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STATEMENT OF FACTS

Respondent/Cross-Appellant Jackson County, Missouri disputes certain information contained within the Statement of Facts set forth in Appellants/Cross-Respondents' Second Brief. For the first time, Appellants, the State of Missouri and Jay Nixon, include additional information in their Statement of Facts concerning the existence of language similar to § 115.348 contained in House Bill 353 ("H.B. 353").

Appellants filed their Appellants' Brief on April 3, 2006. On April 25, 2006, this Court handed down its opinion in the case of *Rizzo v. State*, 189 S.W. 3d 576 (Mo. banc 2006). Respondent/Cross-Appellant Jackson County, Missouri filed its Reply Brief on May 3, 2006, at which time the mandate in *Rizzo* had not yet become final. The mandate in *Rizzo* did not become final until after the time period to file a Motion for Rehearing under Rule 84.17(a)(1) had expired, which occurred fifteen days later, on May 10, 2006.

On April 27, 2006, several days after the hand down in *Rizzo*, the Attorney General's Office wrote to the Court announcing that they had discovered similar language to §115.348 contained in another house bill, numbered H.B. 353, which had been presented to the governor for signature and signed into law. The Attorney General's Office indicated in that letter that its lawyers did not previously know about the duplicate language contained in both H.B. 58 and H.B. 353. The

letter was received and acknowledged by this Court in connection to the *Rizzo* case. The Attorney General's Office did not file a Motion for Rehearing with this Court in *Rizzo*. The Attorney General's Office allowed the time to file a Motion for Rehearing to expire without taking any action other than the letter, thereby making the *Rizzo* opinion final. Sending the letter to this Court was not a viable method to challenge any aspect of the holding in *Rizzo*.

In this case, Appellants' counsel of record did not raise any issue regarding the existence of language similar to § 115.348 in H.B. 353 in her Appellants' Brief filed on April 3, 2006. The Attorney General's Office did not use its available procedural remedy of the Motion for Rehearing to challenge this Court's ruling in *Rizzo*. Instead, counsel for Appellants attempts to inappropriately inject the issue of the similar language contained in H.B. 353 into this case by referring to it in her additional Statement of Facts contained in her Second Brief.

In the additional Statement of Facts, Appellants' counsel describes certain actions of the Revisor of Statutes taken with regard to merging House Bill 353 into House Bill 58. Counsel for Appellants characterizes these actions taken by the Revisor of Statutes as "mistakenly" done. (S.F., 5). There is no evidence whatsoever that the Revisor was "mistaken" in his actions; hence, it is inappropriate for Appellants' counsel to include her own opinion or judgment that the action was "mistakenly" done in the Statement of Facts. If, in fact, anything

done by the Revisor of Statutes is proper and germane for this Court to consider in this case, those actions of the Revisor should be established as facts or evidence rather than as conclusions or characterizations of the Revisor's motivation submitted by counsel for Appellants.¹ As this information is not a fact, the Court should not consider it. The status of H.B. 353 is wholly outside of the record in this matter and should not be considered for any purpose by this Court.

¹ Appellants/Cross-Respondents include within their exhibits as Appendix 1 a copy of the statutory note from the Revisor describing the status of the two bills as "H.B. 58 merged with H.B. 353."

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT'S

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN NOT FINDING THAT §67.2555 VIOLATED THE PROVISIONS OF ARTICLE VI, §18 BECAUSE ARTICLE VI, § 18 VESTS IN QUALIFYING COUNTIES THE POWER TO ESTABLISH A CHARTER FORM OF GOVERNMENT IN THAT §67.2555 VIOLATES THE AUTHORITY GRANTED TO HOME RULE CHARTER COUNTIES UNDER THE MISSOURI CONSTITUTION AND UNCONSTITUTIONALLY INFRINGES UPON JACKSON COUNTY'S RIGHT TO OPERATE A CHARTER FORM OF GOVERNMENT UNDER THAT SECTION OF THE MISSOURI CONSTITUTION.
- II. THE TRIAL COURT ERRED IN FINDING THAT § 115.348 DID NOT VIOLATE ARTICLE III, § 21 OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE III, §21 REQUIRES THE ORIGINAL PURPOSE OF THE BILL NOT TO BE

CHANGED IN THAT AMENDMENTS TO H.B. 58, CHANGED ITS ORIGINAL PURPOSE.

