 U.S. at 317-18; *Walker v. City of Hutchinson,* 352 U.S. 112, 116 (1956). Due process requires that the government send "[n]otice by mail or other means as certain to ensure actual notice." *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800 (1983). But due process does not require that the interested party actually receive notice. *Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir.1988), *cert. denied,* 488 U.S. 1005 (1989). Instead, so long as the government "acted reasonably in selecting means likely to inform [the] persons affected, ... then it has discharged its burden." *Id.* Here, the notices were sent to the addresses provided by Respondents.

Manufactured home titles contain both the name and address of the owner, along with the name and address of the secured party. The notice sent in this case

informs the owner and secured party that an abandoned title has been requested. [LF 95, 162] The notice specifically identifies the property, and states what actions must be taken by the owner and by the lienholder to protect their interests. The notice further states that if the owner or secured party has questions, they can contact the Department.

That notice, sent to the addresses Respondents provided, meets the due process requirements of the U.S. and Missouri Constitutions.

C. Missouri law provides an opportunity for a hearing.

Due process is not denied where a party had an opportunity to act, but failed to do so. For example, where a party had an opportunity to challenge proposed dismissal of lawsuit, yet took no action, was not denied due process. *Warren v. Associated Farmers, Inc.*, 825 S.W.2d 901 (Mo. App. S.D. 1992). Here, the statutory opportunity to oppose the abandoned home title was given to both the owner and secured party, but neither acted.

After an application for an abandoned title is received by the Department of Revenue, notice is sent to both the owner and to the secured party that an application is pending. The statutes do not prohibit the owner or the secured party from seeking an opportunity to be heard.

At any time – before or after receiving notice of an application for abandoned

title – the secured party may take possession of and title to the home pursuant to §§ 400.9-503 and 700.385. Section 400.9-503 specifically allows a secured party to take possession of the collateral upon default and § 700.385 allows a secured party to repossess and obtain title upon submission of an application and proof that the debtor has defaulted in payment to the secured party. Neither of these rights is affected or taken away by the abandoned manufactured home statutes. A secured party may obtain title to the home from the Department by simply exercising its rights to do so; either by following the default provisions or by repossession. The secured party did not take either of these actions in this case.

It should be noted that even if a secured party decides not to seek title through repossession, and even assuming that the landowner does obtain an abandoned home title, the secured party's interest remains valid – if the secured party simply responds to the Department's notice within 30 days. Title, therefore, is subject to the secured party's interest unless the secured party relinquishes its interest. *Ferrell Mobile Homes, Inc., v. Holloway*, 954 S.W.2d 712 (Mo. App. S.D. 1997) (mobile home park owner's right of possession to the abandoned home is dependent upon compliance with § 700.527, which provides that abandoned home title is subject to the secured party's interest).

The owners can also assert their interest after receiving notice of an application

for an abandoned title. The owners may claim title to the home from the landlord seeking possession of the home upon proof of ownership and payment of all reasonable rents due and owing to the landlord. § 700.533. Owners may also retain their title to the home by asserting their interests. The owners in this case did not undertake any of their statutory remedies.

The abandoned manufactured home statutes provide opportunities for owners and lienholders to assert their interests. That a formal hearing is not automatically required should not invalidate the statutes. The U.S. Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) recognized that there should be an opportunity for a hearing, although its form may vary:

> "Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any),' the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

Id. at 82 (citations omitted). Here, Respondents never asserted their interests in the property until almost a year and a half after the notice of the abandoned title

application was originally sent, filing their first petition in August 2001, and an amended petition in February 2002. [LF 9 and 85]

Respondents further argued to the circuit court that the Department previously required a temporary restraining order in order to stop the issuance of abandoned titles. Respondents claim that this is insufficient, as they should have a hearing. But Mr. Bohl's affidavit reflects that the secured parties had, in the past, obtained stay orders or repossession of the homes. [LF 209-10, ¶ 7-10] In fact, the original Petition filed in this case specifically asked for a temporary restraining order for eight separate homes. The abandoned title statutes specifically provide that an action for repossession is permitted. § 700.537, RSMo.

The statutes do not offend due process. Rights are only lost when the owner or secured party sit idle and do not protect their interests. All Conseco had to do was pursue repossession title or notify the Department that it wished to retain its security interest. It did neither. Similarly, all the owners had to do was assert their interest and pay all reasonable rents due and owing to the landlord. That did not happen. There is no due process violation.

D. The Courts have approved an analogous abandoned property statute.

There is little case law involving the abandoned manufactured home title statutes. But the Missouri courts have upheld a similar statute involving motor vehicle

titles that also adversely affect the owner's and the secured party's interests.

