No. SC91130

IN THE MISSOURI SUPREME COURT

MICHELLE SCHAEFER, et al,

Appellants,

v.

CHRISTOPHER KOSTER,

ATTORNEY GENERAL FOR THE STATE OF MISSOURI,

Respondent

Appeal from the Cole County Circuit Court

The Honorable Paul C. Wilson, Judge

BRIEF OF APPELLANTS

WARD | HOLLINGSHEAD
216 W. Main Street
Washington, Missouri 63090
Telephone: (636) 390-0070
Facsimile: (636) 390-0072
Email: carl@carlwardlaw.com

KELEHER & EASTMAN
403 NW Englewood Road
Gladstone, Missouri 64118
Telephone: (816) 452-6030
Facsimile: (816) 455-0968
Email: jse@keleher-eastman.com

Attorneys for the Appellants

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Jurisdictional Statement

This case is an appeal from the judgment of the Cole County Circuit Court in a Declaratory Judgment Action challenging the constitutionality of SCSHCS HB 1715 and RSMo. § 577.023 (Cum. Supp. 2008) on the grounds that they were passed by the Missouri Legislature in violation of Mo. Const. Article III, § 23 and Mo. Const. Article III, § 21. Since this matter involves the constitutionality of a state law, this case is within the exclusive jurisdiction of the Missouri Supreme Court.[1]

[1] Mo. Const. Art V, § 3.

Statement of Facts

On March 4, 2008, this Honorable Court handed down its opinion in *Turner v. State*.[2] In *Turner*, this Court determined that a municipal driving while intoxicated ("DWI") offense that resulted in a suspended imposition of sentence ("SIS") could not be used to enhance punishment under § 577.023 RSMo. (Cum. Supp. 2005).

Following the *Turner* decision**,** various members of the Missouri Legislature sought to pass legislation which would amend RSMo. § 577.023 to allow the use of municipal DWI offenses resulting in an SIS for enhancement purposes. House Bill 1715[3] was selected as the vehicle to carry the amendment to the statute.[4]

When the *Turner* decision was handed down on March 4, 2008, HB 1715 had already been introduced in the Missouri House of Representatives on January 17, 2008.[5] As introduced, the bill was titled, "An Act To repeal sections 304.157,

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[2] 24 S.W.3d 826 (Mo. 2008).

[3] Appellants may refer to House Bill 1715 and the various Committee Substitutes as "1715" or "HB 1715." When it was signed into law by the Governor, it was formally the "Senate Committee Substitute for House Committee Substitute for House Bill 1715."

[4] LF Vol. I, 86-107.

[5] LF Vol. I, 81 and 86-107.

306.010, 306.015, 306.100, 306.111, 306.112, 306.114, 306.117, 306.124, 306.125, 306.126, 306.127, 306.132, 306.147, 306.163, 306.221, 565.024, 565.082, and 577.080, RSMo, and to enact in lieu thereof twenty new sections relating to watercraft, with penalty provision."[6] HB 1715 carried with it no provisions related to automobiles, but instead, included only changes in the law relating to watercraft.[7] After being referred to the House Special Committee on State Parks and Waterways and then to the House Committee on Rules, it was recommended by both Committees that a House Committee Substitute for House Bill 1715 "Do Pass."[8]

On March 31, 2008, House Committee Substitute for HB 1715 was perfected.[9] As perfected it was titled, "An Act To repeal sections 304.157, 306.010, 306.015, 306.030, 306.100, 306.111, 306.112, 306.114, 306.117, 306.124, 306.125, 306.132, 306.147, 306.163, 306.221, 306.228, 565.024, 565.082, and 577.080 RSMo, and to enact in lieu thereof twenty new sections relating to watercraft, with penalty provision."[10]

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[6] LF Vol. I, 81 and 86-107.

[7] LF Vol. I, 81 and 86-107.

[8] LF Vol. I, 81 and 108-127.

[9] LF Vol. I, 82 and 128-149.

[10] LF Vol. I, 129.

The House Committee Substitute for HB 1715 was passed by the House of Representatives on April 3, 2008, approximately one month after this Court's decision in *Turner*.[11] When passed, it was titled, "An Act to repeal sections 304.157, 306.010, 306.015, 306.030, 306.100, 306.111, 306.112, 306.114, 306.117, 306.124, 306.125, 306.132, 306.147, 306.163, 306.221, 306.228, 565.024, 565.082, and 577.080, RSMo, and to enact in lieu thereof twenty new sections relating to watercraft, with penalty provision."[12] Although 1715 included amendments to various statutory sections, RSMo. § 577.023 was not amongst those sought to be changed and the title remained related to "watercraft" at the time of its passage by the House.[13]

On April 7, 2008, the Senate was informed that the House had taken up and passed House Committee Substitute for House Bill 1715.[14] It was subsequently referred to the Senate Financial and Governmental Organizations and Elections Committee, who on April 24, 2008, recommended that a Senate Committee Substitute for House Committee Substitute for House Bill 1715 "Do Pass."[15] The

[11] LF Vol. I, 82 and 128-149.

[12] LF Vol. I, 82 and 128-149.

[13] LF Vol. I, 81-149.

[14] LF Vol. I, 82.

[15] LF Vol. I, 82 and 150-174.

Senate Committee Substitute for House Committee Substitute for House Bill 1715 was titled, "An Act to repeal sections 304.157, 306.010, 306.015, 306.100, 306.111, 306.112, 306.114, 306.117, 306.124, 306.125, 306.132, 306.147, 306.163, 306.190, 306.221, 306.228, 565.024, 565.082, 577.023, and 577.080, RSMo, and to enact in lieu thereof twenty-one new sections relating to watercraft, with penalty provisions and an emergency clause for a certain section."[16] The Senate Committee Substitute was taken up, amended, adopted and passed on that date and the House was notified.[17] It was at this point that RSMo. § 577.023 was finally added to 1715.

On May 7, 2008, the House was informed of the Senate's actions and concurrence of the House was requested.[18] On May 16, 2008, the Senate Committee Substitute for House Committee Substitute for HB 1715, as amended, relating to watercraft, was truly agreed to and passed by the House.[19] After being approved by both Houses, 1715 was presented to and signed by Governor Blunt on July 3, 2008, and became effective on that date.[20]

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[16] LF Vol. I, 151.

[17] LF Vol. I, 83.

