**IN THE**

# SUPREME COURT OF MISSOURI

**NO. SC94641**

**HEATH DUNIVAN,**
***Respondent,***

vs.

**STATE OF MISSOURI and**
**MISSOURI STATE HIGHWAY PATROL**
***Appellants.***

**Appeal from the Circuit Court of Laclede County, Missouri**
**Twenty-Sixth Judicial Circuit**
**The Honorable Kenneth Hayden, Circuit Judge**

# RESPONDENT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

This case arises within Laclede County, Missouri and is an appeal of a judgment of the 26th Judicial Circuit Court of Laclede County, Missouri. Jurisdiction therefore lies within this Court. Mo. Const. art. V, §3; §477.060, RSMo 2000.

## STATEMENT OF FACTS

On October 13, 1993 Respondent Heath Dunivan plead guilty to one count of sexual abuse in the second degree in case number CR493-1130M in the Circuit Court of Laclede County. LF 5.

On March 27, 2012 Respondent's counsel mailed a petition for removal from the Missouri Sex Offender Registry and request to be relieved from the obligation to register as a sex offender to Laclede County Circuit Clerk's office with instruction for a copy to be sent to Laclede County Prosecuting Attorney John Morris. LF 8. On March 29, 2013 the Laclede County Circuit Clerk's office filed the petition for removal. LF 8. On April 19, 2012 Respondent's counsel faxed a notice and motion for trial setting for the petition for removal to Laclede County Prosecuting Attorney John Morris. LF 10.

A hearing was held on the matter on May 7, 2013 in the 26th Circuit Court of Laclede County in front of the Honorable Judge Kenneth Hayden. T.R. 3. At the hearing Chris Rasmussen appeared for Respondent and Laclede County's assistant prosecutor, Amy Folsom, appeared for the State of Missouri. T.R.1. The parties waived opening statements and Mr. Rasmussen called his first and only witness, Heath Dunivan, to the witness stand. T.R. 3. Heath Dunivan testified that: he plead guilty to sexual abuse in the second degree on October 13, 1993 (T.R. 4); no force was involved (T.R. 5); he committed that offense in May of 1991 (T.R. 5); he was 18 when the offense occurred (T.R. 6); he is not currently a threat to public safety (T.R. 6); more than two years have passed since he pled guilty (T.R. 6); and, that he petitioned the court for removal from the Missouri Sex Offender Registry (T.R. 6).

At the May 7, 2013 hearing assistant prosecutor Amy Folsom told the court that she contacted the victim and that the victim did not want to be at the hearing. T.R. 6

The docket entry for the May 7, 2013 hearing states:

> "Case called for trial. Petitioner appears in person and with counsel Mr. Rasmussen. State appears by Ms. Folsom. Evidence heard. Court finds issues in favor of Petitioner and against Respondent. Counsel for Petitioner to prepare formal order for court execution." LF 2.

On May 20, 2013, final judgment was entered and the court ordered Petitioner be removed from the Missouri Sex Offender Registry and to be relieved from the obligation to register as a sex offender. LF 2, 17, 18. Copies of the May 20, 2013, Order were sent to the Heath Dunivan's counsel and to Laclede County's Assistant Prosecuting Attorney, Amy Folsom, on May 24, 2013. LF 2.

On August 19, 2013 the Attorney General's Office filed a motion to intervene as a right on behalf of the Missouri State Highway Patrol and the State of Missouri. LF 21-28. A motion hearing was set for the cause on September 6, 2013. LF 3. Ninety-one days had passed from the May 20, 2013, Order until the time Attorney General filed its motion to intervene. On September 6, 2013 the motion hearing was held and Judge Kenneth Hayden denied the Appellants' motion to intervene. LF 3.

On February 25, 2014, the Court of appeals issued a show cause order noting that the Circuit Court had not denominated its orders as a judgment, and issued a show cause order to the Circuit Court instructing it to issue a judgment. Thereafter, on March 6, 2014, the Circuit Court issued a judgment, and the attorney general filed a notice of

appeal on March 10, 2014. On June 4, 2014, the Southern District consolidated the cases, and on August 8, 2014, Appellant taken no more action on the case, and not having filed a brief with any additional issues, the Southern District set the matter for oral argument.

