In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI EX REL. RACHEL TOWNSEND,	**WD72524**
Appellant,	**OPINION FILED:**
v.	**June 22, 2010**
MARY JO SPINO, CLERK OF THE JACKSON COUNTY LEGISLATURE, ET AL.,	
Respondents.	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Sandra Carol Midkiff, Judge

Before Thomas H. Newton, C.J., James Edward Welsh, and Gary D. Witt, JJ.

Rachel Townsend appeals the circuit court's judgment denying her petition for writ of mandamus against the Clerk of the Jackson County Legislature Mary Jo Spino, the Kansas City Board of Election Commissioners, the Jackson County Board of Election Commissioners, and the Missouri Secretary of State (collectively referred to as "Respondents"). Townsend contends that all Missouri counties are required by statute to conduct a general election for prosecuting attorney in 2010. She asserts, therefore, that the circuit court abused its discretion in refusing to issue a permanent writ of mandamus ordering Spino to accept Townsend's declaration of

candidacy for Jackson County Prosecuting Attorney in 2010 and ordering the Respondents to conduct primary and general elections for this office.

In response to Townsend's appeal, Spino filed a motion to dismiss the appeal for a lack of a final judgment. In particular, Spino alleges that, because the circuit court entered its judgment on May 24, 2010, the circuit court's judgment does not become final for purposes of appeal until June 23, 2010. Rule 81.05. Because a final judgment is a prerequisite to appellate review, this court is without jurisdiction to review Townsend's claim. We, therefore, grant Spino's motion and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On March 30, 2010, Townsend tendered a declaration of candidacy to Spino, the Clerk of the Jackson County Legislature. In her declaration, Townsend sought to have her name placed on the August 2010 primary election ballot for the Democratic Party nomination for the office of Jackson County Prosecuting Attorney. Spino did not accept Townsend's filing. Article V, section 1 of the Jackson County Charter[1] provided for the election of a prosecuting attorney in 1972 and for every four years thereafter. Pursuant to this cycle, the Jackson County Prosecuting Attorney was elected in 2008, and another election is not due for this office until 2012.

When Spino did not accept Townsend's declaration of candidacy, Townsend filed a petition for writ of mandamus in the circuit court on the same day (March 30, 2010). She thereafter filed a first amended petition for writ of mandamus on May 19, 2010. In her petition, she asserted that section 56.010, RSMo 2000, provided for the election of a prosecuting attorney in 1982 and every four years thereafter. Section 56.010 says:

[1]Jackson County adopted a charter form of government pursuant to Article VI of the Missouri Constitution.

> At the general election to be held in this state in the year A.D. 1982, and every four years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for four years, and until his successor is elected, commissioned and qualified.

Pursuant to this cycle, Townsend contended that the Jackson County Prosecuting Attorney was due to be elected in 2010, not 2012. Townsend argued in her petition that, to the extent that the Jackson County Charter conflicts with section 56.010, the charter "is superseded, null and void" and the statute controls.

Townsend asked the circuit court for a writ of mandamus (1) directing the Secretary of State to designate the Jackson County Prosecuting Attorney as an office for which candidates are to be nominated during the August 2010 primary; (2) ordering Spino to accept her declaration of candidacy; and (3) ordering Respondents to place her name on the Democratic Party's primary election ballot and to conduct primary and general elections in 2010 for the office of Jackson County Prosecuting Attorney.

The circuit court entered a preliminary order in mandamus directing Respondents to file responsive pleadings to Townsend's petition. After receiving Spino's responsive pleading, the circuit court, on May 24, 2010, quashed the preliminary writ, denied Townsend's request for a permanent writ of mandamus, and entered judgment against Townsend on her first amended petition for writ of mandamus. Townsend appeals.[2]

[2]Townsend also filed an application for writ of mandamus with this court, which we denied.

ANALYSIS

"'A prerequisite to appellate review is that there be a final judgment.'" *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997) (citation omitted). We, however, do not have a final judgment in this case. We, therefore, lack jurisdiction and must dismiss the appeal. *Id*.

Rule 81.05(a)(1) says: "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." In this case, the circuit court entered its judgment on May 24, 2010, and no one filed an after-trial motion. Thus, pursuant to Rule 81.05, the circuit court's judgment does not become final for the purposes of appeal until June 23, 2010, which is thirty days after its entry.

Townsend notes that, under section 512.020(2), RSMo Cum. Supp. 2009, the General Assembly specifically allows a party to appeal from an order dissolving an injunction. She argues that, because the quashing of a preliminary writ of mandamus is in the nature of and comparable to an order dissolving an injunction, we should permit her appeal. For this court to read section 512.020(2) as Townsend requests would require us to depart from the plain language of the statute and engraft an additional category of cases from which a party may appeal which does not appear in the statute. This we will not do. *See Fidelity Sec. Life Ins. Co. v. Dir. of Revenue*, 32 S.W.3d 527, 531 (Mo. banc 2000) ("[T]he Court will not read into the statute words or provisions that do not appear there."). Thus, to appeal from a circuit court's judgment quashing a preliminary writ of mandamus, the judgment must be final. *See* § 512.020(5) (a party may appeal from a "[f]inal judgment").