SOURCES:

Rizzo v. State, 189 S.W. 3d 576 (Mo. banc 2006).

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994).

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997).

III. THE TRIAL COURT ERRED IN FINDING THAT §§ 115.348 AND 67.2555 IN H.B. 58 DID NOT VIOLATE ARTICLE III, § 23 OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE III, § 23 REQUIRES THAT BILLS CONTAIN A SINGLE SUBJECT IN THAT INCLUDING §§ 115.348 AND 67.2555 CREATED A BILL WITH NUMEROUS SUBJECTS IN VIOLATION OF THE SINGLE SUBJECT CLAUSE.

SOURCES:

Rizzo v. State, 189 S.W. 3d 576 (Mo. banc 2006).

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994).

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997).

IV. THE TRIAL COURT ERRED IN NOT FINDING THAT § 67.2555 WAS UNCONSTITUTIONAL BECAUSE THE TERM “EXPENDITURE “ IS UNCONSTITUTIONALLY VAGUE AND IMPERMISSIBLY OVERLY BROAD IN THAT IT IS SUBJECT TO MULTIPLE INTERPRETATIONS INCLUDING SITUATIONS THAT SHOULD NOT BE COMPETATIVELY BID SUCH AS DAY-TO-DAY PURCHASES FOR UTILITIES, EMERGENCIES AND THE LIKE.

V. THE TRIAL COURT ERRED IN NOT FINDING THAT THE GENERAL ASSEMBLY VIOLATED ARTICLE III, § 42 BECAUSE NOTICE MUST BE PROVIDED PRIOR TO THE ENACTMENT OF A SPECIAL LAW IN THAT § 67.2555 IS A SPECIAL LAW AND THE LEGISLATURE FAILED TO COMPLY WITH THE REQUIRED NOTICE PROCEDURE.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT FINDING THAT §67.2555 VIOLATED THE PROVISIONS OF ARTICLE VI, §18 BECAUSE ARTICLE VI, § 18 VESTS IN QUALIFYING COUNTIES THE POWER TO ESTABLISH A CHARTER FORM OF GOVERNMENT IN THAT §67.2555 VIOLATES THE AUTHORITY GRANTED TO HOME RULE CHARTER COUNTIES UNDER THE MISSOURI CONSTITUTION AND UNCONSTITUTIONALLY INFRINGES UPON JACKSON COUNTY’S RIGHT TO OPERATE A CHARTER FORM OF GOVERNMENT UNDER THAT SECTION OF THE MISSOURI CONSTITUTION.

For the reasons stated herein and those set forth in Respondent/Cross-Appellant’s Brief located at pages 33-38, this Court should sustain the Trial Court’s Judgment declaring § 67.2555 invalid. Accordingly, this Court should grant Point I of the cross appeal and deny Point II of Appellants’ brief.

II. THE TRIAL COURT ERRED IN FINDING THAT § 115.348 DID NOT VIOLATE ARTICLE III, § 21 OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE III, §21 REQUIRES

**THE ORIGINAL PURPOSE OF THE BILL NOT TO BE
CHANGED IN THAT AMENDMENTS TO H.B. 58, CHANGED
ITS ORIGINAL PURPOSE.**

It is improper for the State of Missouri in their Second Brief to inject the issue of putatively similar language contained in both H.B. 58 and H.B. 353. According to the State's counsel, there appears certain language in H.B. 353 that tracks the language in § 115.348 prohibiting persons who have been convicted of, or plead guilty to, certain federal crimes from serving on the county legislature. This issue was not raised or referenced in any manner at the trial court. No reference whatsoever to it appears in the Judgment by Judge Callahan. Counsel for the State of Missouri did not raise this issue in her Notice of Appeal or in her Appellants' Brief.

