In the Missouri Court of Appeals
Eastern District

DIVISION FIVE

IN RE: MISSOURI STATE PUBLIC DEFENDER DISTRICT 21, ST. LOUIS COUNTY TRIAL OFFICE.	)	No. ED106576
	)	Appeal from the Circuit Court of of St. Louis County 18SL-CC00129
	)	Honorable Douglas R. Beach
	)	Filed: December 26, 2018

OPINION

1. Introduction.

This is the first time this Court has been asked to construe § 600.063[1], a 2013 effort by the legislature to address Missouri public defender "caseload concerns" by giving to each district defender the authority to request relief from the presiding judge on behalf of individual public defenders working in the district office. Here, the St. Louis County district defender filed a motion pursuant to § 600.063 on behalf of 16 of the 20 public defenders working in his office claiming their caseloads were excessive and further claiming that those 16 public defenders "will be unable to provide effective assistance of counsel" unless the presiding judge granted certain of the measures of relief authorized by the statute. § 600.063.

[1] All statutory citations are to RSMo 2016.

Before we consider the merits of this appeal, we must first determine the nature of the claims this statute seeks to create because § 600.063 is ambiguous in this regard. Here the presiding judge treated the matter before him as a court-tried case and applied a preponderance of the evidence burden of proof to the district defender's claims. But it is not clear on the face of the statute whether the legislature envisioned a court-tried civil action or whether the district defender's claims should be decided as an administrative action pursuant to administrative procedures by the presiding judge sitting in his role as the circuit court's chief administrative officer.

Based on our analysis pursuant to the applicable rules of statutory construction set forth below, we conclude that the legislature intended that the presiding judge conduct administrative proceedings to determine § 600.063 claims, not a court-tried case which would entail the full breadth of the rules, procedures, and standards applicable to civil actions. Therefore, we would reverse this case with directions that the presiding judge conduct such a procedure consistent with this opinion but due to the issues of general interest and importance presented here, this case is transferred to the Missouri Supreme Court pursuant to Rule 83.02[2].

2. We find § 600.063 to be ambiguous and our statutory construction demonstrates that the legislature did not intend to create a new civil action.

As with any statute, we apply the following standards to our review of § 600.063. Where the language of a statute is unambiguous, there is nothing to construe and we will give effect to the language as written without resorting to rules of statutory construction. *Doe v. St. Louis Community College*, 526 S.W.3d 329, 336-7 (Mo.App.E.D. 2018); *Brady v. Curators of the Univ. of Mo.*, 213 S.W.3d 101, 107 (Mo.App.E.D. 2006). Only in those cases "[w]here the language of

[2] All rules references are to the Missouri Supreme Court Rules 2018.

the statute is ambiguous or where its plain meaning would lead to an illogical result, will this court look past the plain and ordinary meaning of a statute." *Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 106 (Mo.App.W.D. 2008) (internal quotations and citations omitted).

A statute or regulation is ambiguous when the legislative intent cannot be determined from the plain meaning of the language. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909-10 (Mo.banc 2006). Under the principles of statutory construction, courts should first consider the ambiguous language in the context of "the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo.banc 2014); *Dep't of Soc. Servs. v. Senior Citizens Nursing Home Dist.*, 224 S.W.3d 1, 9 (Mo.App.W.D. 2007) ("Context determines meaning.") (citing *Keller v. Marion Cty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo.banc 1991)). This principle is known by the maxim *noscitur a sociis*—a word is known by the company it keeps. *Union Elec. Co.*, 425 S.W.3d at 122.

Second, the court should read one provision of a statute in harmony with the entire section. *Gott v. Dir. of Revenue*, 5 S.W.3d 155, 159-60 (Mo.banc 1999) ("The provisions of a legislative act are not to be read in isolation, but are to be construed together and read in harmony with the entire act."). Third, if the statutory language is unclear from consideration of the statute alone, a court "should interpret the meaning of the statute in pari materia with other statutes dealing with the same or similar subject matter." *Union Elec. Co.*, 425 S.W.3d at 122. In construing the meaning of an ambiguous enactment, a court should only adopt reasonable interpretations, disregarding constructions that would lead to absurd results. *Senior Citizens Nursing Home Dist.*, 224 S.W.3d at 9.

