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SC94641

IN THE SUPREME COURT OF MISSOURI

HEATH AUGUST DUNIVAN,

Plaintiff-Respondent,

v.

STATE OF MISSOURI and
MISSOURI STATE HIGHWAY PATROL,

Defendant-Appellants.

Appeal from the Circuit Court of Laclede County, Missouri,
The Honorable Kenneth Hayden

SUBSTITUTE BRIEF OF APPELLANTS

CHRIS KOSTER
Attorney General

JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

The Missouri Attorney General, the State of Missouri and the Missouri State Highway Patrol, appeal two decisions of the circuit court: (1) the circuit court's denial of their motion to intervene as a matter of right in this sex offender registration matter, *see* Case No. SD32920; and (2) the circuit court's judgment removing Dunivan from Missouri's sex offender registry, *see* Case No. SD33224.

The denial of a motion to intervene as of right is immediately appealable. *See Lodigensky v. Am. States Preferred Ins. Co.*, 898 S.W.2d 661, 663 (Mo. App. W.D. 1995); *Matter of C.G.L. v. Bilyeu*, 28 S.W.3d 502, 504 (Mo. App. S.D. 2000). Likewise, a final judgment of the circuit court is appealable. Jurisdiction was originally vested in the Missouri Court of Appeals because the issues presented on appeal did not fall within the exclusive jurisdiction of the Missouri Supreme Court. The Circuit Court of Laclede County, wherein the motion to intervene was denied and the judgment entered, is within the Southern District as provided by § 477.060, RSMo.[1/]

This Court granted transfer on February 3, 2015.

[1/] All subsequent statutory citations are to 2013 Cumulative Supplement of the Revised Statutes of Missouri, unless provided otherwise.

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STATEMENT OF FACTS

A. Factual Background.

On October 13, 1993, in the Circuit Court of Laclede County, Heath Dunivan pled guilty to one count of sexual abuse in the second degree in violation of § 566.110, RSMo 1993. (LF 5). After registering as a sex offender for many years, Dunivan filed a "Petition for Removal from the Missouri Sex Offender Registry and Request to be Relieved from the Obligation to Register as a Sex Offender" on March 29, 2012. (LF 5-7). In the Petition, Dunivan alleged that he was 18 years of age at the time of the crime and the victim was 13 years of age. (LF 5).

Based on the allegations in his Petition, it appeared that Dunivan only sought removal in the circuit court under Missouri's Sex Offender Registration Act – § 589.400 *et seq.* ("SORA"). He made no mention of his independent obligation to register under the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §16901 *et seq.*, and he did not argue that he should be relieved of that obligation.[2/] *See Doe v.*

[2/] The Court of Appeals also noted that the issue of whether "Dunivan is still required to register under federal law" was not before the court. *Dunivan v. State*, --- S.W.3d ---, 2014 WL 5471471, *1 n.5 (Mo. App. S.D., Oct. 29, 2014).

Keathley, 290 S.W.3d 719 (Mo. banc 2009); *Doe v. Toelke*, 389 S.W.3d 165 (Mo. banc 2012).

B. Procedural Background.

Neither the Missouri Attorney General nor the Missouri State Highway Patrol were named as parties in the circuit court, nor were either notified of the Petition. (LF 8, 11). A hearing was held on Dunivan's Petition, and the pertinent docket entry provides:

> **Hearing Held** 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 COURTS [sic] EXECUTION.

(LF 2). Ms. Folsom is an assistant prosecuting attorney for Laclede County, and presented no evidence or argument at the hearing. (Tr. 3-7).

On May 20, 2013, the circuit court entered a "Court Order for Removal from the Missouri Sex Offender Registry and Order to be Relieved from the Obligation to Register as a Sex Offender." (LF 17-18). The order was not denominated a "judgment," and was not directed to any person or entity. (LF

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17-19). Copies of the order were sent to the prosecuting attorney and Dunivan's counsel. (LF 2).