[18] LF Vol. I, 83.

[19] LF Vol. I, 83.

[20] LF Vol. I, 84.

Each of the Appellants in this case were arrested and charged with driving while intoxicated after 1715 became effective on July 3, 2008. Schaefer was arrested on October 2, 2008, and charged with DWI in the Circuit Court of St. Charles County on January 9, 2009.[21] Brandt was arrested on April 15, 2009, and charged with DWI in the Circuit Court of St. Charles County on May 11, 2009.[22] Price was arrested on April 21, 2009, and charged with DWI in the Circuit Court of Franklin County on September 11, 2009.[23] All of their arrests were made prior to the subsequent repeal and reenactment of § 577.023 RSMo. (Cum. Supp. 2009) by HB 62 on July 9, 2009.[24]

At the time the Appellants were arrested and charged with driving while intoxicated on the aforementioned dates, each of the Appellants had one or more prior municipal DWI cases that resulted in an SIS disposition that could otherwise be used to enhance their punishment.[25] In the most recent criminal prosecutions against the Appellants for DWI, the State of Missouri could have or in fact did

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[21] LF Vol. I, 79.

[22] LF Vol. I, 79.

[23] LF Vol. I, 79.

[24] LF Vol. II, 7.

[25] LF Vol. II, 40-41 and 43-44; LF Vol. II, 55; and LF Vol. II, 57-58.

seek enhancement under RSMo. § 577.023 based on the Appellants' prior municipal DWI dispositions.

On May 15, 2009, the Appellants filed their Petition for Declaratory Judgment herein.[26] The Appellants alleged therein that HB 1715 and the 2008 repeal and reenactment of § 577.023 RSMo. (Cum. Supp. 2008) violated Mo. Const. Article III, § 21 and Article III, § 23.[27] Specifically, the Appellants have contended that the original purpose of HB 1715 was changed after its introduction, that the bill included more than one subject, and that the title did not fairly apprise members of the legislature and general public of its contents.[28]

The Respondent then filed a Motion to Dismiss, which was heard by Judge Richard G. Callahan on October 22, 2009. Respondent argued that Appellants' claims should be dismissed under the doctrine of abatement, and that Price's claim was not ripe, because criminal charges had not yet been filed with the Franklin County Circuit Court.[2930] The Respondent's Motion was overruled.[31]

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[26] LF Vol. I, 10-53.

[27] LF Vol. I, 10-14.

[28] LF Vol. I, 10-14.

[29] Andrew McCaddin voluntarily dismissed his claim in the trial court on February 1, 2010, leaving only Schaefer, Brandt and Price. (LF Vol. I, 7).

[30] LF Vol. I, 54-62.

Following Judge Callahan's appointment as U.S. Attorney for the Eastern District of Missouri, Judge Paul C. Wilson was assigned this case on January 21, 2010.[32] An Agreed Statement of Uncontroverted Material Facts was filed by the parties on January 27, 2010.[33] Both parties thereafter filed their respective Motions for Summary Judgment.[34]

The Respondent argued that the Appellants' claims were moot because § 577.023 RSMo. (Cum. Supp. 2008), as enacted by HB 1715, was repealed and reenacted by HB 62 on July 9, 2009, and that the criminal courts in Appellants' pending prosecutions would apply the 2009 version.[35]

The Respondent also argued that the Appellants' claims were barred by the doctrine of abatement, and that the Appellants were required to resolve their constitutional claims in the pending criminal prosecutions rather than continuing with their present lawsuit.[36] Respondent did not address the merits of the

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[31] LF Vol. I, 2.

[32] LF Vol. I, 2.

[33] LF Vol. II, 2; 78-199.

[34] LF Vol. II, 5-13 and 21-58.

[35] LF Vol. II, 6-10.

[36] LF Vol. II, 10-13.

Appellants' constitutional claims in either its Motion to Dismiss or Motion for Summary Judgment.[37]

On June 29, 2010, Judge Wilson ruled on the case and entered his Final Judgment.[38] Judge Wilson granted the Respondent's Motion for Summary Judgment, denied the Appellants' Motion for Summary Judgment, and entered his order dismissing the Appellants' Petition with prejudice.[39]

Since this case involves the constitutionality of a state law, the Appellants' Notice of Appeal to the Supreme Court was filed with the Circuit Court of Cole County on August 4, 2010.[40] Due to an error by a clerk of that court, the Notice was sent to the Western District Court of Appeals.

[37] LF Vol. I, 54-62; LF Vol. II, 5-14.

[38] LF Vol. II, 70-82.

[39] LF Vol. II, 70-82.

[40] LF Vol. I, 7.

Points Relied On

I. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW BY GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING THE APPELLANTS' PETITION FOR DECLARATORY JUDGMENT FOR THE REASONS THAT: (A) ADVERSITY EXISTS BETWEEN THE PARTIES; (B) THE APPELLANTS HAVE A PRESENT AND PERSONAL STAKE IN THE RESOLUTION OF THE CONSTITUTIONAL CLAIMS THEY RAISE AND THE CASE IS RIPE FOR DECLARATORY RELIEF; (C) THE DOCTRINE OF ABATEMENT DOES NOT APPLY TO PRECLUDE THIS ACTION; (D) THE APPELLANT'S CLAIMS ARE NOT MOOT BECAUSE RSMo. § 577.023 (Cum. Supp 2008) IS SUBSTANTIVE IN NATURE, AND EVEN THOUGH THE STATUTE WAS REPEALED AND REENACTED FOLLOWING THE APELLANTS' ARRESTS, IF CONVICTED, THE APPELLANTS WILL OTHERWISE BE SENTENCED UNDER THAT LAW; AND (E) IT FACILITATES JUDICIAL ECONOMY TO ALLOW A CRIMINAL DEFENDANT TO CHALLENGE A PROCEDURALLY UNCONSTITUTIONAL STATUTE BY SEEKING DECLARATIVE RELIEF.

Missouri Health Care Ass'n v. AG, 953 S.W.2d 617 (Mo. 1997)

Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732 (Mo. 2007)

State v. Coomer, 888 S.W.2d 356 (Mo. App. S.D. 1994)

State ex rel. Waterworth v. Clark, 275 Mo. 95 (Mo. 1918)

II. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW BY DENYING THE APPELLANTS' MOTION FOR SUMMARY JUDGMENT, BECAUSE THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE APPELLANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW FOR THE REASON THAT HB 1715 AND THE 2008 AMENDMENT TO RSMo. § 577.023 WERE PASSED BY THE LEGISLATURE IN VIOLATION OF ARTICLE III, §§ 21 and 23 OF THE MISSOURI CONSTITUTION.