We find that § 600.063 is ambiguous with regard to the rules, standards, and procedures the legislature intended the presiding judge to apply when considering motions filed pursuant to the statute. As a result, we have applied the foregoing rules of statutory construction to § 600.063 in reaching our conclusions regarding the meaning of the statute.

As a preface to our discussion, we note that due to the statute's murky and ambiguous language and its near silence[3] as to the procedures applicable to these claims, we are not critical of the presiding judge's decision to treat these § 600.063 claims as court-tried civil actions, though we conclude in this opinion that he was in error. While the statute may seek to tackle a complex matter, public defender caseload concerns would almost certainly be better addressed by the legislature through budgetary action or by enacting statutory caseload protocols or standards rather than by tasking the judicial branch with the potentially overwhelming responsibility of considering case by case whether each individual public defender who claims a caseload issue will in fact be unable to provide effective assistance of counsel in every case that is the subject of a § 600.063 motion.

Beyond the judicial time and resources required to administer § 600.063, the statute also involves Missouri courts in enormously difficult questions of proper procedure and interpretation (many, though not all, detailed in this opinion) and for the first time requires our courts to determining *prospectively* whether counsel will be able to provide effective assistance. Of course, although in *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo.banc 2012), our Supreme Court recognized that the right to effective assistance is a "prospective right," the judicial branch has heretofore been called to consider the issue of effective assistance only

[3] Though § 600.063 is silent regarding the record to be kept at § 600.063 conferences, recently our Western District colleagues in *Petsch v. Jackson Cty. Prosecuting Attorney's Office*, 2018 WL 3118455 (Mo.App.W.D. 2018) held that the conference must be on the record. *Id.* at *5-*6.

retrospectively—using the context-dependent, prejudice-focused test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To attempt to apply the *Strickland* test prospectively to representation that has not yet occurred, even in an administrative adjudication setting, would be difficult and likely largely reliant on speculation.

The bottom line is that if the legislature intended that Missouri presiding judges treat § 600.063 claims as adversarial civil actions, it was entitled to do so. A cursory review of Chapters 521 through 538 of the Revised Statutes of Missouri pertaining to statutory causes of action demonstrates that when the legislature intends to create a civil action it knows how to do it. *See, e.g.*, § 538.210.1 (statutory cause of action for damage against a health care provider); § 537.123 (civil action for damages for passing bad checks); § 537.353 (liability for damage or destruction of field crop products). Here, it did not do so.

Moreover, since the legislature has already made clear that in Missouri there is only one type of case known as a "civil action," interpreting § 600.063 as creating a civil action would require the application of our well-established and mandatory rules of civil procedure, discovery, evidence, burdens of proof, and standards of review. § 506.040; *see also* Rule 42.01; *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976); Rule 56.01; Rule 73.01; Rule 41.01(a). But, again, we do not believe that was the legislature's intent.

Nevertheless, there is limited language in § 600.063 that in the interest of completeness warrants mention because it not only helps to explain why the presiding judge may have decided to treat this as a court-tried civil action, but also demonstrates the statute's ambiguity. First, the claim commences with a "motion," a term generally used in a litigated civil action setting and a term with which the legislature is familiar. Rule 55.26; § 506.050. Second, the statute designates the district defender and the prosecuting attorney at the motion stage and at the appellate stage as

the two opposing sides of the matter. That again evokes a litigation posture. Finally, the statute directs the presiding judge to treat the motion and the conference as a request by the district defender for an order granting one or more of the six types of relief set forth in the statute[4] and the presiding judge is authorized to grant relief only "upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to caseload issues." Again, the notion of a motion being filed in a circuit court seeking an order granting relief is consistent with a litigation setting but, it must be stated, it is likewise consistent with a contested case under administrative procedures in which a party seeks relief from an administrative body. *Kixmiller v. Bd. Of Curators of Lincoln Univ.*, 341 S.W.3d 711, 715 (Mo.App.W.D. 2011) (citing §563.010(4)) ("A 'contested case' is defined as 'a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.'").