Ultimately, the Missouri Attorney General's Office and the Missouri State Highway Patrol received a copy of the order of removal on July 29, 2013. The matter was assigned to an assistant attorney general, and following an investigation and the collection of materials, on August 19, 2013, a motion to intervene as of right was filed arguing that the Missouri Attorney General and the Missouri State Highway Patrol were entitled to intervene pursuant to § 27.060 and Rule 52.12(a). (LF 21-22). Attached as an exhibit to the motion to intervene was a motion to set aside the circuit court's order and enter judgment in favor of the State of Missouri and the Missouri State Highway Patrol. (LF 24-28).

The circuit court denied the attorney general's motion to intervene as well as the motion to set aside the order and enter judgment in favor of the State of Missouri and the Missouri State Highway Patrol. (LF 3). The attorney general then filed a notice of appeal as to the denial of intervention. (LF 37). The Missouri Court of Appeals, Southern District, assigned Case No. SD32920 to the "intervention appeal."

After the attorney general filed an opening brief in the "intervention appeal," the court of appeals issued a show cause order on February 25, 2014 noting that the circuit court had not denominated its orders as "judgments."

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Apprised of the show cause order from the court of appeals, the circuit court entered a "judgment" with respect to Dunivan's request for removal from the registry on March 6, 2014, which was then filed in the court of appeals. Having received a "judgment" with respect to Dunivan's request for removal from the registry, the attorney general filed a notice of appeal as to that judgment on March 10, 2014. The Missouri Court of Appeal, Southern District, assigned Case No. SD33224 to the "removal appeal."

Meanwhile, on April 14, 2014, the Attorney General filed a reply brief in the "intervention appeal," and argued in the reply brief that Dunivan should not be removed from the sex offender registry because of his independent obligation to register under federal law. Before any briefing could be completed in the "removal appeal," the court of appeals, *sua sponte*, entered an order on June 4, 2014, consolidating the "intervention appeal" and the "removal appeal."

The court of appeals' June 4, 2014 order stated that "Appeal numbers SD32920 and SD33224 are consolidated for all purposes on appeal. The record on appeal and briefs filed in case no. SD32920 are showing filed in both cases." The court of appeals did not set a briefing schedule for the "removal appeal," but instead set the consolidated appeals for oral argument on September 16, 2014.

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In its *per curiam* decision following oral argument, the court of appeals held that the attorney general cannot appear and defend in a proceeding involving the state's interests if the State is already "represented by the prosecuting attorney." *Dunivan v. State*, --- S.W.3d ---, 2014 WL 5471471 (Mo. App. S.D., Oct. 29, 2014). The court of appeals also concluded that the attorney general "did not claim in its points relied on any trial court error concerning the removal of Dunivan from the registry." *Id.* at *1.

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POINTS RELIED ON

I. The Circuit Court Erred in Denying the Attorney General's Motion to Intervene as of Right, Because the Circuit Court Misapplied § 27.060 and Rule 52.12, in That the Attorney General has the Statutory Right to "Appear and Interplead, Answer or Defend, in Any Proceeding or Tribunal in Which the State's Interests are Involved."

Jones v. Fidelity Nat. Bank & Trust Co. of Kansas City,
243 S.W.2d 970 (Mo. banc 1951)

State ex rel. Igoe v. Bradford,
611 S.W.2d 343 (Mo. App. W.D. 1980)

State ex rel. Nixon v. Am. Tobacco Co., Inc.,
34 S.W.3d 122 (Mo. banc 2000)

II. The Circuit Court Erred in Denying the Attorney General's Motion to Intervene as of Right on Behalf of the Missouri State Highway Patrol and the State of Missouri, Because the Circuit Court Misapplied Rule 52.12(a)(2), in That There is an Absolute Right to Intervene.

Allred v. Carnahan, 372 S.W.3d 477 (Mo. App. W.D. 2012)

State ex rel. Mayberry v. City of Rolla,

970 S.W.2d 901 (Mo. App. S.D. 1998)

III. The Circuit Court Erred in Granting Dunivan's Request for Removal From the Sex Offender Registry, Because the Circuit Court Misapplied Missouri Law and Failed to Apply Federal Law, in That Dunivan has an Independent Obligation to Register in Missouri Under Federal Law and Therefore Must Register Under Missouri Law.