Mo. Const. Art III, §21

Mo. Const. Art III, § 23

National Solid Waste Management Assoc. v. Dir. of the Dept. of Natural Resources, 964 S.W.2d 818 (Mo. 1998).

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

Arguments

I. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW BY GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING THE APPELLANTS' PETITION FOR DECLARATORY JUDGMENT FOR THE REASONS THAT: (A) ADVERSITY EXISTS BETWEEN THE PARTIES; (B) THE APPELLANTS HAVE A PRESENT AND PERSONAL STAKE IN THE RESOLUTION OF THE CONSTITUTIONAL CLAIMS THEY RAISE AND THE CASE IS RIPE FOR DECLARATORY RELIEF; (C) THE DOCTRINE OF ABATEMENT DOES NOT APPLY TO PRECLUDE THIS ACTION; (D) THE APPELLANT'S CLAIMS ARE NOT MOOT BECAUSE § 577.023 RSMo. (Cum. Supp 2008) IS SUBSTANTIVE IN NATURE, AND EVEN THOUGH THE STATUTE WAS REPEALED AND REENACTED FOLLOWING THE APELLANTS' ARRESTS, IF CONVICTED, THE APPELLANTS WILL OTHERWISE BE SENTENCED UNDER THAT LAW; AND (E) IT FACILITATES JUDICIAL ECONOMY TO ALLOW A CRIMINAL DEFENDANT TO CHALLENGE A PROCEDURALLY UNCONSTITUTIONAL STATUTE BY SEEKING DECLARATIVE RELIEF.

Standard of Review

This Court has exclusive appellate jurisdiction over challenges to the validity of a state statute.[41] Constitutional challenges to a statute are reviewed de novo.[42] A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision.[43] The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.[44]

A. Adversity exists between the parties in this case

The first point of error involves the Trial Court's ruling that "the parties in this case are not truly adverse."[45] The Trial Court reasoned that the "Attorney General is not prosecuting the [Appellants'] separate criminal cases" and "did not bring those charges, is not in control of whether or how to amend those charges, and will not ever be responsible for proving the charges alleged."[46] According to

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[41] Mo. Const. Art. V, § 3.

[42] *Franklin County ex rel. Parks v. Franklin County Comm'n,* 269 S.W.3d 26, 29 (Mo. banc 2008).

[43] *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006).

[44] *Trout v. State*, 231 S.W.3d 140, 144 (Mo. banc 2007).

[45] LF Vol. II, 74-74.

[46] LF Vol. I, 74.

the Trial Court, "the [Respondent] Attorney General has not been, and will never be, in a position to decide whether Section 577.023…should be used to enhance [Appellants'] charges."[47] The Trial Court also found that the Attorney General does not "have any supervisory authority over the prosecutors…who *do* control the charges against [Appellants]..." and at most can "'advise' these independently elected officials."[48] The Trial Court therefore concluded that the "[Appellants] attempt to litigate these claims against the Attorney General must fail."[49]

Respectfully, the Trial Court clearly misunderstood the nature of the case before it.[50] Simply put, the Appellants are seeking declaratory relief concerning the constitutionality of a Bill, and the statute that was amended as a result of the passage of that Bill. The Attorney General is a proper party to defend the constitutionality of a state law and he is being sued in his official capacity for that purpose alone. Appellants say that the law is unconstitutional; the Attorney General failed to address the issue. Therein lies the core of the adversity.

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[47] LF Vol. I, 74.

[48] LF Vol. II, 74-75.

[49] LF Vol. II, 75.

[50] The issue of whether or not the parties were "adverse" was never raised by either party in their respective Motions for Summary Judgment. As a result, the matter was not briefed for the trial court by either the Respondent or Appellant.

In *Missouri Health Care Ass'n v. AG*, MHCA brought a declaratory judgment to challenge the constitutionality of a House Bill, and named the Attorney General of the State of Missouri as the sole defendant.[51] The Attorney General argued in that case that he was not the proper defendant.[52] This Court held that the state official empowered to enforce a law that is challenged through a declaratory judgment action, i.e., the Attorney General, is the proper defendant.[53] It is well settled in Missouri that "the Attorney General is a sworn officer of the State charged with, among others, important duties in the enforcement of the criminal laws..."[54]

Glick v. Allstate Ins. Co., which was relied upon by the Trial Court, is inapplicable, and does not support the Trial Court's Judgment.[55] In that case, a father and two children were killed in an automobile accident. The wife, who subsequently remarried, instituted a lawsuit on behalf of herself and her son for the wrongful deaths of her husband and the children. After the trial court denied her motion in limine to prohibit the defendants from disclosing the fact that she had remarried by mentioning her new last name during voir dire, she voluntarily

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[51] 953 S.W.2d 617 (Mo. 1997).

[52] *Id.* at 620-621.

[53] *Missouri Health Care Ass'n* at 621.

[54] *State v. Kennedy*, 123 S.W.2d 118, 123 (Mo. 1938).

[55] 435 S.W. 2d 17 (Mo. App. 1968).

dismissed her lawsuit. She then re-filed her wrongful death suit and also filed a declaratory judgment action against the insurers who were defending the defendants in the wrongful death action.

In her declaratory judgment action, she asked the court to decide whether in the anticipated trial of their pending wrongful death claim, defending counsel would be permitted to inquire of the jury panel on voir dire examination in such a way as to disclose the fact of her remarriage. The defendant insurers then filed motions to dismiss, which for obvious reasons, were granted.

Aside from the totally irrelevant and unbelievable nature of the *Glick* lawsuit, the Plaintiffs in *Glick* were not challenging the constitutionality of a state law, and had not sued the official responsible for defending challenges to the constitutionality of Missouri's laws. In addition, they were not being criminally prosecuted, and were not being subjected to enhanced punishment under a law that is unconstitutional, and which the Attorney General is charged with not only defending, but enforcing.