There are some practical considerations inherent in civil actions that also militate against treating § 600.063 claims as such. First, the parties would be entitled to conduct discovery

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[4] Section 600.063.3(1)-(6) provides: The judge may order one or more of the following types of relief in any appropriate combination:

> (1) Appoint private counsel to represent any eligible defendant pursuant to the provisions of section 600.064;
> (2) Investigate the financial status of any defendant determined to be eligible for public defender representation under section 600.086 and make findings regarding the eligibility of such defendants;
> (3) Determine, with the express concurrence of the prosecuting or circuit attorney, whether any cases can be disposed of without the imposition of a jail or prison sentence and allow such cases to proceed without the provision of counsel to the defendant;
> (4) Modify the conditions of release ordered in any case in which the defendant is being represented by a public defender, including, but not limited to, reducing the amount of any bond required for release;
> (5) Place cases on a waiting list for defender services, taking into account the seriousness of the case, the incarceration status of the defendant, and such other special circumstances as may be brought to the attention of the court by the prosecuting or circuit attorney, the district defender, or other interested parties; and
> (6) Grant continuances.

including interrogatories, document production requests, and depositions. The critical issue in these claims, and the district defender's only burden, is whether the individual public defender will be unable to provide effective assistance of counsel due to an excessive caseload. That issue in a litigation setting is fertile ground for inquiry including by deposition into multiple questions: (1) what constitutes the effective assistance of counsel in this context; (2) what is an excessive caseload; and (3) whether the individual public defender's difficulty in providing effective assistance of counsel is due to caseload issues or whether it is due to other causes including reasons existing in the individual's personal life.

Second, the parties would be entitled to treat the "conference" called for by the statute as an adversarial hearing in which the evidence presented by the district defender would likely be tested by cross-examination which, according to Wigmore is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." *State v. Hughes*, 497 S.W.3d 400, 405 (Mo.App.E.D. 2016) (citing 5 J. Wigmore, Evidence §1367, p. 32 (J. Chadbourn rev. 1974)). Our review of the record here does not demonstrate that the materials presented by the district defender in support of his claims were tested by the great legal engine of cross-examination.

A third point to be made in this context—we do not pretend to provide an exhaustive list—arises from the unmistakable reality that Missouri's civil pleading rules would apply if we treated § 600.063 as civil actions. *See* Rule 44.01(a). And the most immediately noteworthy rule is Rule 52.12 governing intervention because the indigent criminal defendants, whose representation is subject to being impacted by § 600.063 claims, may be entitled to employ Rule 52.12.

Intervention is permitted by Rule 52.12(a) as a matter of right or by Rule 52.12(b), which provides for intervention by permission of the court. Rule 52.12; *Johnson v. State*, 366 S.W.3d 11, 20 (Mo.banc 2012). Intervention is permitted as a matter of right when the applicant's interest

relates to the subject matter of the litigation and that interest may not be protected unless the applicant is allowed to intervene. Rule 52.12(a). Intervention generally should "be allowed with considerable liberality." *In re Liquidation of Prof'l Med. Ins. Co.*, 92 S.W.3d 775, 778 (Mo.banc 2003); *Eakins v. Burton*, 423 S.W.2d 787, 790 (Mo.banc 1968) (noting that the intervention rule should be construed liberally to permit broad intervention).

We do not decide here whether any of the criminal defendants impacted by the § 600.063 claims before us could satisfy Rule 52.12's requirements, but we raise intervention as a consequence to be considered if § 600.063 claims are treated as civil actions. After all, the threshold issue in the statute concerns the interests of certain St. Louis County indigent criminal defendants in the effective assistance of counsel in their cases. Moreover, the relief permitted by § 600.063 may impact whether the defendants are represented by public defenders or appointed private counsel, whether less serious (but still criminal) cases are even assigned an attorney, whether certain defendants are placed on a waiting list for defender services, whether cases are continued, and whether modification of the conditions of release and bond is warranted in certain cases. § 600.063.3.

Finally, we note that the statute's requirement that the presiding judge weigh in on the subject of what constitutes the ineffective assistance of counsel risks encroaching on the Supreme Court's authority. Our Supreme Court possesses the inherent authority to regulate the practice of law and administer attorney discipline in Missouri. *In re Krigel*, 480 S.W.2d 294, 300 (Mo.banc 2016). This authority is exclusive, see *In re Zink*, 278 S.W.3d 166, 169 (Mo.banc 2009) ("When attorney discipline is administered, it is administered by this Court."), and the Court's jurisdiction over disciplinary matters is original. *In re Foley*, 364 S.W.2d 1, 1 (Mo.banc 1963).