No legal authority is cited by the State of Missouri standing for the proposition that Appellants may properly raise any issue associated with H.B. 353 at this late date or at this procedural point of the case. Without legal authority cited, any point the State of Missouri is attempting to make is ineffective and must not be considered by this Court. Failure to cite relevant authority supporting the point or to explain the failure to do so preserves nothing for review. *Snyder v. Snyder*, 142 S.W. 3d 780, 783 (Mo. App. 2004).

The first undersigned counsel knew of an issue involving H.B. 353 occurred when the April 27, 2006 letter from the Attorney General's Office was received by her office, but at that time, the ruling in *Rizzo* was not yet final and still subject to a Motion for Rehearing. Counsel in the *Rizzo* case received a reply from the Supreme Court to the April 27, 2006 letter. In its reply, the Supreme Court acknowledged receipt of the April 27, 2006 letter as a communication to the Court pursuant to Supreme Court Rule 84.20. *See* Appendix, 15.

If there exists a second bill contained in H.B. 58 that says essentially the same thing as § 115.348, it was never discussed in the trial of this case nor in the trial of the *Rizzo* case. It is procedurally improper and patently unfair for it to become an issue in the case at this late stage. The Missouri Supreme Court Rules state "allegations of error not briefed or not properly briefed shall not be considered in any civil appeal" Rule 84.13(a). Assertions raised for the first time in a reply brief are not generally considered by the appellate courts of Missouri for review. *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995). The State in this case never filed a Motion for Rehearing. The State in this case never mentioned the language in H.B. 353 in their Notice of Appeal or their first brief in this case. Therefore, the State is estopped from arguing that H.B. 353 controls this case, and this Court need not address any issues concerning H.B. 353.

Furthermore, Appellants plainly violated this Court's rules when they asserted that "[t]he Revisor of Statutes mistakenly included only one version of § 115.348 in the 2005 cumulative supplement (the H.B. 58 version) and mistakenly wrote in the statutory note that 'H.B. 58 merged with H.B. 353.'"

(Appellants/Cross-Respondents Second Br. at 5). While the State of Missouri arguably complies with Rule 84.04(i)'s requirement that it reference this statement to the legal file, undersigned counsel for Jackson County has examined the legal file for the proposition that the Revisor of Statutes actions were a "mistake" and has been unable to verify this "fact." This Court has plainly instructed counsel filing appellate briefs that a "statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). The State's unsubstantiated and unfair assertion of "mistake" plainly violates this rule. Further, no legal authority was cited for the proposition that the Revisor made a mistake; thus, nothing has been preserved for review. *Snyder*, 142 S.W. 3d at 783.

The *Rizzo* case made a determination that a violation of the single subject and original purpose provisions of the Missouri Constitution existed with regard to § 115.348 contained in H.B. 58. *Rizzo v. State*, 189 S.W.3d 576, 579-80 (Mo. banc 2006). This Court struck down the passage prohibiting individuals who were found guilty of or who pled guilty to a federal felony or misdemeanor from

running for office as unconstitutional. *Id.* at 581. This Court ruled based on *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994) that widespread changes to the statewide election laws did not belong within a bill containing numerous other unrelated provisions and described as a bill about political subdivisions. *Id.* at 579-81. At the point in time that the State did not challenge this Court's holding in *Rizzo* through a Motion for Rehearing under Rule 84.17(a)(1), the holding became final and the doctrine of collateral estoppel applies.

To the extent that Jackson County's Cross-Appellant's Brief requests this Court to determine whether § 115.348 contained in H.B. 58 violated the single subject and original purpose provisions of the Missouri Constitution, (*see* Respondent/Cross-Appellant Br. at 38-42 and 51-52) Jackson County respectfully withdraws that point because it has already been ruled by this Court in the affirmative in the *Rizzo* case and no further analysis is necessary. Due to the ruling in *Rizzo* on that precise issue, these points on appeal are decided.