In its decision, the Southern District Court of Appeals held that "the attorney general does not have a 'unconditional right' to intervene in such a suit." *Dunivan v. State,* S.W. 3d ---, 2014 WL 5471471 (Mo. App. S.D., Oct. 29, 2014). It also held that Appellant "did not claim in its points relied on any trial court error concerning the removal of Dunivan from the registry." *Id.* At 1.

## POINTS RELIED ON

### Point Relied On I

**The circuit court did not error in denying the Attorney General's motion to intervene because Appellant's motion to intervene was untimely.**

*State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994)

Section 589.400 RSMo (2000)

Rule 52.12

### Point Relied On II

**The circuit court did not error in denying Missouri State Highway Patrol's motion to intervene because Appellant's interests were adequately represented by the Laclede County Prosecutor's Office and because Appellant's motion to intervene was untimely.**

*State ex rel. Mayberry v. City of Rolla*, 970 S.W.2d 901, 906 (Mo.App. S.D. 1998)

*The Maries County Bank v. Hoertel*, 941 S.W.2d 806, 808 (Mo.App. 1997)

*State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994)

### Point Relied On III

**Appellant is barred from arguing that the Circuit Court misapplied the law, as it did not raise that point on appeal in its brief to the Court of Appeals.**

*Dunivan v. State* S.W.3d ---, 2014 WL 5471471 (Mo. App. S.D., Oct. 29, 2014)

Rule 83.08

## STANDARD OF REVIEW

An applicant must timely file a motion to intervene regardless of whether an applicant claims an unconditional right to intervene or an absolute right to intervene. Rule 52.12(a)(1)(2). "It is within the trial court's discretion to determine whether a motion to intervene is timely." *State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994) (citing *Frost v. White*, 778 S.W.2d 670 (Mo.App 1989)).

If the applicant is claiming an absolute right to intervene the applicant must fulfill three elements. "In order to be entitled to intervene under Rule 52.12(a)(2), an applicant must show: (1) an 'interest' in the subject of the action in which it seeks to intervene; (2) that its ability to protect its interest will be impaired or impeded as a practical matter, and (3) that its interest is not is not adequately represented by the existing parties. *The Maries County Bank v. Hoertel*, 941 S.W.2d 806, 808 (Mo.App. 1997) (quoting *Ruth L. v State*, 830 S.W.2d 528, 530 (MO.App. S.D. 1992)). A motion to intervene may be denied if any one of the requirements is not met. *Hoertel*, 941 S.W.2d 806, 808 (Mo.App. S.D. 1997) (quoting *State ex rel Mercantile Bank v. Pennell*, 804 S.W.2d 63, 65 (Mo.App. S.D. 1991)).

Appellate Courts view the evidence in the light most favorable to the trial court's judgment." *Hawk v. Director of Revenue*, 943 S.W.2d 18, 20 (Mo. App. S.D. 1997) (citing *Thurmond v. Director of Revenue*, 759 S.W.2d 898, 899 (Mo. App. 1998)).

## ARGUMENT

## POINT RELIED ON I

**The circuit court did not error in denying the Attorney General's motion to intervene because Appellant's motion to intervene was untimely, and because the State of Missouri was already a party to the action.**

Even if the Court finds Appellant Attorney General has an unconditional right to intervene the Appellant still failed to timely file its motion to intervene and therefore the trial court was correct. "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 52.12.

"Like reasonableness, timeliness (where not specified by statute, rule or order) is a relative matter, depending on the circumstances of each particular instance in which it is asserted that timely action was not taken. *State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994) (citing *State of Missouri ex rel. Transit Casualty Company v. Holt*, 411 S.W.2d 249, 253 (1967)).

Judge Kenneth Hayden's denial of Appellant's motion to intervene is very reasonable if the Court looks at the facts in the light most favorable to the trial court's judgment, such as: it was within the trial court's discretion to determine whether the Attorney General's motion to intervene was timely; the Attorney General filed its motion

to intervene 143 days after the Respondent filed his petition for removal from the Missouri Sex Offender Registry; and, the Attorney General filed its motion to intervene 91 days after the court ordered Respondent to be removed from the Missouri Sex Offender Registry. The Attorney General's inordinate delay in filing its motion to intervene made it reasonable for the trial court to deny its motion.