Doe v. Keathley, 290 S.W.3d 719 (Mo. banc 2009)

Doe v. Toelke, 389 S.W.3d 165 (Mo. banc 2012)

Grieshaber v. Fitch, 409 S.W.3d 435 (Mo. App. E.D. 2013)

§ 589.400, *et seq.*

42 U.S.C. § 16901, *et seq.*

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SUMMARY OF THE ARGUMENT

There are a great many proceedings that involve the interests of the State. Far more than the Missouri Attorney General's office can handle with its limited resources; a point that was not lost on the General Assembly, nor anyone that is familiar with the organization and work of the Missouri Attorney General's office. Yet, as the State's chief legal officer, the attorney general has the responsibility to ensure that the law is upheld and that the interests of the State are appropriately protected.

In order to carry out his responsibilities, the attorney general has broad common law powers, in addition to significant statutory authority. *See, e.g.,* § 27.060. Indeed, the power and authority of the attorney general to represent the interests of the State are only limited if there are statutes "enacted specifically for the purpose of limiting his power." *State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. banc 2000). There are no such limitations in this case.

The circuit court and the court of appeals denied the intervention of the Missouri Attorney General and the Missouri State Highway Patrol in this case, believing that the state's interests were already adequately represented. But that is not the test for the attorney general, and it is certainly not true in this case in any event. The attorney general has the discretion – if he chooses – to "appear and interplead, answer or defend, in any proceeding or tribunal

in which the state's interests are involved." § 27.060. This includes existing proceedings where he "may also" appear and defend. *Id.* Indeed, "[i]t is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare." *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. W.D. 1980). And because there is a common law and statutory right to appear and defend in this case, without a specific statute limiting his right to do so, the circuit court and the court of appeals erred in denying the attorney general intervention.

Similarly, the circuit court and the court of appeals erred in denying the Missouri State Highway Patrol intervention. The Highway Patrol has an interest in the case, as it is the organization that maintains Missouri's sex offender registry. In fact, in order to have a name taken off the registry, as contemplated by the circuit court's decision, the Highway Patrol must be the organization to remove the name. Here, the interests of the Highway Patrol were not adequately protected because it is left in an uncertain position. There is now a removal order (albeit subject to appeal) that was not directed to the Highway Patrol, but that requires the removal of a sex offender from the registry even though the sex offender is not entitled to be removed.

Dunivan is still required to register in the Missouri not simply because of Missouri law, but also because of federal law. *See* 42 U.S.C. § 16901, *et seq.*; *Doe v. Keathley*, 290 S.W.3d 719 (Mo. banc 2009). He has registered for

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many years in Missouri, and because he has been or is required to register under federal law, he is currently required to register in Missouri under Missouri law. *See* § 589.400.1(7); *Doe v. Toelke*, 389 S.W.3d 165 (Mo. banc 2012).

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ARGUMENT

Standard of Review

The denial of a motion to intervene as of right will be reversed if it misapplies the law. *Maries Cnty. Bank v. Hoertel*, 941 S.W.2d 806, 808 (Mo. App. S.D. 1997). And the denial of a motion to intervene is a misapplication of the law where a Missouri statute confers an unconditional right to intervene. *Moxness v. Hart*, 131 S.W.3d 441, 445 (Mo. App. W.D. 2004); *Martin v. Busch*, 360 S.W.3d 854, 857-58 (Mo. App. E.D. 2011).

In the absence of a statute conferring an unconditional right to intervene, a person seeking to intervene as of right 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).

When an applicant satisfies all three elements of Rule 52.12(a)(2), " 'the right to intervene is absolute, and the motion to intervene may not be denied.' " *Allred v. Carnahan*, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012), *quoting McMahon v. Geldersma*, 317 S.W.3d 700, 705-06 (Mo. App. W.D. 2010). Here, there is an unconditional and absolute right to intervene.

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I. The Circuit Court Erred in Denying the Attorney General's Motion to Intervene as of Right, Because the Circuit Court Misapplied § 27.060 and Rule 52.12, in That the Attorney General has the Statutory Right to "Appear and Interplead, Answer or Defend, in Any Proceeding or Tribunal in Which the State's Interests are Involved."