Sections 304.155 and .156, RSMo enable towing companies to obtain a lien and title to abandoned motor vehicles that were towed and stored at the direction of law enforcement. The statutes give a towing company a lien for all "reasonable charges" for towing and storage until possession of the abandoned vehicle is relinquished to the owner or to the holder of a valid security interest. § 304.155.9, RSMo. When the owner or the lienholder reclaims the abandoned vehicle, they must pay the towing company all reasonable charges. § 304.155.8. The payment of the towing and storage charges by the owner or lienholder is similar to the requirement for the payment of back rent found in the abandoned manufactured home statutes.
§ 700.533.

A Missouri court has held that the lien created by the abandoned vehicle statutes is superior to the security interest held by a secured party. In *General Motors Acceptance Corp. v. Crawford*, 58 S.W.3d 529 (Mo. App. S.D. 2001), the secured party filed a replevin action alleging that its perfected security interest entitled it to possession of an abandoned vehicle. The towing company, which possessed the vehicle, argued that § 304.156 gave it a lien that was superior to the secured party's interest.

The Court of Appeals found against the lienholder, holding that § 304.156 gave

the towing company a "superior right to possession" of the vehicle: "[a] lien created pursuant to Section 304.155, regardless of the amount or the means of collection, takes precedence over a prior security interest." The *Crawford* decision was consistent with a prior decision, *General Motors Acceptance Corp. v. City of St. Louis*, 663 S.W.2d 408 (Mo. App. E.D. 1983), where the court of appeals upheld a city ordinance making towing charges payable prior to release of the abandoned vehicle. The court of appeals noted that the ordinance was permitted and consistent with § 304.155, et seq., giving the towing company a "superior right" to possess an abandoned vehicle, and that the holder of a perfected security interest could not replevin the vehicle absent payment of the towing charges. *Id.* at 409.

The abandoned vehicle statutes provide that the towing companies may obtain title to an abandoned vehicle "free of all prior liens" if the abandoned vehicle remains unclaimed for thirty days. § 304.156.1(7), RSMo. Similarly, the Abandoned Manufactured Home title statutes provide that owners and secured parties that sit and do nothing to assert their rights risk losing their interests.

Here, the statutes for abandoned manufactured home titles provide that third parties can obtain title to abandoned property, even against the interests of the owner or the secured party, but the statutory requirements must be followed. Similar laws on vehicles have received court approval. The circuit court's decision herein was

incorrect on this point. This Court should reverse and remand the decision.

E. Respondents received all the process that they were due.

The General Assembly set the procedure to be followed; that notice was to be sent to the owner and the lienholder by mail, detailing the request for an abandoned manufactured home title. The Department sent notice of the request for an abandoned title as required by the statutes.

Respondents attack the statutes, claiming that sending notice to the abandoned home address is inadequate, and that the content of the notice itself was insufficient. The notices were sent to the addresses given to the Department by the owner and lienholder; as provided by § 700.531 and consistent with the Department's standard procedure. [LF 156, ¶ 8-10; LF 208, ¶ 4,5] Implicit within the statute is an obligation on the party to keep their address current, or to have their mail forwarded. The lack of any actual notice was due purely to their failure to keep current addresses on file with the title.

Conseco had, in the past, received and responded to notices of applications for abandoned titles sent by the Department. [LF 158, ¶ 21; LF 209, ¶ 6-8] These notices, like the one sent her, apprized the owner and the secured party that an application for an abandoned home title has been made. The notices also spelled out the actions that must be taken under the statutes by the owner or the secured party to preserve their

interest, or an abandoned title will be issued. §§ 700.527-.533. In those other instances, the notices had their intended effect: Conseco was alerted to the claim for abandoned title, and took advantage of the opportunity to assert and protect its interest.

With respect to the content of the notices, Respondents complain that the notices do not contain a statement as to back rent owing, do not provide for an administrative procedure to test the allegations in the application, and do not state that a hearing is available. [LF 193] The statutes do not require the Department to state the amount of back rent. The only time back rent would be an issue would be where the home is being redeemed or repossessed, and neither happened in this case.

As to a hearing, any person has a right to appeal to the administrative hearing commission from any decision made by the director of revenue, by filing a petition within 30 days after the decision is made. § 621.050, RSMo. Thus, a hearing on a motor vehicle license is available under § 621.050, RSMo. *State ex rel. Dep't of Revenue v. Deutsch*, 751 S.W.2d 132 (Mo. App. W.D. 1998). Nothing in the abandoned manufactured home statutes prohibit an owner or a secured party from similarly obtaining a hearing.