We acknowledge that the above-described implications of treating § 600.063 claims as court-tried civil actions border on the absurd, are certainly onerous, and are probably unworkable. The presiding judge here acknowledged the time-consuming logistical nightmare in which the presiding judge "is placed in the position of literally holding hundreds of hearings each month on the caseload of each individual public defender attorney found to have excess caseloads."

But we have included these illustrations because they support the conclusion that the legislature likely did not intend this to be handled as a civil action. We are dubious that the legislature would seek to address public defender caseload issues by enacting a statute capable of creating an entire new docket of litigation concerning individual public defender excessive caseload claims.

Moreover, the designation of the prosecuting attorney as the "opposing" party to this would-be litigation docket is less than ideal. Certainly, prosecuting attorneys have an interest in the matters addressed by § 600.063 because they concern the cases being prosecuted which places them within the prosecuting attorney's overarching interest and obligation to support the fair administration of justice. *Berger v. U.S.*, 295 U.S. 78, 88 (1935); Rule 4-3.8. Nevertheless, it is possible, if not likely, that some prosecuting attorneys may not be opposed to § 600.063 motions because while the relief allowed goes to the timing of the prosecutions and in some instances who will be defending the cases, the relief does not go to the merits of the case or otherwise undermine the prosecution. Prosecuting attorneys might decide that their time and resources are better spent elsewhere and might just concede these cases. Such a circumstance illustrates that there is a serious question whether there is even a justiciable controversy between the district defender and the prosecuting attorney. *See Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo.banc 2013) (setting forth

justiciability requirement that a substantial controversy between parties with genuinely adverse interest exists that is ripe for judicial determination).

3. The legislature intended § 600.063 motions to be handled as administrative matters.

We find that the thrust of § 600.063 is far more consistent with the conclusion that the legislature intended that this be handled as an administrative procedure with the presiding judge acting as the presiding administrative body or more specifically as the 21st Judicial Circuit's chief administrative authority. 21st Judicial Circuit Local Rules, Rule 100.1.2; § 478.240.2; Mo. Const. Article V, Section 15.3.

We note that the application of an administrative approach to public defender caseload issues has been dealt with previously by our Supreme Court in *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo.banc 2012). In *Waters*, the Court held that in addressing public defender caseload issues, "trial judges have inherent authority, and an inherent responsibility, to manage their dockets in a way that respects the rights of the defendant, the public and the State and that respects the obligation of public defenders to comply with the rules governing their representation." 370 S.W.3d at 598. In accomplishing this task, the Court stated, trial judges must follow promulgated administrative rules unless invalidated. *Id.* at 597. Moreover, trial judges must follow the Missouri Supreme Court Rules in the same way that any administrative actor must follow applicable regulations—they cannot ignore or defy those rules unless they do so in order to follow a validly-enacted superseding statute. *See Gabriel v. Saint Joseph License, LLC*, 425 S.W.3d 133, 139 (Mo.App.W.D. 2013) ("Authorized by the Missouri constitution and statutes, Missouri Supreme Court Rules are to be given the same effect as statutes so long as they are not in conflict with other law. . . . If there is a conflict between the Supreme Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings.

. . . Moreover, Missouri Supreme Court Rules may only be annulled or amended in whole or in part by a law enacted solely for that purpose.") (internal quotations marks and citations omitted).

Turning now to the specific language employed, it is significant that the legislature designated the *presiding judge* to handle these motions. The presiding judge in Missouri judicial circuits wears two hats, one as a general jurisdiction judge with the responsibility to preside over adversarial litigation cases and the other as the chief administrative officer of the circuit court. Mo Const. Art. V, Section 15.3; § 478.240. So, we find it significant that the legislature would designate the administrative head of the circuit to handle these motions. These factors, and basic logic, support the conclusion that the legislature intended this to be an administrative procedure before the presiding judge in which the presiding judge is being asked to render a decision with regard to how an important sector of his circuit's docket—criminal cases involving the public defender's office—will be administered.

Next, we find § 600.063's use of the term "conference" to describe the proceeding contemplated by the statute to be significant and supportive of our conclusion here. The term "conference" is defined as "a meeting for consultation, discussion, or an interchange of opinions whether of individuals or groups." Webster's Third New International Dictionary of the English Language, "Conference" (3d ed. 1993). The legislature could have described the event as a "hearing" or "trial" but chose not to. Simply put, the phrase "a motion to request a conference to discuss caseload concerns" fairly describes a non-adversarial event, not the litigation of a contested motion, much less a trial conducted by the court.

