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 REPLY BRIEF OF APPELLANTS

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I. The Attorney General has the Unconditional and Absolute Right to "Appear and Interplead, Answer or Defend, in Any Proceeding or Tribunal in Which the State's Interests are Involved."

There is no dispute in this case that the Missouri Attorney General has the unconditional and absolute right (as well as the discretion) under common law and statute to appear, answer, and defend in "*any proceeding or tribunal* in which the State's interests are involved." § 27.060, RSMo[1/] (emphasis added); *see Clark Oil and Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596 (Mo. banc 1982). Dunivan does not even suggest – as the court of appeals did – that the participation of a local prosecutor somehow limits the Attorney General's right to appear and defend. And of course, there is no basis for such a limitation in either Missouri statutes or case law. "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).

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

Instead of arguing that the Attorney General lacks authority to appear and defend in this case, Dunivan argues only that the Attorney General's participation was untimely. More than untimely, Dunivan claims that there was an "inordinate delay" because the motion was "post-judgment." Respondent's Brief, pp. 14 & 15. This claim, however, is both factually incorrect and it fails as a matter of law. The Attorney General and the Missouri State Highway Patrol moved to intervene and defend on August 19, 2013 – before any judgment was entered. Substitute Appendix of Appellants, A3-A11. Dunivan, in fact, admits in his brief that it was "on March 6, 2014, [that] the Circuit Court issued a judgment." Respondent's Brief, p. 8.

There is no "judgment" until the trial court "'denominate[s]' its final ruling as a 'judgment.'" *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997). At that point, a judgment becomes final at the expiration of thirty days following its entry. *See* Rule 81.05; *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642, 645 (Mo. App. W.D. 2006). The Attorney General and the Missouri State Highway Patrol moved to intervene and defend before there was any judgment in this case. Therefore, Dunivan's timeliness argument is factually unsupported. But even if the motion had come after the entry of judgment, Dunivan's untimeliness argument would fail.

The authority of the Attorney General to appear and defend under § 27.060 is not restricted by time. There is no such limitation in the language

of § 27.060 requiring timely application, and the statutory language actually suggests the opposite. The Attorney General is permitted to appear and defend in "*any proceeding or tribunal*." Whether that proceeding or tribunal is administrative or a trial court, the court of appeals or this Court, the Attorney General has the authority to appear and defend the State's interest. Certainly the Attorney General takes the case as it is. In this case, it was after the entry of an erroneous order, but while the trial court still had the matter before it. As such, the Attorney General sought to set aside the order and enter judgment in favor of the State and the Missouri State Highway Patrol.

Even if timeliness were an issue, however, the motion in this case was timely. Whether the motion was timely is decided under Missouri Rule of Civil Procedure 52.12. And "[b]ecause Rule 52.12 is essentially the same as Fed. R. Civ. Pro. 24, Missouri courts have looked to interpretations of the federal rule for guidance in construing Rule 52.12." *State ex rel. Strohm v. Bd. of Zoning Adjustment of Kansas City*, 869 S.W.2d 302, 304 (Mo. App. W.D. 1994).

Factors to be considered in determining timeliness under Fed. R. Civ. P. 24 (and Missouri Rule 52.12) include:

> (1) [T]he length of time the applicant knew or should have known of his interest before making the motion;

> (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness.

State ex rel. Strohm, 869 S.W.2d at 304. Here, the factors all favor the intervention and participation of the Attorney General and the Missouri State Highway Patrol. Indeed, Dunivan concedes that a delay of two and a half months after a judgment is still timely. *See* Respondent's Brief, p. 16 (citing *State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854 (Mo. App. 1965). The two and one half month delay acknowledged by Dunivan as timely was, in fact, in a case in which the parties seeking intervention were aware of the action throughout its pendency. *State ex rel. Aubuchon*, 389 S.W.2d at 858-59.

The Attorney General and the Missouri State Highway Patrol were not notified of the filing of the Petition for removal or the hearing on the Petition. (LF 21). After learning of the order of removal, the Attorney General and the Missouri State Highway Patrol moved to intervene and defend as soon as possible, and to set aside the circuit court's order in accordance with controlling case law. (LF 21-28).

II. The Missouri State Highway Patrol Has the Absolute Right to Intervene.

Like his argument with respect to the Attorney General, Dunivan asserts that the Missouri State Highway Patrol's intervention was untimely. It was not. As set forth above, the Missouri State Highway Patrol sought to intervene as soon as possible after learning of the matter. And it was before any judgment was entered.

Dunivan further argues that the Highway Patrol fails to meet the other requirements of intervention, but those arguments also fail. The Highway Patrol has an interest, indeed an obligation, to maintain Missouri's statewide sex offender registry as required by statute. *See* §§ 589.407 and 589.410. Dunivan attempts to minimize this obligation by arguing that the Highway Patrol "is merely charged with keeping the sex offender registry." Respondent's Brief, p. 19. But that is the whole point of this lawsuit – to potentially require the Highway Patrol to remove Dunivan from the registry. 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. Any removal

order would have to be carried out by the Highway Patrol, not the local prosecutor.[2/]

Denial of the motion to intervene in this case will also impede the Highway Patrol in discharging its responsibilities. After all, Dunivan was, and still is, obligated to register as a sex offender in Missouri under federal and Missouri law (*see infra* part III). 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 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. Finally, the Highway Patrol's interests were not

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[2/] For this reason, the Missouri State Highway Patrol should be a required party for any action seeking removal from the sex offender registry.

adequately represented. The Highway Patrol has extensive knowledge and expertise regarding sex offender registration. And no existing party presented any arguments or evidence concerning Dunivan's independent obligation to register under the federal SORNA, 42 U.S.C. § 16901, *et seq.*, or SORNA's interplay with Missouri's SORA. Thus, the Highway Patrol's motion to intervene should have been granted.

III. There Remains an Obligation to Register in Missouri Under Federal Law.

Instead of making any argument concerning his obligation to register as a sex offender, Dunivan briefly suggests that the point is barred because it was not raised as a point relied on appeal. Yet, as set forth in the opening brief, Appellants were not provided an opportunity to raise the matter in a point relied on. Even so, the issue was certainly raised on appeal.

Furthermore, if the matter was not before the trial court, as the court of appeals concluded, then the trial court and the court of appeals' decisions are essentially meaningless. After all, a sex offender has an independent obligation in Missouri under federal law. *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. banc 2009). That federal registration requirement triggers Missouri law requiring registration of a sex offender if he "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. (LF 5; TR at 5). As such, he must continue to register under federal law, and therefore under Missouri law. 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the Appellant's Substitute Reply Brief was served electronically via Missouri CaseNet e-filing system, the 6th day of April, 2015, to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,951 words.

/s/ *Jeremiah J. Morgan*
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