"The Missouri attorney general derives his power to represent the state from both statutory and common law." *Clark Oil and Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596 (Mo. banc 1982) (citing *State ex rel. Taylor v. Wade*, 231 S.W.2d 179, 182 (Mo. banc 1950)). The Missouri Constitution provides that "there shall be [an] attorney general," Mo. Const. Art. IV, § 12, and "[t]he absence of a provision for specific powers for the attorney general in our constitution vests the office with all of the powers of the attorney general at common law." *State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. banc 2000).

The powers of the attorney general encompass more than merely serving as counsel for the State and its agencies, departments, and officers. The Missouri Attorney General is the "chief legal officer" of the State. *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968) (noting that "the various offices of the prosecuting attorneys are 'carved out of' this overriding authority"). Indeed, the attorney general is required to be notified and given the opportunity to be

heard if there is a constitutional challenge to any "statute, ordinance or franchise." § 527.110; Rule 87.04.

The powers of the attorney general at common law have been described by this Court as "broad," and are only restricted by statutes "enacted specifically for the purpose of limiting his power." *State ex rel. Nixon*, 34 S.W.3d at 136. There are very few statutes enacted specifically for the purpose of limiting the attorney general's broad common law authority. And there are none here. Accordingly, Missouri law authorizes the attorney general to appear and defend in this case.

A. Section 27.060 Authorizes the Attorney General to Appear and Defend Because the State's Interests are Involved.

Chapter 27 of the Revised Statutes of Missouri sets forth the various powers of the attorney general. There is no limitation in Chapter 27 (or any other statutory provision for that matter) on the power of the attorney general to intervene, appear, or defend in this matter. Instead, § 27.060 provides that:

> The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and

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> enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and *he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved*.

§ 27.060 (emphasis added).

So long as the proceeding at issue involves the state's interests, there is no limitation in § 27.060 as to the attorney general's power to appear and defend. Thus, in a sex offender registry case such as this, it does not matter whether a local prosecutor has already appeared in the matter. The attorney general "*may also* appear and interplead, answer or defend." *Id.* (emphasis added). That is exactly what the attorney general attempted to do in this case under § 27.060. And he did so, along with the Highway Patrol, in a timely fashion. *See Moxness v. Hart*, 131 S.W.3d at 444 (finding that when a Missouri statute confers an unconditional right to intervene, intervention must be permitted upon timely application).

Although the circuit court did not address timeliness in its order, the attorney general had no basis for filing earlier in this case. He was not notified of the Petition for removal or the hearing on the Petition. (LF 21). After learning of the order of removal, the attorney general promptly moved

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to intervene and to set aside the circuit court's order in accordance with controlling caselaw. (LF 21-28). No judgment was even entered at the time. The May 20, 2013 order was not denominated a "judgment," as the court of appeals recognized, nor was there a separate docket entry signed by the judge that would constitute a judgment. *See City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997).

Of course, a motion to intervene may be timely despite being filed after entry of judgment. In *Frost v. White*, 778 S.W.2d 670 (Mo. App. W.D. 1989), for example, the court of appeals reversed the trial court's decision to deny a motion to intervene filed sixteen days after the intervenor learned that a judgment had been entered, concluding that the trial court had abused its discretion in denying intervention. *Frost*, 778 S.W.2d at 674. The attorney general's motion to intervene was certainly timely in this case. *See State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854, 857, 862 (Mo. App. 1965) (motion to intervene filed 2 ½ months after interlocutory entry of default was timely).

Like the circuit court, the court of appeals said nothing about the timeliness of intervention in this case. Instead, it found in § 27.060 an unwritten limitation on the representation of the State's interests by the attorney general. According to the court of appeals, as long as "the State" is already represented, the attorney general cannot "appear and interplead, answer or defend." There is no statutory basis for such a limitation, and it is

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contrary to the plain language of the statute. *See State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d at 136 (concluding that the Attorney General's broad authority can only be restricted by a statute enacted specifically for the purpose of limiting his power).

Nowhere in § 27.060 does it mention that the attorney general may appear and defend, but only if the State is not already represented. In fact, the exact opposite is evidenced by the plain language of the statute. The provision at issue in § 27.060 contemplates that there will already be an existing "proceeding or tribunal in which the state's interests are involved." Under these circumstances, the attorney general is authorized not only to interplead and answer on behalf of the State, but he may also "appear" and "defend." This is broad authority consistent with the long-recognized common law authority of the attorney general.