We next turn to the legislature's use of the phrase "application for review" in subsection 4 pertaining to appellate review of the presiding judge's order under § 600.063.3. The phrase "application for review" appears in Missouri law primarily in administrative review contexts. *See,*

e.g., *Guffey v. Ctr. for Women in Transition, Inc.*, 308 S.W.3d 302 (Mo.App.E.D. 2010) (reviewing Labor and Industrial Relations Commission's consideration of "application for review" of unemployment compensation decision); *Kolar v. First Student, Inc.*, 470 S.W.3d 770 (Mo.App.E.D. 2015) (reviewing Commission's consideration of "application for review" of workers' compensation decision); *Brinker v. Dir. of Revenue*, 363 S.W.3d 377 (Mo.App.E.D. 2012) (reviewing circuit court's consideration of "petition for review" of Department of Revenue's determination that driver made a false license application).

Similarly, the statute's ten-day limitation to file the application for review is also more consistent with an administrative procedure than with a judgment in a civil action where the judgment is not final for 30 days. Rule 81.05.

Finally, and importantly, subsection 6 of the statute unequivocally demonstrates the administrative law tilt to this section. § 600.036.6. The subsection starts by authorizing the public defender commission and the Missouri Supreme Court to "make such rules and regulations to implement this section." This is classic enabling-legislation language frequently used by our legislature to empower administrative agencies to implement the law. *See, e.g.*, § 537.640.1; § 375.426; §267.645.2.

The question becomes which portions of the statute the legislature intended to be subject to this rule-making authority. We identify three possibilities. First, rules may be enacted to provide for the procedures to be followed by the presiding judge when conducting the conference including the types of materials or testimony that could be submitted, the burden of proof to be applied and other matters. Second, rules could be enacted to address the procedures governing the appeal of § 600.063 orders. Third, rules might also be made to implement one or more of the six

areas of relief set forth in subsection 3, which would be effective on a state-wide basis and which, coincidentally, might reduce the necessity of § 600.063 motions in many instances.

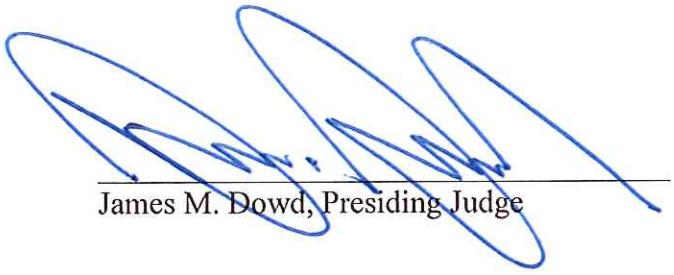
Of course, both the commission and the Supreme Court are experienced rulemakers. The legislature has already granted authority to the commission in § 600.017(10) to "[m]ake any rules needed for the administration of the state public defender system." Likewise, our Supreme Court has plenary rule-making authority under Missouri Constitution Article V, Section 5, and Article V, Section 4 gives the Supreme Court supervisory and superintending authority over all courts in the state.

Perhaps the most noteworthy aspect of subsection 6 is that it explicitly makes any rule enacted by the commission or the Supreme Court subject to Missouri's Administrative Procedure Act (MAPA), § 536.010 et seq. And subsection 6 deems § 600.063 and § 536.010 *et seq.*, to be "nonseverable." Thus, the legislature has unequivocally infused this section with administrative law principles.

We find in light of the above discussion that the legislature intended to create an administrative procedure with the presiding judge sitting in his capacity as the administrative body charged with the management and supervision of the circuit's docket. The question then becomes what administrative rules and procedures should govern the presiding judge's task. We are guided by the Supreme Court's decision in *Waters* and by § 600.063 as well. Thus, we would remand this case with directions that the presiding judge treat this case as a contested case subject to the applicable procedures prescribed by MAPA, any applicable Missouri Supreme Court rules including operating rules, and any applicable other regulations, local rules, statutory authorities and constitutional provisions.

Conclusion

For the reasons stated above, we would reverse the judgment of the circuit court and remand the case for proceedings consistent with this opinion. However, because of the general interest and importance of the issues presented, this case is transferred to the Missouri Supreme Court pursuant to Rule 83.02.



James M. Dowd, Presiding Judge

Lisa P. Page, Chief Judge, and
Kurt S. Odenwald, J., concur.