B. The Appellants have a present and personal stake in the resolution of the constitutional claims they raise and the case is ripe for declaratory relief

The Trial Court also opined that the "[Appellants] are seeking nothing more than an advisory opinion…*in cas*e they need it in their criminal cases and *in case* it

can help them," and as a result, declined to grant a declaratory judgment on the grounds that the Appellants do not "have any present and personal stake in the resolution of the constitutional claims they raise."[56]

Essentially, the Trial Court believed – erroneously – that the Appellants' claims for declaratory relief cannot be ripe unless and until there is absolutely no question or uncertainty that the Appellants are (or will be) subject to punishment in their criminal cases, and the statute challenged as unconstitutional is (or will be) enforced.[57] This is clear from the language of the Trial Court's FINAL JUDGMENT, explaining its reasons for declining to grant a declaratory judgment.[58] However, and again with all due respect, the Trial Court is incorrect

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[56] LF II, 75-76.

[57] LF Vol. II, 70-82.

[58] LF Vol. II, 70-82 and LF Vol. II, 76-77 (An assertion "that Plaintiffs…actually *will receive* a lesser punishment in their criminal cases if HB 1715 is declared unconstitutional…would establish the necessary present and personal interest to allow [Appellants] to litigate their constitutional claims," but "[Appellants'] separate criminal cases are not far enough along to know what issues will (and will not) be relevant. For instance, [Appellants] do not know…whether *any* [Appellant] will be given *any* sentence because none of them…have yet pled guilty or been found guilty of their charges. Any of them might be, and all of them could

in its ruling on this issue, and the Appellants are entitled to declaratory relief in this case.

The law on this issue is well settled and clearly in the Appellants' favor. The stated purpose of the declaratory judgment act is "to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."[59]

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be, acquitted of the underlying conduct. If so, the constitutionality (or lack thereof) of HB 1715 will be wholly irrelevant and this Court's declaration (if given) would be meaningless as to these parties."); LF Vol. II, 77-78 ("If [Appellants'] charges are dropped, or if their separate prosecutors do not seek to enhance [Appellants'] charges when [Appellants'] several cases actually go to trial, the constitutionality of HB 1715…will be wholly irrelevant. In those events, therefore, any declaration this Court would have given in this case would be of no use to these parties."); LF Vol. II, 79 ("[M]any of the decisions that the prosecutors and/or the Judges in [Appellants'] separate criminal cases have yet to make could result in a complete disposition of those cases at trial without needing to address the constitutionality of HB 1715.").

[59] RSMo. § 527.120 (2000).

It is for this reason that "[t]here can be a ripe controversy before a statute is enforced."[60]

As so aptly stated by this very Court in the *Planned Parenthood* case:

> "Parties need not subject themselves to a multiplicity of suits or litigation or await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction. … ***Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act***. … [I.e.,] a petitioner need not expose himself to enforcement before challenging a statute. One must assume the State will enforce its laws."[61]

For two of the three remaining Appellants in this lawsuit, the trigger has already been pulled, and the bullet has been shot from the gun while this case has been pending. On October 8, 2010, Appellant Schaefer pleaded guilty to the Class C felony of DWI and was sentenced to five years in prison as an aggravated DWI

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[60] *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 739 (Mo. 2007) (citing *Mo. Health Care Assn. v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997)).

[61] *Id.* at 739 (emphasis added).

offender in exchange for a recommendation for a suspended execution of sentence, five years probation, and her completion of DWI court.[62] Two of the predicate priors were two municipal DWI SIS dispositions. Unfortunately, Schaefer was forced to choose between litigating a motion to declare RSMo. § 577.023 unconstitutional in her criminal case and then hoping that the trial court granted her motion, or losing a plea recommendation that afforded her the opportunity to avoid a seven year prison sentence. She now has a felony conviction.

Under the Trial Court's analysis, Schaefer now has a "present and personal stake in the resolution of the constitutional claims" being raised because she has both plead guilty, and been found guilty, and sentenced under an unconstitutional law.[63] Had Judge Wilson properly ruled on the merits of this case, Schaefer would have been able to avoid choosing between two bad options...stay out of jail, but suffer a felony conviction, or refuse the plea offer, litigate the motion, and risk going to prison for seven years if the criminal court judge ruled against her motion. In the later case, she would have likely been sitting in prison waiting for a decision from this Court by way of direct appeal.

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[62] See Missouri Case.net, *St. v. Michelle Marie Schaefer*, 0911-CR00169-01, Page 8, Docket entries.

[63] LF Vol. II, 75-76.

In Price's case, mysteriously, the local prosecutor never attempted to enhance the charge, and Price was offered and accepted a suspended imposition of sentence following his plea of guilty to a Class B Misdemeanor.[64] Otherwise, Price could have been charged as a persistent offender, a Class D felony, based on his two prior offenses, one of which included a SIS disposition in the Washington, Missouri municipal court. The bullet is out of the gun for him as well.

Appellant Cindy Brandt is still standing with her blindfold on, and her back against the wall, while her DWI charge is still pending in the St. Charles County Circuit Court. [65] The State is using her prior municipal DWI SIS disposition to enhance the offense to a Class A misdemeanor.[66] In Brandt's case, the trigger is cocked and the gun is pointed squarely between her eyes.

For all of the Appellants, there has been clear "uncertainty and insecurity" as to the class of crime and possible punishment they *could face, would face, should* face and/or *did face*. The pleadings, stipulations and affidavits indicate that they

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[64] See Missouri Case.net, *St. v. Dale D. Price*, 09AB-CR01870, Docket Entries, P.6.

[65] See Missouri Case.net, *St. v. Cindy L. Brandt*, 0911-CR02679, Charges, Judgments and Sentences.

[66] LF Vol. II, 55.

had criminal prosecutions pending and that the State may seek, threatened to seek, or had sought prior, persistent, aggravated or chronic offender status.[67] As Appellants' counsel can attest, there has also been absolute "uncertainty and insecurity" as to how they should proceed in their respective criminal cases.[68] How could anyone logically say that the Appellants have not had a present and personal stake in the game from the very beginning? The trial court erred.

C. The doctrine of abatement does not apply to preclude this action

Although the Trial Court failed to specifically address the issue in its Judgment, the Respondent previously claimed in its Motion for Summary Judgment that the doctrine of abatement bars Appellants' actions.[69] In support of its position, the Respondent argued that (1) the doctrine of abatement applies to dismiss claims in a civil proceeding related to claims in a criminal prosecution, (2) the requirements for abatement are satisfied in the Appellants' case, and (3) the doctrine of abatement is a one-way street, allowing dismissal of a civil proceeding

[67] LF Vol. I, 11 and 13; LF Vol. II, 16.

