IN THE

Missouri Court of Appeals

FOR THE

Western District of Missouri

No. WD68066

JANE DOE I, et al.,
Respondents,

v.

THOMAS PHILLIPS, et al., Defendants,
COL. JAMES F. KEATHLEY, Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Jon R. Gray, Circuit Judge

RESPONDENTS' BRIEF

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INTRODUCTION

The trial court correctly understood that the use and public dissemination of information about and photographs of the Doe Respondents – obtained from them only because they were unconstitutionally subjected to SORA's registration requirements – should be prohibited. The requisite balancing of the equities tips the scale against allowing the use and dissemination of the fruit of an unconstitutionally applied registration process. Accordingly, the trial court's grant of a permanent injunction prohibiting the use and dissemination of the fruit of the illegal registrations should be affirmed.

STANDARD OF REVIEW

An action seeking an injunction is an action in equity. *Southern Star Central Gas Pipeline, Inc. v. Murray*, 199 S.W.3d 423, 429 (Mo.App. S.D. 2006) (quoting *Systematic Bus. Serv. Inc. v. Batten*, 162 S.W.3d 41, 46 (Mo.App. W.D. 2005)). The standard of review in a court-tried action in equity is that of a judge tried case: the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or unless it erroneously applies the law. *Id.* (citing *id.*; *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Appellate courts should proceed

with caution when weighing whether to set aside a decree on the ground that it is against the weight of the evidence and do so "only if it has a firm belief that the decree or judgment is wrong." *Id.*

Whether an injunction should be granted is a matter of the trial court's discretion in balancing the equities, *id.* at 432 (citing *Heinrich v. Hinson*, 600 S.W.2d 636, 640 (Mo.App. W.D. 1980)), and a trial court's decision to grant an injunction is reviewed under an abuse of discretion standard. *Id.* at 429 (citing *Colbert v. Nichols*, 935 S.W.2d 730, 734 (Mo.App. S.D. 1996)).

> "The issuance of injunctive relief, along with the terms and provisions thereof, rests largely within the sound discretion of the trial court." *Id.* The trial court "is vested with a broad discretionary power to shape and fashion the relief it grants to fit particular facts, circumstances, and equities of the case before it." *Id.* (internal quotations omitted).

Id. at 432.

Appellant Keathley tersely recites that the *Murphy* standard applies. (APP'T BR. at 16) He argues that the trial court's decision was wrong for various reasons. But his brief is completely silent as how the trial court abused its discretion in granting the injunction. The burden is on Keathley to show that the trial court abused its discretion in granting the injunction and he has not even attempted to do so.

I. THE TRIAL COURT DID NOT ERR IN GRANTING PERMANENT INJUNCTIVE RELIEF PROHIBITING PUBLIC DISSEMINATION OF REGISTRATION MATERIAL THAT WOULD NEVER HAVE BEEN PROVIDED TO APPELLANT KEATHLEY ABSENT THE RETROSPECTIVE APPLICATION OF SORA TO THE DOES WHILE ALLOWING APPELLANT TO USE AND DISSEMINATE OTHER PUBLICLY AVAILABLE INFORMATION ABOUT THE DOES (POINT I)

A. Appellant Keathley Would Not Have Been Unable to Obtain, Use, or Disseminate the Does' Identifying Information and Photographs Absent the Unconstitutional Retrospective Application of the Registration Requirement

Because the Does' convictions predated SORA's January 1, 1995 effective date, as to them, SORA acted as a retrospective law. *Doe v. Phillips*, 194 S.W.2d 833, 838, 852-53 (Mo. banc 2006) ("*Doe I*"). Here, the trial court correctly understood *Doe I* to mean that the Does should never have been required to register, and that, because of those unconstitutionally required registrations, Appellant Keathley was provided with information and photographs that he would not otherwise have possessed. The use and publication of information and photographs obtained only because the Does were unconstitutionally compelled to comply with the registration requirements was, the trial court held, "the continuation of an aspect of the plaintiffs' registration that was held

unconstitutional." AMENDED ORDER at 2 (LF 272). Accordingly, the trial court permanently enjoined Appellant from publishing the photographs and identifying information of person registered under SORA whose convictions predated January 1, 1995. *Id.* at 2-3 (LF 272-273). Notably, the Does did not ask that the court prohibit dissemination of identifying information or photographs that were publicly available and that were obtained through means other than their unconstitutional SORA registrations.