Under the principle of collateral estoppel, the holding in *Rizzo*, finding an unconstitutional violation of the single subject and original purpose provisions, controls the outcome of those same provisions of H.B. 58 in the instant case. This Court has stated that four factors should be considered in determining the applicability of collateral estoppel. These factors are: (1) whether there was

identity of issues involved in the prior and present action; (2) whether the prior action was decided on the merits; (3) whether the party against whom collateral estoppel is asserted was either a party or was in privity with a party in the prior action; and (4) whether that party had a “full and fair opportunity” in the prior action to litigate that issue. *In re Caranchini*, 956 S.W.2d 910, 912-13 (Mo. banc 1997).

The issues are identical in *Rizzo* and the present action challenging the constitutionality of § 115.348 in H.B. 58. Just as § 115.348 in H.B. 58 violated the single subject and original purpose provisions in *Rizzo*, that section unconstitutionally changed the original purpose of and violated the single subject provisions in the case at bar. The *Rizzo* case was decided on the merits by this Court and became final on May 10, 2006 after the Attorney General failed to file a Motion for Rehearing. In both *Rizzo* and the case *sub judice*, the State was a party and was represented by the Attorney General. It cannot claim it was denied a “full and fair opportunity” to litigate this issue.

Mr. Rizzo and Jackson County are essentially the same party because he was a member of the Jackson County Legislature, was a public officer of the County, and was represented by the County Counselor’s Office. However, mutuality of estoppel (*i.e.*, where the same party to prior litigation invokes the prior judgment to assert estoppel against an opposing party) is no longer required for collateral

estoppel so long as the party against whom it is asserted has a “full and fair opportunity” to litigate the issues. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28 (1979); *Bd. of Educ. v. City of St. Louis*, 879 S.W.2d 530, 532 (Mo. banc 1994) (citing *Oates v. Safeco Ins. Co. of America*, 583 S.W.2d 713 (Mo. banc 1979)). Therefore, collateral estoppel is appropriate in this case.

This Court should follow its precedent in *Rizzo* and apply traditional tenets of collateral estoppel to determine that the inclusion of §115.348 in H.B. 58, as challenged in this case, changed the original purpose and violated the single subject provisions contained in the Missouri Constitution. *Rizzo* is controlling and completely disposes of the issues raised by Jackson County on cross appeal because Judge Callahan’s erroneous judgment concerning § 115.348 being constitutional has been overruled and supplanted by this Court’s ruling and analysis in *Rizzo*. There exists no need to hunt for sustainable other grounds to explain Judge Callahan’s trial court ruling regarding § 115.348 since this Court has spoken on that identical issue.

This Court should make no determinations about the impact of the inclusion of § 115.348 in H.B. 353 since that issue is not properly before this court in this case procedurally, and is not factually developed or briefed in this case. In the event that this Court should choose to consider what, if any, impact results from substantially similar language to that which was struck down in *Rizzo* being

located after the fact in another bill, this Court should allow additional briefing and factual development of that issue. It would be more prudent for this Court not to address the situation of language in H.B. 353 in this case, but rather leave that matter for another day, especially in light of a lawsuit pending in Jackson County Circuit Court involving § 115.348 in H.B. 353. That lawsuit, styled *Wilson v. Jackson County Bd. of Election Commissioners*, 0616-CV13798, is now pending before Division 16 of the Jackson County Circuit Court in Independence, Missouri. See Appendix, 4.

III. THE TRIAL COURT ERRED IN FINDING THAT §§ 115.348 AND 67.2555 IN H.B. 58 DID NOT VIOLATE ARTICLE III, § 23 OF THE MISSOURI CONSTITUTION BECAUSE ARTICLE III, § 23 REQUIRES THAT BILLS CONTAIN A SINGLE SUBJECT IN THAT INCLUDING §§ 115.348 AND 67.2555 CREATED A BILL WITH NUMEROUS SUBJECTS IN VIOLATION OF THE SINGLE SUBJECT CLAUSE.