[68] Brandt's attorney fully expects that an amicable disposition will occur if the charge is reduced to a Class B misdemeanor following a favorable ruling by this court.

[69] LF Vol. II, 10-13.

subsequent to a criminal prosecution, but not allowing dismissal of a criminal prosecution subsequent to a civil proceeding.[70] The Trial Court had earlier rejected the Respondent's arguments in connection with the Defendant's (i.e. Respondent's) Motion to Dismiss.[71]

1. The doctrine of abatement does not apply to require dismissal of a civil proceeding filed subsequent to a criminal prosecution

In Respondent's Motion to Dismiss in the Trial Court, Respondent relied upon *Meyer v. Meyer* as support for the argument that abatement does, in fact, apply to require dismissal of a civil proceeding filed subsequent to a criminal prosecution.[72] The Respondent quoted language in *Meyer* which, as Respondent says, sets forth "the standard for when the doctrine of abatement operates to dismiss a lawsuit:

> "[W]here a **claim** involves the same subject matter and parties as a previously-filed **action** so that the same facts and issues are presented, resolution should occur through the prior **action** and the second **suit** should be

[70] LF Vol. II, 10-13.

[71] *See* LF Vol. I, 54-62. Judge Callahan ruled on Respondent's Motion to Dismiss.

[72] 21 S.W.3d 886 (Mo. App. E.D. 2000).

> dismissed."[73] This is because the court in which a **lawsuit** is first filed obtains exclusive jurisdiction over the **action**.[74] In deciding to dismiss the second **action**, the court "may look beyond the [Appellants'] **petition** to the facts alleged in the movant's motion and supporting evidence attached thereto."[75]

First, it should be pointed out that *Meyer* involved two separate and identical civil actions related to a probate controversy, not a criminal prosecution and a civil action.[76] Second, examination of the language used by the court in *Meyer* leads to only one conclusion: that abatement analysis is limited to situations where there are two pending *civil actions*.

The *Meyer* Court refers to "the second **suit**" being dismissed, not permitting two "**suits** to continue," and speaks of the court in which a "**cause of action**" is first filed.[77] It also talks in terms of looking beyond the **"petition."** All of these terms are used exclusively in a civil law context.

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[73] *Id.* at 889-90.

[74] *Id.*

[75] LF Vol. I, 55 (quoting *Meyer*, 21 S.W.3d 886 at 890) (emphasis added).

[76] LF Vol. I, 55-56.

[77] *Meyer* at 890.

Despite extensive research on the part of the Appellants, the Appellants have been unable to find a single Missouri case where any Court has held that the doctrine of abatement precludes declaratory relief when a related criminal matter has already been filed. The doctrine of abatement appears to be limited to situations involving only civil cases and is not applicable in this case.

2. The requirements for abatement are not satisfied

Even if abatement did apply to a pending criminal prosecution, the requirements would still not be satisfied.

The Respondent argued below that abatement "applies when the 'object and purpose of the respective **[proceedings]** is the same.'"[78] Respondent then argued that the "object and purpose" of both the criminal case and the declaratory judgment action was to determine whether [Appellants'] sentences should be enhanced under § 577.023, RSMo."[79] That is simply not the case.

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[78] LF Vol. II, 11. What the *Meyer* court actually said was that, "Though different **actions** were filed by the parties, the object and purpose of the respective **actions** is the same." *Meyer* at 886. Of course, the Respondent did not use words like **actions** or **suits** when referring to the Appellants' criminal prosecutions, but instead chose the word, "proceedings" so as not to emphasize the fact that the doctrine of abatement is really a civil law doctrine.

[79] LF Vol. II, 11 and 12.

The object and purpose of criminal prosecutions are to determine the guilt or innocence of the individuals charged and, if applicable, to sentence the guilty parties according to the sentencing guidelines provided for the charged crimes. The object and purpose of this lawsuit is to assess the constitutionality of a criminal statute under which the Appellants have been or will be punished.

3. The doctrine of abatement is not applicable because if applied to criminal cases, it would necessarily require that criminal cases be dismissed if filed after the filing of a declaratory judgment action

If the Respondent is correct that the doctrine of abatement is applicable to cases involving a criminal prosecution and a civil action, and that the object and purpose herein are the same, then previously-filed actions seeking declaratory relief would require the abatement or dismissal of a subsequently-filed criminal prosecution.[80] That is another reason *not* to apply the doctrine of abatement in this situation. In other words, it has to be a two-way street.

When presented with this argument in the Trial Court, the Respondent claimed that abatement "could never require dismissal of a criminal prosecution, but it can work the opposite way, dismissing a civil proceeding," arguing, that this

[80] LF Vol. I, 69.

would otherwise create "a race to the court house."[81] The Respondent wants the cake and to eat it, too, and of course, cited no authority for applying the doctrine in only one direction, or for applying it at all for that matter. Appellants submit that "(w)hat is 'sauced' for the goose is 'sauced' for the gander."[82] If the Court is going to apply the doctrine of abatement between a criminal prosecution and a civil action, it should be applied for the benefit or detriment of both the goose and the gander. [83]

D. RSMo. § 577.023 is a substantive law

The Respondent also contended in its Motion for Summary Judgment that because the House Bill 1715 version of RSMo. § 577.023 was repealed and reenacted by House Bill 62, "[d]eclaring the challenged…law void and unconstitutional or enjoining the State…from enforcing or using the…law is impossible because it is a *procedural law*, which is no longer in effect and will never be applied to [Appellants]."[84] This is an incorrect statement of the law.

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[81] LF Vol. II, 12.

[82] *Booth v. Dir. of Revenue*, 34 S.W. 3d 221, 225 (Mo.App. E.D. 2000).

[83] Price was charged after the filing of the Petition in this case. If abatement is applicable, which it is not, the criminal charges would have been subject to a motion to dismiss.

[84] LF Vol. II, 7.