Even if the Department's issuance of an abandoned manufactured home title does not fall under § 621.050, a party could still bring an action under § 536.150,

RSMo to challenge the Department's decision to issue (or not to issue) an abandoned manufactured home title. Section 536.150 permits a circuit court to review an agency action that is not subject to administrative review, to determine the legal rights, duties or privileges of any person. Thus, an owner or secured party can always pursue his rights in circuit court for possession of a manufactured home. Similarly, contract disputes over what constitutes reasonable rent could be handled in circuit court.

As past history shows, the notice provided by Missouri law has proven sufficient and is therefore reasonably calculated, under the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to respond.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BECAUSE THE ABANDONED MANUFACTURED HOME STATUTES, §§ 700.525-.541 DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U.S. AND MISSOURI CONSTITUTIONS, IN THAT THE STATUTES DO NOT INVOLVE A SUSPECT CLASS, DO NOT TREAT ANY SIMILARLY SITUATED PERSONS DIFFERENTLY, AND DO NOT IMPERMISSIBLY IMPINGE ON THE RIGHT TO PROPERTY.

The Missouri abandoned manufactured home statutes do not violate equal protection requirements. The statutes do not, on their face or as applied, violate the

Fourteenth Amendment of the U.S. Constitution, or Article I, § 10 of the Missouri Constitution.

The first step in an equal protection challenge is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class. *Zobel*, 167 S.W.3d at 693. There is no suspect class in this case, as there are no classifications based on race, national origin, illegitimacy, or gender. For each of the classes of persons mentioned in the abandoned home statutes (home owners, owners of real property, and secured lenders), the laws apply equally. Therefore, the circuit court's finding of an Equal Protection violation could not be based on a facial challenge.

Nor could there be an equal protection challenge to the law as applied here. There is no evidence in this case of any person – owner, landlord, or secured party – who was treated differently from others similarly situated.

The other determination for this Court is whether the statutes impinge upon a fundamental right explicitly or implicitly protected by the Constitution. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). The only fundamental right that could be involved is that of property. See, *Stone v. City of Jefferson*, 293 S.W. 780, 782 (Mo. 1927). But the right to property is not absolute. There are many examples where the law will terminate a person's interests in personal property due

to inaction: foreclosure, tax sales, and quiet title for real property; repossession and abandonment laws for personal property. In Missouri, manufactured homes are treated as personal property. § 137.080(5), RSMo.

The fact that property is lost does not mean that a statute violates the constitution. Statutes are presumed to be constitutional, and the party attacking the constitutionality of a statute "bears an extremely heavy burden." *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003). The Missouri Supreme Court has stated that it will not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied" therein. *Id.*

But again, an equal protection challenge fails because the abandoned manufactured home laws apply to all manufactured homes, to all owners, and to all lienholders. Respondents' complaints centered on the fact that the Department required for some homes that the secured party obtain a stay order; otherwise an abandoned title would be issued. Such actions do not violate equal protection. That a circuit court order would stay issuance of an abandoned title would only be to the benefit of the Respondents, and does not demonstrate that their property was accorded less process or protection than other properties.

There is no evidence of a suspect class, nor evidence that any person is treated

differently than other similarly situated persons. As such, the circuit court erred in granting summary judgment on equal protection, and that portion of the judgment should be reversed.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BECAUSE THERE WAS NO EVIDENCE OF ANY VIOLATION OF RESPONDENTS' FEDERALLY PROTECTED RIGHTS, IN THAT 42 U.S.C. § 1983 CREATES NO SUBSTANTIVE RIGHTS AND IS MERELY A VEHICLE FOR SEEKING A FEDERAL REMEDY FOR VIOLATIONS OF FEDERALLY PROTECTED RIGHTS.

The circuit court held that the statutes in question violated 42 U.S.C. § 1983. [LF 245] But a § 1983 claim is not a separate cause of action. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Circuit 1999). "[S]ection 1983 creates no substantive rights; that it is merely a vehicle for seeking a federal remedy for violations of federally protected rights." *Id.* at 1012. As 42 U.S.C. § 1983 does not create a separate cause of action, Respondents cannot maintain an action claiming a violation of that statute. Therefore, summary judgment on that issue was erroneous.

Conclusion

The abandoned manufactured home statutes provide all the process due, and apply equally to all homeowners, land owners and secured parties. The statutes are not vague or ambiguous, and all sections can be read in harmony with each other. The circuit court erred in finding that the statutes were unconstitutional, both facially and as applied. That judgment should be reversed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 21st day of November, 2005, one true and correct copy 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 7,579 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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Mark E. Long, Assistant Attorney General