For the reasons stated herein, in Respondent/Cross-Appellant's Brief located at pages 39-42 and 52, and above in Point II of Respondent/Cross-Appellant's Reply Brief, this Court should follow its precedent in *Rizzo v. State*, 189 S.W.3d 576 (Mo. banc 2006) holding that § 115.348 violates the single subject

provision of the Missouri Constitution. *See* Respondent/Cross-Appellant’s Reply Br. at 13-19.

IV. THE TRIAL COURT ERRED IN NOT FINDING THAT § 67.2555 WAS UNCONSTITUTIONAL BECAUSE THE TERM “EXPENDITURE “ IS UNCONSTITUTIONALLY VAGUE AND IMPERMISSIBLY OVERLY BROAD IN THAT IT IS SUBJECT TO MULTIPLE INTERPRETATIONS INCLUDING SITUATIONS THAT SHOULD NOT BE COMPETATIVELY BID SUCH AS DAY-TO-DAY PURCHASES FOR UTILITIES, EMERGENCIES AND THE LIKE.

For the reasons stated herein and those set forth in Respondent/Cross-Appellant’s Brief located at pages 42-44, this Court should sustain the Trial Court’s Judgment declaring § 67.2555 invalid. Accordingly, this Court should grant Point IV of the cross appeal and deny Point II of Appellants’ brief.

V. THE TRIAL COURT ERRED IN NOT FINDING THAT THE GENERAL ASSEMBLY VIOLATED ARTICLE III, § 42 BECAUSE NOTICE MUST BE PROVIDED PRIOR TO THE ENACTMENT OF A SPECIAL LAW IN THAT § 67.2555 IS A SPECIAL LAW AND THE LEGISLATURE FAILED TO COMPLY WITH THE REQUIRED NOTICE PROCEDURE.

For the reasons stated herein and those set forth in Respondent/Cross-Appellant's Brief located at pages 44-46, this Court should sustain the Trial Court's Judgment declaring § 67.2555 invalid. Accordingly, this Court should grant Point V of the cross appeal and deny Point II of Appellants' brief.

CONCLUSION

As a result of the arguments set forth above and those contained in the Respondent/Cross-Appellant's Brief, this Court must confirm the ruling of Judge Callahan that §67.2555 is stricken as unconstitutional. This Court should utilize the analysis contained in the *Rizzo* case to find a violation of the single subject provision and find the original purpose of the bill is changed. Since this Court will find §67.2555 to be a special law, it follows that there exists a violation of the required notice provisions set forth in Article III, § 42. Section 67.2555 infringes upon the rights of Respondent/Cross-Appellant to make its decisions as a charter county. Each of these separate grounds provides additional confirmation of the unconstitutional nature of §67.2555; therefore, this Court should eliminate the legislation. *Rizzo* has already stricken down § 115.348 in H.B. 58. No consideration of H.B. 353 is necessary because it is outside the record and not preserved for appellate review.

CERTIFICATION

COMES NOW, Lisa Noel Gentleman, Deputy County Counselor, attorney of record for Respondent/Cross-Appellant, Jackson County, Missouri, and pursuant to Missouri Supreme Court Rule 84.06, states the following required information:

1. The Respondent/Cross-Appellant's Reply Brief complies with the provisions of Missouri Supreme Court Rule 55.03;
2. The Respondent/Cross-Appellant's Reply Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);
3. The name of the word processing software used to prepare Respondent/Cross Appellant's Reply Brief is Microsoft Word 2000;
4. The diskette accompanying Respondent/Cross Appellant's Reply Brief has been scanned and is virus free;
5. The number of words in Respondent/Cross Appellant's Reply Brief is 3,822.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Respondent/Cross-Appellant's reply Brief and a diskette of same were mailed to the Clerk of the Missouri Supreme Court for filing, and two copies of Respondent/Cross-Appellant's Reply Brief with the diskette were mailed on this 13th day of June, 2006, to:

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