The Appellants' alleged criminal offenses occurred after the effective date of House Bill 1715, and prior to the effective date of House Bill 62. However, the applicable law for purposes of sentencing is the law in effect on the date the alleged offenses occurred.[85] In other words, in Appellants' cases, sentencing as a prior, persistent or aggravated DWI offender falls under the HB 1715 version of RSMo. § 577.023 that became law on July 3, 2008.[86]

If this Court finds that 1715 and the amendment to RSMo. § 577.023 that it created are unconstitutional, the immediately preceding statute automatically comes into force again.[87] That means that the Appellants would have to be sentenced under the 2008 version of § 577.023, and *Turner* would apply to bar the use of municipal DWI SIS dispositions for enhancement purposes.[88]

Furthermore, if it is determined that a statute of the type in question is only *procedural* in nature, a criminal defendant would necessarily be subject to greater

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[85] See *State v. Coomer*, 888 S.W.2d 356 (Mo.App. S.D. 1994).

[86] § 577.023 RSMo. (Cum. Supp 2008).

[87] *State ex rel. Waterworth* v. *Clark*, 275 Mo. 95 (Mo. 1918).

[88] See also RSMo. § 3.066(1), requiring the Missouri Reviser of Statutes to reprint the statute as it existed in the revised statutes of Missouri prior to the enactment of a bill that the Missouri Supreme Court or a federal court later determines was unconstitutional on procedural grounds.

punishment if the legislature subsequently passed legislation increasing the penalties before the defendant's case could be disposed of. This runs contrary to the *ex post facto* prohibition of the Constitution.[89]

E. Allowing a criminal defendant to challenge procedurally unconstitutional statutes by seeking declaratory relief against the Attorney General in Cole County facilitates judicial economy by allowing the opportunity for such issues to be litigated before a single trial court, with direct review by this Court, instead of litigating the same issue repeatedly before multiple trial courts from around the state.

The Respondent stated below that "[t]he principles behind abatement are (1) judicial economy – to use one proceeding to adjudicate related claims and (2) fairness to the parties – to not have to appear in multiple courts to litigate related claims."[90] The Appellants could not agree more.

If this Court were to find that the doctrine of abatement applies and prevents a criminal defendant from seeking declaratory relief from a procedurally unconstitutional statute in a situation such as this, it will have the effect of undermining, not advancing, the primary purpose behind the abatement doctrine.

Instead of having an issue of the type presented in this case ruled upon by

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[89] See *State v. Coomer*, 888 S.W.2d 356 (Mo.App. S.D. 1994).

[90] LF Vol. II, 10.

one circuit court judge in Cole County and then by this Court, the issue could well be litigated and ruled upon numerous times in front of numerous criminal courts throughout the State, with the likelihood of inconsistent rulings on the constitutionality of the statute.

F. Allowing a criminal defendant to challenge a procedurally unconstitutional law by means of seeking declaratory relief in a case such as this will serve as a deterrent to the State legislature against disregarding our Constitutional requirements for the passage of laws.

During the 2010 Legislative session, 1,274 bills were introduced in the House of Representatives. Four hundred ninety were introduced in the Senate. All together, 1,764 new laws were introduced in the General Assembly. Members of the legislature serve in a part-time capacity, and the vast majority of them are non-lawyers. That is why it is critical that our constitutional mandates for the passage of laws be followed.

We must insist that the title to legislative proposals fairly reflect their content, that the purpose of the bill be clearly expressed in that title, and that the original purpose expressed in that title not be changed in the course of the legislative process for the sake of convenience or political opportunity, or as a result of political pressure.

It is all too easy for the power brokers within our General Assembly to wheel and deal in the corridors and back rooms of the state capitol, and to place the needs of special interest groups and campaign contributors above the requirements of our constitution. That is why this Court must be vigilant. That is why members of the defense bar must be vigilant. That is why this Court should send the legislature a message and declare the procedurally defective law to be unconstitutional.

II. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW BY DENYING THE APPELLANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE APPELLANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW FOR THE REASON THAT HB 1715 AND THE 2008 AMENDMENT TO RSMo. § 577.023 WERE PASSED BY THE LEGISLATURE IN VIOLATION OF ARTICLE III, §§ 21 and 23 OF THE MISSOURI CONSTITUTION.

Summary judgment sought "shall be entered forthwith if a motion for summary judgment and response thereto show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[91] There was no genuine issue as to any material fact. Appellants submit they are entitled to a judgment declaring House Bill 1715 and the 2008 amendment to RSMo. § 577.023 unconstitutional as a matter of law because they were passed by the legislature in violation Article III, §§ 21 and 23 of the Missouri Constitution.

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[91] *MECO Sys. v. Dancing Bear Entertainment,* 948 S.W.2d 185, 186 (Mo. App. S.D. 1997), quoting Supreme Court Rule 74.04(c)(3).

Summary of 1715's History in Legislature

When House Bill 1715 was introduced on January 17, 2008, it related solely to **watercraft** and was titled as such.[92] Prior to its passage by the House, it was referred to the House Special Committee on State Parks and Waterways.[93] Referral to such committee would be consistent with legislation dealing with watercraft, not automobiles traversing the state's highways.

When 1715 was perfected in the House, it related solely to **watercraft** and was titled as such.[94] When 1715 was passed by the House on April 2, 2008, it related solely to **watercraft** and was titled as such.[95] When it was read for the first time in the Senate, it related solely to **watercraft** and was titled as such.[96]

Once in the Senate, 1715 was then sent to the Senate Financial and Governmental Organizations and Elections Committee.[97] Like the House Committee referral to Parks and Waterways, this committee assignment on a bill

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[92] LF Vol. I, 15.

[93] LF Vol. I, 81.

[94] LF Vol. I, 82.

[95] LF Vol. I, 82.

[96] LF Vol. I, 82.

[97] LF Vol. I, 82.

related to **watercraft** provided little indication that the bill would eventually include an amendment to the state's DWI penalty laws.

The Senate Committee on Financial and Governmental Organizations and Elections recommended that a Senate Committee Substitute for House Committee Substitute for House Bill 1715 "Do Pass."[98] 1715 was titled, "An Act to repeal sections 304.157, 306.010, 306.015, 306.100, 306.111, 306.112, 306.114, 306.117, 306.124, 306.125, 306.132, 306.147, 306.163, 306.190, 306.221, 306.228, 565.024, 565.082, 577.023, and 577.080, RSMo, and to enact in lieu thereof twenty-one new sections relating to **watercraft**, with penalty provisions and an emergency clause for a certain section."[99]

On May 7, 2008, the House was informed of the Senate's actions and concurrence of the House was requested.[100] On May 16, 2008, the Senate Committee Substitute for House Committee Substitute for House Bill 1715, as amended, relating to **watercraft**, was truly agreed to and passed by the House.[101]

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[98] LF Vol. I, 50-174 and LF Vol. I, 82.