In *Jones v. Fidelity Nat. Bank & Trust Co. of Kansas City*, 243 S.W.2d 970, 977 (Mo. banc 1951), the trustees of various banks argued that "the duty to collect funds that would escheat to the state is delegated only to the prosecuting attorney and, therefore, cast serious doubts upon the right of the attorney general to institute his intervention." In response, this Court noted that the trustee "evidently overlooked section 27.060, RSMo 1949 . . . . Surely, under this section the attorney general has the same rights as a prosecuting attorney." *Id.*

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The language of § 27.060 authorizes the attorney general – at his discretion – to appear and defend "in any proceeding" in which the state's interests are involved. The court of appeals recognized that the State has an interest when a circuit court orders the removal of a sex offender's name from the Missouri sex offender registry. *See, e.g., Kennedy v. State*, 411 S.W.3d 873, 877-78 (Mo. App. S.D. 2013). Furthermore, the attorney general has authority "to seek enforcement of the General Assembly's statutory purposes." *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. W.D. 2009); *see also* § 527.110 (requiring that if a "statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard").

Moreover, the fact that § 27.060 uses the words "may also appear and interplead, answer or defend," does not make the right conditional or subject to judicial construction. In its brief analysis, the court of appeals focused on the word "may" in § 27.060 to suggest a limitation on the attorney general's authority to "appear and interplead, answer or defend" a case in which the state's interests are involved. But this misses the point of the provision entirely. The term "may" is not a limitation on the attorney general, but the grant of discretion to the attorney general. *See State ex rel. McKittrick v. Mo. Pub. Serv. Comm.*, 175 S.W.2d 857 (Mo. banc 1943) (describing the provision as the attorney general's "broadest discretionary duties").

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"It is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare." *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. W.D. 1980) (citing § 27.060 and *State ex rel. Taylor v. Wade*, 231 S.W.2d 179 (Mo. banc 1950)). Thus, it is not at the discretion of the court to allow the attorney general to appear and defend in this case. The discretion is in the hands of the attorney general.

B. The Attorney General Was Entitled to Intervene Under Rule 52.12.

In addition to the attorney general's broad authority to appear and defend the State's interests pursuant to common law and § 27.060, Rule 52.12 also authorizes intervention of right. Upon timely application, there is a right 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

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the applicant's interest is adequately represented by existing parties.

Rule 52.12(a).

Here, a statute confers an unconditional right to intervene – § 27.060. In *Moxness v. Hart*, 131 S.W.3d at 444, the court considered the statutory terms "may interplead" in § 525.090, RSMo 2000, which are nearly identical to the statutory terms in § 27.060 providing that the attorney general "may also appear and interplead, answer or defend." The court concluded that this "may interplead" language conferred an unconditional right to intervene. *Id.*

Furthermore, the attorney general has an interest relating to the property or transaction which is the subject of the action under Rule 52.12(a) – a provision that applies "[i]n the absence of a statute conferring an unconditional right of intervention." *State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d at 127. The attorney general unquestionably has an interest in the subject of the action; particularly in the consistent application of the laws relating to the sex offender registry. *See, e.g., Roe v. Replogle*, 408 S.W.3d 759 (Mo. banc 2013); *Doe v. Toelke*, 389 S.W.3d 165 (Mo. banc 2012); *Doe v. Keathley*, 290 S.W.3d 719 (Mo. banc 2009). As such, he should have been permitted to intervene in this action. *See also Dye v. Div. of Child Support Enforcement, Dep't of Soc. Servs.*, 811 S.W.2d 355, 358 (Mo. banc

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1991) (concluding that the attorney general should be notified and granted leave to intervene even under § 527.110 and Rule 87.04).

II. The Circuit Court Erred in Denying the Attorney General's Motion to Intervene as of Right on Behalf of the Missouri State Highway Patrol and the State of Missouri, Because the Circuit Court Misapplied Rule 52.12(a)(2), in That There is an Absolute Right to Intervene.