Respondent disagrees with Appellant's contention that Respondent should have put Appellants on notice of Respondent's petition. Missouri Revised Statute 589.400(8) governs the procedure for petitions for removal from the sex offender registry and when relief should be granted. RSMo 589.400. Section 9 of Missouri Revised Statute 589.400 sheds light on who Respondent was required to give notice to:

> "The court may grant such relief under subsection 7 or 8 of this section if such person demonstrates to the court that he or she has complied with the provisions of this section and is not a current threat to public safety. The prosecuting attorney in the circuit court in which the petition is filed must be given notice, by person seeking removal or exemption from the registry, of the petition to present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied. Failure of the person seeking removal or exemption from the registry to notify the prosecuting attorney of the petition shall result an automatic denial of such person's petition. If the prosecuting attorney is notified of the petition he or she shall make reasonable efforts to notify the victim of the crime for which the person was required to register of the petition and

the dates and times of any hearings or other proceedings in connection with that petition." Section 589.400.9.

Respondent fulfilled all of the statutory notice requirements according to Missouri Revised Statute 589.400.9. Respondent gave notice of his petition to the Laclede County Prosecutor, Jon Morris, by mailing a copy of the petition to him on March 27, 2012. LF 8. The Laclede County Prosecutor's office was notified of the petition, the motion for trial setting and the notice of trial setting. LF 8-11. Assistant prosecutor Amy Folsom from the Laclede County Prosecutor's office was present at the May 7, 2012 trial and Ms. Folsom contacted the victim and the victim told Ms. Folsom that she did not want to be present. T.R. 6.

Missouri Revised Statute 589.400.9 does not require Respondent to notify Appellants of his petition for removal from the sex offender registry. In fact, the only party that is entitled to notice is the State of Missouri through the prosecuting attorney. Respondent did notify the prosecuting attorney as required by the statute, and therefore Respondent believes that the State had notice of Respondent's petition when Respondent initially filed his petition for removal and the Laclede County Prosecutor's Office received a copy of Respondent's Petition. Respondent should not be unduly punished because of the Laclede County Prosecutor Office's failure to correspond with Appellant Attorney General regarding the Respondent's case. Allowing Appellant to intervene post-judgment in a case where the State was already a party and had the opportunity to defend, gives the State a second chance in any case where the Attorney General's Office does not support the outcome. Appellant Attorney General's motion to intervene was

untimely and the circuit court did not error in denying Attorney General's motion to intervene.

Also Appellant Attorney General does not cite any controlling Missouri cases where a motion to intervene was found to be timely when filed 91 days after the final judgment or later. The latest timely filed motion to intervene Appellants could find in Missouri case law was a 1965 case called *State ex rel. Aubuchon v. Jones,* where a motion to intervene was filed two and a half months after an interlocutory judgment was given. *State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854, 857, 862 (Mo.App. 1965). Respondent points out that the case at hand is substantially different than *State ex. rel. Aubuchon v. Jones* because in the case at hand it was 91 days after the final judgment and not an interlocutory judgment. Moreover, according to Appellants' research almost 50 years have passed since the decision in *State ex rel. Aubuchon v. Jones* and presumably neither the Missouri Court of Appeals Southern District nor the Missouri Supreme Court have held that a motion to intervene filed 91 days after the final judgment or later to be timely.

## Point Relied On II

**The circuit court did not error in denying Missouri State Highway Patrol's motion to intervene because Appellant's interests were adequately represented by the Laclede County Prosecutor's Office and because Appellant's motion to intervene was untimely, and because the Highway Patrol does not have an interest in the property or transaction that is the subject of the action.**

A party that claims to have an absolute right to intervene must show "(1) an interest in the property or transaction that is the subject of the action; (2) disposition of the action may as a practical matter impair or impede his ability to protect his interest; and (3) his interest is not adequately represented by the existing parties." *State ex rel. Mayberry v. City of Rolla*, 970 S.W.2d 901, 906 (Mo.App. S.D. 1998); see *Matter of C.G.L.*, 28 S.W.3d 502, 504 (Mo.App. S.D. 2000). A motion to intervene may be denied if any one of the requirements is not met. *Hoertel*, 941 S.W.2d 806, 808 (Mo.App. S.D. 1997) (quoting *State ex rel Mercantile Bank v. Pennell*, 804 S.W.2d 63, 65 (Mo.App. S.D. 1991).