[99] LF Vol. I, 150-174 and LF Vol. I, 83.

[100] LF Vol. I, 83.

[101] LF Vol. I, 83.

After being approval by both Houses, 1715 was presented to and signed by Governor Blunt on July 3, 2008, and became effective on that date.[102]

House Bill 1715 as originally introduced, as reflected by its title, sought to change the state's **watercraft** laws**.** As enacted however, it changed numerous sections, including RSMo. § 577.023, which does not relate to **watercraft**, has no natural connection to **watercraft**, and is not a means to accomplish the subject of "watercraft" as expressed in the title.

Violation of Original Purpose Limitation

Mo. Const. Art III, §21 prohibits amending any bill through its passage in either house as to change its original purpose while Mo. Const. Art III, § 23 provides that; "No bill shall contain more than one subject which shall be clearly expressed in its title…," and "The purpose of these two sections is 'to keep individual members of the legislature and the public fairly apprised of the subject matter of pending laws and to insulate the governor from 'take-it-or-leave-it' choices when contemplating the use of the veto power.'"[103] They are constitutional limitations that "'function in the legislative process to facilitate orderly procedure, avoid surprise, and prevent 'logrolling,' in which several matters that would not

[102] LF Vol. I, 84.

[103] *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 326 (Mo. 2000) *quoting Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. Banc 1997).

individually command a majority vote are rounded up into a single bill to ensure passage.'"[104] They are also designed to "defeat surprise within the legislative process. It prohibits a clever legislator from taking advantage of his or her unsuspecting colleagues by surreptitiously inserting unrelated amendments into the body of a pending bill."[105]

Section 21 seeks to restrict the introduction of subject matter into legislation "that is not germane to the object of the legislation or that is unrelated to its original subject."[106] "'Germane is defined as: 'in close relationship, appropriate, relative, pertinent. Relevant to or closely allied.'"[107]

"Alterations that bring about an extension or limitation of the scope of the bill are not prohibited; even new matter is not excluded if *germane*. The original purpose of the bill must, of course, be measured at the time of the bill's introduction."[108]

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[104] *Stroh Brewery at 325.*

[105] *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. 1994).

[106] *Id. at 326.*

[107] *C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 327 (Mo. 2000)* quoting *Black's* Law Dictionary 687 (6th ed.).

[108] *Id.*

As introduced, House Bill 1715 related to **"watercraft."** While the breadth of the term "**watercraft**" is self evident, it is not so pervasive as to include redefining the statutory term "conviction" as it is used to characterize prior acts necessary to enhance the recidivism status of one who operates a motor vehicle upon the highways of this state while in an impaired condition, as was done with the bill's amendment to RSMo. § 577.023.16. One is not "fairly apprised" by the title of House Bill 1715 of its change in the criminal law applicable to those operating motor vehicles on non-aquatic surfaces.

Violation of the Clear Title Limitations

If the title of a bill contains a particular limitation or restriction, a provision that goes beyond the limitation in the title is invalid because such title affirmatively misleads the reader.[109] Stated more simply, "the rule is that the title to a bill cannot be underinclusive."[110]

In *National Solid Waste Management Assoc*., the stated title of Senate Bill 60 was "An Act to repeal sections ...relating to solid waste management, and to enact in lieu thereof twenty new sections relating to the same subject, with penalty provisions."[111] One of these new sections, added by amendment, pertained to

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[109] *Fust v. AG*, 947 S.W.2d 424, 429 (Mo. 1997).

[110] *National Solid Waste Management Assoc*., 964 S.W.2d 818, 821 (Mo. 1998).

[111] *Id.* at 820. (emphasis added).

hazardous waste management.[112] The bill was challenged as unconstitutional under Art. III, Section 23, because the title does not clearly describe a bill that includes hazardous waste management.[113]

This Court stated that "[t]he title's failure to refer also to hazardous waste management or to an all encompassing category of environmental control, or something similar, is a fatal defect."[114] The Court found that "[t]he irreconcilable problem is that the bill also includes the particular subject of hazardous waste management and thus does not conform to the title. This lack of conformity makes the title affirmatively misleading."[115] The Court found the bill in *National Solid Waste Management Assoc.* unconstitutionally violated the "clear title" rule of Art. III, Section 23.[116]

Here, as finally passed, 1715's title was described as being "related to **watercraft**."[117] As in *National Solid Waste Management Assoc*., 1715 is unconstitutional under Art. III, Section 23, because the title does not clearly

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 821.

[116] *Id.*

[117] (LF Vol. I, 82 and 150-174).

describe the bill. Specifically, 1715's title does not clearly describe a bill that includes penalty provisions for the operation of **automobiles or other land based** vehicles.

Furthermore, just as in *National Solid Waste Management Assoc.*, 1715's failure to refer also to automobiles or other land based vehicles, or to an all encompassing category such as transportation, or something similar, is a fatal defect. It includes the particular subject of "penalty provisions for the operation of automobiles or other land based vehicles while intoxicated" and thus does not conform to the title, and this lack of conformity makes the title affirmatively misleading. 1715 is unconstitutional because it violates the "clear title" rule of Art. III, Section 23.

In *St. Louis County Water Company v. Public Service Commission*, the Court considered a title challenge to Senate Bill 583, "[a]n Act relating to the protection and safety of the public by providing notices to operators of underground facilities through regulation of demolition, excavation and blasting."[118] In its analysis the Court observed,

> "The title of Bill No. 583 is not general. It refers to "the protection and safety of the public," but it does not stop there. Instead, it adds: "by providing notices to operators

[118] 579 S.W.2d 633, 634 (Mo. App. E.D. 1979).