The Missouri Supreme Court did not view "publication of true information about the Does [as affecting] a past transaction to their substantial detriment by imposing a new obligation, adding a new duty, or attaching a new disability in respect to transactions or considerations already past", concluded that such publication "merely looks back at antecedent actions", and rejected the publication of true information as a basis for holding SORA to be retrospective. *Doe I*, 194 S.W.2d at 852. But rejecting publication as a basis for finding SORA to be a retrospective law does not *necessarily* imply that, as Appellant Keathley suggests, having determined that the registration requirement was retrospective in application and, therefore, unconstitutional, the Missouri Supreme Court would conclude that continued dissemination of information and photographs obtained from persons who are no longer required to register does not run afoul of the prohibition on retrospective laws. APP'T BR. at 23. The court's holding is to the

contrary.

The Missouri Supreme Court recognized that the registration requirement "specifically requires the Does to fulfill a new obligation and imposes a new duty to register and *to maintain and update* the registration . . .." *Doe I*, 194 S.W.2d at 852. Because maintaining and updating the registration included being photographed and providing updated identifying and personal information, the photographs and identifying information received from Respondents as part and parcel of the retrospectively applied registration requirement were unconstitutionally acquired. In turn, because the information and photographs were unconstitutionally acquired, Appellant should not be able to continue to disseminate them.

B. Balancing the Equities Weighs In Favor of Prohibiting the Continued Dissemination of Identifying Information and Photographs Obtained Only as a Result of Unconstitutionally Required Registrations

The Does do not mean to trivialize the significance of being relieved of the unconstitutionally imposed burden of registration. But, although the registration requirement has been declared unconstitutional, if the illegally obtained information and photographs can continue to be published, the collateral impact of that illegal registration continues indefinitely and there is no remedy at law.

Discontinuation of the obligation to register is a significant victory, but if this Court were to vacate the district court's injunction, the Does' remedy is rendered incomplete.

As observed, *supra* at 4, whether an injunction should be granted is a matter of the trial court's discretion in balancing the equities. Here, that balancing must include the facts that the Does never should have had to register and give Appellant Keathley the information and photographs he seeks to disseminate publicly. And, the Missouri Supreme Court has said so. To give a full remedy to the Does, equity and fairness require that, because the information and photographs were unconstitutionally exacted from the Does, Appellant Keathley be foreclosed from disseminating that illegally obtained material.

What the trial court ordered – that information and photographs obtained as the result of illegally required registrations cannot be published – is somewhat analogous to the "fruit of the poisonous tree" doctrine aspect of the exclusionary rule applied in criminal cases.[1] Of course, this is not a criminal case, and there are

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[1]In an early case, *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920), the Supreme Court aptly makes the point:

> The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the

knowledge obtained by that means which otherwise it would not have had.

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, [232 U .S. 383 (1914)], to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. [*Id.* at 393.] The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

Id., at 391-92. *See also*, *e.g.*, *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (the more apt question is

exceptions to the application of the "fruit of the poisonous tree" doctrine. But akin to the "fruit of the poisonous tree" doctrine in criminal cases are rules of civil procedure that permit courts to refuse to admit evidence as a sanction for failure to observe discovery rules or pretrial disclosure deadlines. Similarly, failure to comply with chain of custody and breaches of other evidentiary requirements may result in evidence being withheld from use. If one can be precluded from using evidence for failing to comply with the rules of civil procedure, certainly Appellant can be precluded from using information and photographs he unconstitutionally acquired.

Balancing the equities is about balancing the law and a sense of fairness and being able to go beyond the law when the law is considered to be incomplete or inadequate, injecting an element of humanism into jurisprudence. It invokes a concept of decision-making that takes conscience and humanity into consideration. Having acquired jurisdiction, equity acts in aid of affording complete justice. *Joe Dan Market v. Wentz*, 223 Mo.App. 772, 20 S.W.2d 567, 569 (Mo.App. St. L.

"whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint"); *U.S. v. Ceccolini*, 435 U.S 268 (1978).

1929). Equity seeks to do justice and not by halves. It follows the law, which here says the Does were unconstitutionally required to register. Equity also regards that as done which ought to be done. Here, to do complete justice and do what ought to be done, the trial court, in an equitable exercise of discretion, prohibited further dissemination of identifying information and photographs of the Does obtained solely because of the unconstitutional requirement to register. Appellant Keathley has not shown that the trial court abused its discretion in so doing and, accordingly, the permanent injunction and judgment must be affirmed.