Even if there were no statute or rule conferring on the attorney general a right to appear and defend, a person seeking to intervene must be granted intervention if they 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). Where all three elements of Rule 52.12(a)(2) are satisfied, " 'the right to intervene is absolute, and the motion to intervene may not be denied.' " *Allred v. Carnahan*, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012) (quoting *McMahon v. Geldersma*, 317 S.W.3d 700, 705-06 (Mo. App. W.D. 2010)).

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The circuit court and the court of appeals erred in denying the Missouri State Highway Patrol's intervention of right in this case.[3/] The Highway Patrol has an interest in maintaining Missouri's statewide sex offender registry as required by statute. *See* §§ 589.407 and 589.410. The Highway Patrol's ability to discharge its duties under Missouri's Sex Offender Registration Act (SORA), §§ 589.400 to 589.426, is implicated where a sex offender is seeking removal from the sex offender registry. In fact, any removal order would have to be carried out by the Highway Patrol.

Denial of the motion to intervene in this case will impede the Highway Patrol in discharging its responsibilities. Dunivan was, and still is, obligated to register as a sex offender in Missouri under federal and Missouri law. Dunivan's requirement to register as a sex offender in Missouri is not solely because of his guilty plea; rather, he is subject to the state registration requirement in § 589.400.1(7), which is based on his present status as a sex

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[3/] The State of Missouri, like the Missouri State Highway Patrol, has an interest in the subject of the action and meets the elements of intervention. The intervention analysis will not be repeated with respect to the State of Missouri, but the conclusion is the same – the attorney general's motion to intervene on behalf of the State of Missouri under Rule 52.12(a)(2) should have been granted.

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offender who has been or is required to register under SORNA. *See Doe v. Toelke*, 389 S.W.3d 165 (Mo. banc 2012). Thus, he was not eligible to file a petition for removal from Missouri's sex offender registry pursuant to § 589.400.8. *See Grieshaber v. Fitch*, 409 S.W.3d 435, 439-40 (Mo. App. E.D. 2013).

The disposition of this case without the Highway Patrol's participation as a party will, as a practical matter, impair or impede the Highway Patrol's ability to discharge its duties under SORA because it cannot presently challenge the order granting Dunivan relief from his obligation to register as a sex offender in Missouri. Yet, the circuit court's judgment did not take into consideration Dunivan's obligation to register in Missouri under federal law, a point that even the court of appeals noted. This leaves the Highway Patrol in an uncertain position as to the discharge of its duties. Due to the lack of notice of the May 2013 hearing, and the denial of its motion to intervene, the Highway Patrol has been denied an opportunity to present evidence or arguments in support of its position that Dunivan is required to register as a sex offender in Missouri under federal law.

Finally, the Highway Patrol's interests were not adequately represented. The record does not reveal that an existing party presented arguments or evidence concerning Dunivan's independent obligation to register under the federal SORNA, 42 U.S.C. §16901 *et seq.*, or SORNA's

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interplay with Missouri's SORA. Thus, the Highway Patrol's motion to intervene should have been granted.

III. The Circuit Court Erred in Granting Dunivan's Request for Removal From the Sex Offender Registry, Because the Circuit Court Misapplied Missouri Law and Failed to Apply Federal Law, in That Dunivan has an Independent Obligation to Register in Missouri Under Federal Law and Therefore Must Register Under Missouri Law.

In addition to the circuit court's error in denying intervention, the circuit court's judgment of removal from the sex offender registry was erroneous. "The interpretation and application of a statute to a given set of facts is a question of law" that is reviewed *de novo*. *Solomon v. St. Charles Cnyt. Pros. Attorney's Office*, 409 S.W.3d 487, 489 (Mo. App. E.D. 2013). Whether Dunivan is required to register in Missouri under federal law is just such a question of law.

Missouri law requires that a party register as a sex offender if they have been "convicted of, been found guilty of, or pled guilty or nolo contendere to committing, attempting to commit, or conspiring to commit" certain offenses. § 589.400.1. On this basis, Dunivan registered for many years. In addition to this requirement to register in Missouri, a sex offender has an independent obligation to register in Missouri if they are required to register

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under federal law. *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. banc 2009). Indeed, Missouri law specifically provides that registration is required if a sex offender "has been or is required to register in another state or has been or is required to register under tribal, federal, or military law." § 589.400.1(7).