> of underground facilities." There then follows a phrase of somewhat doubtful meaning, but apparently intended to state that the "protection and safety" is to be provided by "notices to operators of underground facilities" through the process of "regulation of demolition, excavation and blasting." The use of these particulars results in them becoming the "subject of the Act," and the contents of the Act "must conform to the title as expressed in the particulars." The words of the title could not possibly be construed to include or to refer to the imposition of a duty on a "public utility, municipal corporation or other person," which provides "such service," to "fully" maintain property of which it is not the owner. Although the language of the amendment to paragraph 3 of § 319.015 is of questionable meaning, any reasonable construction is totally foreign to and outside the limits of the particulars constituting the subject of the Act."[119]

The Court continued, "[n]o reasonable person could read the title and have reason to believe or suspect that somewhere in the bill there was a provision

[119] *Id.* at 636.

imposing a duty on the suppliers of 'such service' to assume 'full maintenance' of the property of others. The amendment is 'beyond the title,' and for that reason violates the provisions of Article III § 23 Constitution of Mo., and is void."[120]

Likewise, no reasonable person could read "related to **watercraft**" and believe or suspect that somewhere in the bill there was a provision relating to land based criminal conduct.

Violation of the Single Subject Rule

"No bill shall contain more than one subject which shall be clearly expressed in its title."[121] "By limiting each bill to a single subject and requiring that amendments not change a bill's original purpose, the issues presented by each bill can be better grasped and more intelligently discussed."[122]

The main test in determining if a bill violates the single subject rule is laid out in *Hammerschmidt*: "a 'subject' within the meaning of article III, section 23, includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation."[123] However, "the single subject test is not whether

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[120] *Id.*

[121] Mo. Const. Article III, § 23.

[122] Ruud, "No Law Shall Embrace More Than One Subject", 42 Minn.L.Rev. 389, 391 (1958).

[123] *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. 1994).

individual provisions of a bill relate to each other. The constitutional test focuses on the subject set out in the title. We judge whether a particular provision violates the single subject rule by examining the individual provision under consideration to determine if it fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose."[124]

In *Hammerschmidt*, the original purpose and single subject core of the bill was to "amend laws relating to elections."[125] The bill was amended during the legislative process to include a change to the form of county government, specifically to allow counties that met certain qualifications to adopt a county constitution. The Missouri Supreme Court ruled "the bill sent by the legislature to the governor contained two subjects."[126] The Court further held "[t]he amendment authorizing a county to adopt a county constitution does not fairly relate to elections, nor does it have a natural connection to that subject."[127]

Here, as finally passed, 1715 carried the title "An Act To repeal sections ... and to enact in lieu thereof twenty-two new sections relating to **watercraft**, with a penalty provision and an emergency clause for a certain section." The original

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[124] *Fust v. AG*, 947 S.W.2d 424, 428 (Mo. 1997).

[125] *Hammerschmidt* at 103.

[126] *Id*. at 103.

[127] *Id.*

purpose and single subject core of this bill, as reflected in the title, was to amend the state's **watercraft** laws. Like in *Hammerschmidt*, 1715 was amended to include a second subject, i.e., new penalty provisions relating to the operation of automobiles or other land based vehicles. This second subject does not fairly relate to **watercraft**, nor does it have a natural connection to that subject.

If this Court is to hold true to the mission expressed by the People of this Great State in adopting Art. III §§ 21 and 23 of their Constitution, then this Court must find 1715 was passed by the legislature in violation of the law. It is imperative that this Court recognize and enforce the People's demands. House Bill 1715 is prime exemplification of what should not be allowed to happen. Under the careful watch of this Court, it won't.

Conclusion

This Court should set aside and vacate the Trial Court's judgment granting the Respondent's Motion for Summary Judgment and Dismissal of the Appellants Claims. Pursuant to Mo. Sup. Ct. R. 84.14, the Court should dispense with remand, render the judgment that the trial court should have rendered, and finally dispose of this case. There are no contested issues of material fact, and the only issues left to be decided are questions of law. The record is such that this Court can readily decide the case. Because the resolution of the constitutional issue depends entirely on facts that occurred before 1715 was passed, the facts necessary to adjudicate the underlying claim are fully developed. The accuracy of judicial fact-finding will not be aided by a delay.[128]

The Appellants request that the Court find and declare that 1715 and the 2008 amendment to RSMo. § 577.023 are unconstitutional for the reasons stated herein, order that the State be enjoined from enforcing same, and grant such other and further relief as this Court deems just and proper.

Finally, the Appellants request that the Court award them reasonable attorney's fees and costs, and that Appellants' counsel be granted leave at the

[128] If this case is remanded to the trial court below, a third judge would take over responsibility for this case, as Daniel Green defeated Judge Wilson during the general elections.

appropriate time to submit their affidavits setting forth an itemized statement of their fees and expenses.

Respectfully submitted,

CARL M. WARD #34295
WARD | HOLLINGSHEAD
216 West Main Street
Washington, Missouri 63090
Telephone: (636) 390-0070
Facsimile: (636) 390-0072
Email: c.ward@carlwardlaw.com
Website: www.carlwardlaw.com

JEREMY D. HOLLINGSHEAD #60447
WARD | HOLLINGSHEAD
216 West Main Street
Washington, Missouri 63090
Telephone: (636) 390-0070
Facsimile: (636) 390-0072
Email: j.hollingshead@carlwardlaw.com
Website: www.carlwardlaw.com

JEFFREY S. EASTMAN #31177
KELLEHER & EASTMAN
403 NW Englewood Road
Gladstone, Missouri 64118-3969
Telephone: (816) 452-6030
Facsimile: (816) 455-0968
Email: jse@keleher-eastman.com
ATTORNEYS FOR APPELLANTS

Certificate of Service

The undersigned hereby certifies that on this 12th day of January, 2011, one true and correct copy of the foregoing brief, and one CD containing a true and correct copy of the foregoing brief, were mailed, postage prepaid, to:

JEREMIAH J. MORGAN
Deputy Solicitor General
Office of the Missouri Attorney General
207 West High Street
Jefferson City, Missouri 65102
jeremiah.morgan@ago.mo.gov
ATTORNEY FOR RESPONDENT

CARL M. WARD #34295

Rule 84.06 Certificate

As required by Rules 84.06(c) and 84.06(g), the undersigned certifies that:

1. This brief complies with the limitations contained in Rule 84.06(b);

2. That there are 8,016 words in the brief (including footnotes, but not including the cover, certificate of service, certificate required by Rule 84.06(c), signature block, or appendix) according to the word counting feature of Microsoft Office Word 2007.

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CARL M. WARD #34295