II. APPELLANT KEATHLEY SHOULD BE PROHIBITED FROM DISSEMINATING ONLY IDENTIFYING INFORMATION AND PHOTOGRAPHS OBTAINED FROM THE UNCONSTITUTIONAL REGISTRATIONS (POINT II)

As mentioned, *supra* at 8, the Does did not request that Appellant Keathley be prohibited from disseminating identifying information and photographs that is otherwise publicly available and was obtained through sources other than the unconstitutionally required registrations. The trial court understood that there were limits to the requested relief as shown by the language in its finding that "continued use and dissemination to the public by Defendant James F. Keathley of the photographs obtained from plaintiffs constitutes an unlawful retrospective application of the laws . . .." AMENDED ORDER at 2, LF 272. However, the Does acknowledge that the actual language enjoining Appellant Keathley's conduct could be refined to delineate more precisely that its prohibitions extend only to the identifying information and photographs obtained as a result of the Does' compliance with the unconstitutional registration requirement. However, to the extent Keathley and the Missouri State Highway Patrol seek to publish information from other sources, they are obligated to assure that it is indeed truthful.

III. BECAUSE THIS ISSUE WAS NOT LITIGATED IN THE TRIAL COURT, BUT IS RAISED IN LITIGATION NOW PENDING IN JACKSON COUNTY CIRCUIT COURT, THIS COURT SHOULD NOT DECIDE THE QUESTION; NEVERTHELESS, THERE WAS NO TRIAL COURT ERROR IN NOT LIMITING THE INJUNCTION TO PERSONS WHOSE CONVICTIONS OCCURRED IN MISSOURI BECAUSE REGARDLESS OF THE LOCATION OF THE OFFENSE, IF THE CONVICTION PRE-DATED SORA'S EFFECTIVE DATE, THE REGISTRATION REQUIREMENT WAS APPLIED RETROSPECTIVELY AND, THEREFORE, STILL IMPOSED A NEW OBLIGATION BASED ON PAST CONDUCT (POINT III)

This issue was not fully litigated in the trial court (LF 261-64), albeit raised in a post-trial motion attacking the entry of the injunction (LF 287-88), and accordingly, this Court should not consider this point. Indeed, this issue is squarely presented and is among those issues concerning the application of *Doe I* being litigated in *John Doe I, et al. v. Keathley, et al.*, Case No. 0616-CV-35929, presently pending before the Sixteenth Judicial Circuit Court of Jackson County. The parties anticipate presenting the issues for resolution by cross-motions for summary judgment to be filed yet this summer. Among the respondents here, however, only John Doe II has a conviction from a jurisdiction other than Missouri – he was convicted in Wyandotte County, Kansas, in 1986, of one count of

enticement of a minor and placed on probation for two (2) years. He moved to Newton County, Missouri, but the record does not disclose when he moved to Missouri relative to SORA's January 1, 1995, effective date. LF 66-67.

Although the Does steadfastly maintain that this argument should not be considered by this Court at all, they nonetheless respond lest the Court deem the issues properly before it and conclude in the absence of a response on the merits that the Does had no meritorious arguments to counter Keathley.

The trial court did not err in not limiting the prohibition on publication of identifying information and photographs to those whose Missouri pleas or convictions for conduct committed prior to enactment of SORA. The foremost reason is that *Doe I* did not limit its application to those who were being required to register because of their Missouri offenses or convictions. *Doe I*, 194 S.W.3d at 838 ("The Does are correct that the portions of the law imposing an affirmative duty to register based solely on pleas or convictions for conduct committed prior to enactment of Megan's Law on January 1, 1995, some eleven and one-half years ago, violates Missouri's constitutional prohibition of laws 'retrospective in . . . operation.'"); at 852 ("Missouri's constitutional bar on laws retrospective in their operation compels this Court to invalidate Megan's Law's registration requirements as to, *and only as to*, those persons who were convicted or pled guilty prior to the law's January 1, 1995, effective date."). In neither instance did the

Missouri Supreme Court draw a distinction between Missouri pleas or convictions for conduct committed before January 1, 1995, and out-of-state, federal, or military pleas or convictions for conduct committed before January 1, 1995. Nor is there good reason for such a distinction: as to all those persons who were required to register as a result of pleas or convictions for conduct committed before January 1, 1995, regardless of the jurisdiction under which they were convicted or pled guilty, the law is retrospective in application inasmuch as it adds a new obligation as a consequence of past conduct that predated SORA's effective date.