Here, Dunivan is a sex offender pursuant to SORNA because he was convicted of sexual abuse in the second degree, a criminal offense involving a sexual act, *see* 42 U.S.C. § 16911(5)(A)(i), and also because SORNA additionally defines a "sex offense" to include "[c]riminal sexual conduct involving a minor" or "any conduct that by its nature is a sex offense against a minor." *See* 42 U.S.C. § 16911(7)(H), (I); *see also Grieshaber*, 409 S.W.3d at 439. In his Petition, Dunivan admitted that he was convicted of a sex offense as an adult – 18 years old, and that his victim was a minor – 13 years old.[4/] (LF 5; TR at 5).

Dunivan could not seek removal from the registry in Missouri pursuant to § 589.400.7, because his offense – sexual abuse in the second degree – is not listed in that subsection. Nor could he properly seek relief under

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[4/] 42 U.S.C. § 16911(5)(C), which excludes certain consensual conduct from its definition of "sex offense," does not apply here because Dunivan was more than four years older than his victim. *Id.*

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§ 589.400.8, because when a sex offender's "state registration requirement is based on an independent federal registration requirement, he may not file a petition for removal from Missouri's sex offender registry pursuant to section 589.400.8." *Grieshaber*, 409 S.W.3d at 439-40. Like the sex offender in *Grieshaber*, Dunivan was not required to register in Missouri "solely because of the fact of his past convictions or guilty pleas. Instead, he is on the registry because of the state registration requirement in section 589.400.1 (7) of SORA, which is based on [Dunivan]'s present status as a sex offender who 'has been or is required' to register pursuant to SORNA." *Grieshaber*, 409 S.W.3d at 439, citing *Toelke*, 389 S.W.3d at 167.

Absent from the circuit court's judgment was any discussion of Dunivan's requirement to register in Missouri under federal law. The existing parties failed to address Dunivan's independent obligation to register under SORNA, 42 U.S.C. § 16901 et seq., or its interplay with SORA. SORNA imposes an independent, federally mandated sex offender registration requirement on sex offenders residing in Missouri. *Doe v. Toelke*, 389 S.W.3d 165, 167 (Mo. banc 2012); *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. banc 2009). That federal requirement "triggers the individual's duty to register in Missouri pursuant to section 589.400.1(7)[.]" *Grieshaber v. Fitch*, 409 S.W.3d at 438. If a sex offender is or has been required to register under SORNA,

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"he or she is presently required to register pursuant to SORA." *Id.* at 438-39, *citing Doe v. Toelke*, 389 S.W.3d at 167.

The court of appeals did not address Dunivan's independent obligation to register under federal law, despite noting it was an issue. According to the court of appeals, the State "did not claim in its points relied on any trial court error concerning the removal of Dunivan from the registry." *Dunivan v. State*, --- S.W.3d ---, 2014 WL 5471471, *1 (Mo. App. S.D., Oct. 29, 2014). Yet, the matter was raised to the court of appeals in the "intervention appeal," (SD32920), and certainly would have been a point relied on and briefed. But before briefing could be initiated in the "removal appeal," (SD33224), the court of appeals, *sua sponte*, consolidated the "removal appeal" with the "intervention appeal." And the court of appeals then stated that "[t]he record on appeal and brief" in the "intervention appeal" are "filed in both cases" and the consolidated appeal was set for oral argument.

Accordingly, this Court should resolve this issue and determine that Dunivan is still required to register in Missouri as a sex offender.

CONCLUSION

For the foregoing reasons, the circuit court's order and judgment should be reversed.

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Respectfully submitted,

CHRIS KOSTER
Attorney General

By: /s/ *Jeremiah J. Morgan*
JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR APPELLANTS

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the Appellant's Substitute Brief and Appendix were served electronically via Missouri CaseNet e-filing system, the 5th day of March, 2015, to:

Christian Rasmussen
16 Camden Court NE
P.O. Box 3319
Camdenton, Missouri 65020
chris@deputyandmizzel.com

Attorney for Plaintiff-Respondent

I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,301 words.

/s/ *Jeremiah J. Morgan*
Jeremiah J. Morgan
Deputy Solicitor General