Appellant Missouri State Highway Patrol admits that it did not have an unconditional right to intervene in Respondent's case. Appellant Missouri State Highway Patrol also did not have an absolute right to intervene in Respondent's case because its interests were adequately represented by an existing party in the case, which was the Laclede County Prosecuting Attorneys' Office. It appears the prosecutors that were involved in this case were Laclede County prosecuting attorney Jon Morris and Laclede County assistant prosecuting attorney Amy Folsom. Everyday county prosecutors across the state of Missouri represent the Missouri State Highway Patrol's interests in a myriad of cases. The Laclede County prosecutors adequately represented the Missouri State Highway Patrol by: issuing several witnesses with subpoenas; appearing and representing the State of Missouri at the May 7, 2013 hearing; and, contacting the victim and asking whether she wanted to attend.

The Laclede County prosecutor's office also has similar interests with Appellant Missouri State Highway Patrol. The prosecuting attorney has a strong interest in maintaining Missouri's statewide sex offender registry as required by state statute 589.400. Assistant prosecuting attorney Amy Folsom was present and the May 20, 2013 hearing and presumably made no objections nor presented any evidence because of the fact Respondent fulfilled the requirements for removal under statute 589.400.The trial court was correct to deny Appellant Missouri State Highway Patrol's motion to intervene because its interests were adequately represented by the Laclede County Prosecuting Attorneys' Office.

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 52.12. "It is within the trial court's discretion to determine whether a motion to intervene is timely." *State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994) (citing *Frost v. White*, 778 S.W.2d 670 (Mo.App 1989). "Like reasonableness, timeliness (where not specified by statute, rule or order) is a relative matter, depending on the circumstances of each particular instance in which it is asserted that timely action was not taken. *Board of Zoning Adjustments of Kansas City*, 869

S.W.2d 302, 304 (Mo.App W.D. 1994) (citing *State of Missouri ex rel. Transit Casualty Company v. Holt*, 411 S.W.2d 249, 253 (1967).

"It is within the trial court's discretion to determine whether a motion to intervene is timely." *State ex rel. Stohm v. Board of Zoning Adjustments of Kansas City*, 869 S.W.2d 302, 304 (Mo.App W.D. 1994) (citing *Frost v. White*, 778 S.W.2d 670 (Mo.App 1989). Respondent believes the trial court was correct in denying Appellant Missouri State Highway Patrol's motion to intervene because it was untimely. As discussed in Point Relied On II of Respondent's Brief, Respondent believes Appellant Missouri State Highway Patrol's motion to intervene was untimely for the same reasons. Respondents Brief 14-15. Respondent believes it is objectively reasonable for trial court judge to determine an applicant's motion to intervene is untimely filed if it is filed 143 days after a petitioner filed his petition and 91 days after the final judgment was filed.

Finally, the Highway Patrol does not have an interest in the subject matter of the action, as it is merely charged with keeping the sex offender registry, not choosing who is on the registry.

## Point Relied On III

**Appellant is barred from arguing that the Circuit Court misapplied the law, as it did not raise that point on appeal in its brief to the Court of Appeals.**

Missouri Supreme Court Rule 83.08(b) states that "(a substitute brief) shall not alter the basis of any claim that was raised in the court of appeals brief." Rule 83.08(b). In this case, Appellant is attempting to raise an issue that it did not previously cite as a

point relied upon, and did not indicate in its brief that it was challenging the decision itself, merely the denial of intervention. Appellant claims that it was not raised as an issue in the brief due to the actions of the Appellate Court. Appellant made no attempt to amend their brief, or ask for additional time to file a brief in the "removal appeal." In fact, more than 60 days passed from the time that the appellate court consolidated the cases and the time that the case was docketed for oral argument. (SD32920)

Accordingly, this Court should not consider Appellant's argument in its third point relied upon.

## CONCLUSION

The circuit court did not error in denying Appellants' motion to intervene and therefore the circuit court's denial of Appellants' motion to intervene should be affirmed.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 84.06

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 3,773 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word software; and

2. That a copy of this notification was sent through the eFiling system on this 25th day of March, 2015, to:

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