The lesson of *Doe I* is that a person living in or moving into Missouri with an out-of-state, military, or federal conviction has committed an offense, in Missouri or elsewhere, that would be a registrable offense if it occurred here *only* if that offense occurred after January 1, 1995. Thus, under *Doe I*, the relevant inquiry is not when the person moved to Missouri, or whether persons who are considering a move to Missouri have notice of the registration requirement, or whether the person is subjecting him/herself to the operation of SORA by moving to Missouri. Rather – regardless of whether the conviction was under Missouri law, another state's law, federal law, or military law – the inquiry is whether the conviction date was prior to January 1, 1995. If it was prior to January 1, 1995, SORA still imposes a new duty or obligation based on pre-act criminal conduct which, as *Doe I* explains, is unconstitutionally retrospective. Even if moving to or

living in Missouri is one part of what triggers the registration requirement – the other part being the commission of an offense that resulted in a plea or conviction – where the conduct giving rise to the plea and conviction predates the effective date, application of the law is retrospective and the fact that there may be a two-part trigger does not somehow eviscerate that retrospective flaw.

Even though no one suggests that the injunction applies to the identifying information and photographs of persons whose out-of-state, federal, or military convictions post-date January 1, 1995, Keathley nevertheless urges that the "imposition of a duty to register upon persons moving to Missouri who have previously been required to register as sex offenders in other states, or under federal or military law" is not a "new duty implicating the prohibition on laws that apply retrospectively." APP'T BR. at 33. But given *Doe I*, this is not true if the offense causing the requirement to register occurred before the January 1, 1995 effective date of SORA. The assertion that "registration in Missouri is nothing more than the continuation of a previously existing obligation to register in another jurisdiction," assumes the other state had a SORA before the registrant left the state. In some instances, the person whose conviction is from another jurisdiction may have been relieved by that jurisdiction of the requirement to register and yet still be required to register in Missouri. Keathley ignores the possibility that some of those who have out-of-state, federal, or military pleas or convictions that pre-

date SORA's January 1, 1995, effective date also came to Missouri before SORA's January 1, 1995, effective date, as may or may not be the case with John Doe II – the record is silent on the point.[2] The fact that some persons whose out-of-state, federal, or military pleas or convictions predate January 1, 1995, also moved to Missouri before SORA was enacted undercuts the Keathley's argument that in moving to Missouri, they voluntarily accepted Missouri's registration obligation. While that might be the case for those whose pleas or convictions and move to Missouri was *after* January 1, 1995, it cannot be the case that those whose pleas or conviction and move to Missouri was before January 1, 1995. Accordingly, it

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[2]The Respondents originally sought, unsuccessfully, to have a class action certified. An individual who would have been a member of the class, but not a named Doe plaintiff submitted an Affidavit indicating that he had been arrested and was sentenced in Arizona in 1983, when he was twenty, for having sexual conduct with a minor over the age of fifteen; had been given a certificate of absolute discharge in July, 1984; had his civil rights restored in Arizona in December, 1993; and moved to Missouri before Missouri's SORA became effective. LF 182-83. Such an individual could hardly be said to have had notice of Missouri's SORA law when he moved to Missouri, nor to have voluntarily submitted himself to the operation of SORA.

cannot be concluded that the latter group had notice of SORA's registration requirement before they moved to Missouri.

Keathley raises the spectre of Missouri becoming a haven for sex offenders if the trial court's injunction is affirmed. But there is no factual basis for the assertion and it is pure speculation. Furthermore, this is not a legal argument, but a legislative issue. Should Missouri actually become a haven for sex offenders, Missouri can seek to amend its constitution and enact legislation that is precisely drawn to combat the problem.

Keathley has not shown that the trial court abused its discretion in making its injunction applicable to all those whose pleas or convictions were for conduct committed before January 1, 1995, irrespective of whether under Missouri's law, another state's law, military law, or federal law.

IV. THE INJUNCTION SUFFICIENTLY DEFINED THE INFORMATION TO WHICH IT APPLIES (POINT IV)

The language of the injunction, taken as a whole, is sufficiently clear to give guidance as to what classes of material may not be published. "The defendant shall immediately and forthwith cease and desist from publishing photographs and identifying information of persons registered under SORA whose convictions predated January 1, 1995." LF 272-73. Presumably, Keathley questions what is meant by "photographs and identifying information" and says that since the order does not state that "all" information obtained from pre-1995 offenders is subject to the injunction, he interprets that to allow him to publish the names of pre-1995 offenders and their offenses in the registry. He further justifies this interpretation on the ground that the Does only asked that their photographs be removed from the website. There are two problems with this position.

First, it ignores the plain meaning of "identifying information". There could hardly be any information more identifying than a name. A "name" is, by definition, "identifying information." It is somewhat disingenuous to take the position that one does not understand "identifying information" to include a name.

Second, the fact that the Does may not have asked for identifying information does not restrict a court sitting in equity from doing complete equity as the court deems fit. "The trial court 'is vested with a broad discretionary power to

shape and fashion the relief it grants to fit particular acts, circumstances, and equities of the case before it.'" *Southern Star*, 190 S.W.3d at 432. In doing complete justice, the court in equity need not be constrained by the fact

> "that plaintiffs did not in terms ask for such relief, but they did ask for 'such other and further relief as to the court shall seem meet and proper,' and the able trial chancellor deemed it meet and proper to incorporate in the judgment that part now complained of. But the court was not circumscribed by the prayer; the prayer is no part of a petition. [citations omitted]

Woods v. Cantrell, 218 S.W.2d 613, 616 (Mo. 1949). In *Bollinger County v. Ladd*, 564 S.W.2d 267, 273 (Mo.App. St. L. 1978), the appellant had not requested the relief ordered by the court, but, the appellate court observed, this did not prevent the court from granting it.

In *Mayor, Councilmen, etc. v. Dealers Transport Co.*, 343 S.W.2d 40 (Mo. banc 1961), a declaratory judgment suit, the court said:

> "Under the Declaratory Judgment Act, the relief should be complete. As said in 26 C.J.S. Declaratory Judgments § 161, p. 374, 'As a general rule, in awarding declaratory relief, the court shoud make a full and complete declaration, disposing of all questions of right, status or other legal relations encountered in adjudicating the controversy . . ..'" 343 S.W.2d at 43(3).

> Likewise in *Chapman v. Schearf*, 360 Mo. 551, 229 S.W.2d 552, 555(5) (banc 1950), the court held that although defendants did not request affirmative equitable relief, "the trial chancellor in determining the issues of injunctive relief sought by plaintiffs properly undertook to do full, adequate and complete justice between the parties justified by the evidence." The court in *Hoechst v. Bangert*, 440 S.W.2d 476 (Mo. 1969) cited *Chapman* in approving injunctive relief granted by the trial court to defendants. As in the instant case, appellant had not requested affirmative relief but respondents had requested the court to declare the rights of the parties and to grant specific injunctive relief and such other relief as should be appropriate. The court found that under all the pleadings and the evidence the trial court did not err in granting the injunction.

Bollinger County, 464 S.W.2d at 273. Here, although the motion confined itself to requesting relief related to the photographs, the petition requested "such further legal and equitable relief as this Court deems appropriate," and the trial court, in considering what would constitute complete relief in the light of *Doe I*, determined that not only photographs, but other identifying information of those whose conduct resulted in pleas and convictions predating January 1, 1995, which clearly would include names, should not be published.

The injunction is clear as to what types of material cannot be published and

accordingly, this Court should affirm.

CONCLUSION

Appellant has not shown that the trial court abused its discretion in ordering Appellant Keathley to cease and desist from publishing personal identifying information and photographs obtained from persons who, because of conduct resulting in pleas or convictions prior to January 1, 1995, were registering pursuant to SORA. Accordingly, this Court should affirm.

Respectfully submitted,

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July 31, 2007

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	)	
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	)	
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	)	
Appellants.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO. SUP. CT. R. 84.06(b). It contains no more than 27,900 words of text (specifically, containing 4,554 words). It was prepared using Word Perfect 6/7/8/9/10/11/12 for Windows. The enclosed CD-ROM disc also complies with MO. SUP. CT. R. 84.06(g) in that it has been scanned and is virus free. The files on the CD-ROM disc contain the brief in both Word Perfect 6/7/8/9/10/11/12 for Windows and "saved as" MSWord 97/2000 formats.

By_____
Attorney for Respondents

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	)	
Appellants.	)	

CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of Respondent's Brief as well as a CD-ROM disc of same were sent by Federal Express to the Clerk of the Court for filing, and two copies of Appellant's Brief and a CD-ROM disc containing the word processing file of same in Word Perfect 6/7/8/9/10/11/12 and "saved as" Word 97/2000 formats were served by U.S. mail this _____ day of _____, 2007, on:

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