Indeed, under Rule 75.01, the circuit court retains the power to vacate, reopen, correct, amend, or modify its May 24, 2010 judgment for thirty days. Rule 75.01 says:

> The trial court retains control over judgments during the thirty-day period after entry of judgment and may, after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time. Not later than thirty days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and every order granting a new trial shall specify the grounds therefor. After the filing of notice of appeal and before the filing of the record on appeal in the appellate court, the trial court, after the expiration of such thirty-day period, may still vacate, amend or modify its judgment upon stipulation of the parties accompanied by a withdrawal of the appeal.
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> The thirty-day period after entry of judgment for granting a new trial of the court's own initiative is not shortened by the filing of a notice of appeal but is terminated when the record on appeal is filed in the appellate court.

As the Missouri Supreme Court said in *State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229, 232 (Mo. banc 1969):

> Logic and justice would seem to indicate that a trial court should be permitted to retain control of every phase of a case so that it may correct errors, or, in its discretion, modify or set aside orders or judgments until its jurisdiction is extinguished by the judgment becoming final and appealable.

Thus, under Rule 75.01, the circuit court retains jurisdiction over this case until June 23, 2010.

Townsend argues that the circuit court loses jurisdiction upon the filing of the record on appeal because Rule 75.01 says: "The thirty-day period after entry of judgment for granting a new trial of the court's own initiative is not shortened by the filing of a notice of appeal but is terminated when the record on appeal is filed in the appellate court." This portion of Rule 75.01, however, is not controlling in this case because we are not dealing with an entry of a judgment granting a new trial on the court's own initiative. The rule does not expressly hold that the filing of the record on appeal terminates the trial court's control over the judgment, except as to granting a new trial. Rule 75.01 also recognizes that, even after a notice of appeal has been filed, the circuit court, "after the expiration of the thirty-day period, may still vacate, amend or modify

its judgment upon stipulation of the parties accompanied by a withdrawal of the appeal" but that the circuit court loses jurisdiction once the record on appeal is filed with the appellate court. This portion of Rule 75.01 also does not apply because the thirty-day period has not yet expired after entry of the circuit court's judgment.

Until a final judgment is rendered, this court has no jurisdiction over Townsend's appeal. *Gibson*, 952 S.W.2d at 244. We recognize that the filing of a notice of appeal usually divests the circuit court of jurisdiction, but, until a final judgment is rendered, jurisdiction remains in the circuit court, even if a party files a notice of appeal with this court. *Reynolds v. Reynolds*, 109 S.W.3d 258, 269-70 (Mo. App. 2003). "Where [an] appeal is premature because it is from a non-final, and, thus, nonappealable[] judgment, the [circuit] court retains jurisdiction over the case." *Id*. at 269. "It is only after a final judgment is entered that 'jurisdiction vests in the appellate court to decide the substantive issues of the appeal[.]'" *Id*. at 270 (citation omitted). In the absence of a final judgment, we cannot proceed with an appeal even if the parties urge us to proceed or even where there are "considerations of manifest convenience." *Schott v. Beussink*, 913 S.W.2d 106, 107 (Mo. App. 1995).

We acknowledge that Rule 81.05(b) provides that a premature notice of appeal "shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal." But, the filing of Townsend's appeal on June 24, 2010, after the judgment becomes final on June 23, 2010, does not aid Townsend. Section 115.121.5, RSMo Cum. Supp. 2009, requires that notice of the primary election be given six weeks prior to the primary election date. That notice, therefore, must be given by June 22, 2010. Thus, if we were to consider Townsend's

appeal filed as of June 24, 2010, her appeal would be rendered moot, and we would not review it.[3]

Although this result may seem harsh, to the extent that the issues raised by Townsend are time sensitive, the urgency in this case was created by Townsend's own conduct. Townsend claims that the Secretary of State failed to issue a notice of the election, which Townsend says was required by section 115.345, RSMo 2000,[4] but Townsend did nothing to enforce this provision. She did not file any mandamus or declaratory action regarding the Secretary of State's failure to notice up the primary election. If Townsend were aggrieved by the Secretary of State's failure to call for this election, she could have commenced her challenge anytime after December 21, 2009. Instead, Townsend waited until 4:43 p.m. to file her declaration for candidacy on March 30, 2010, which was the last day that Townsend could file. Her last-minute attempt to file her declaration seemingly assured, whether intentional or not, that she would be unopposed in an election for prosecuting attorney. When Spino refused Townsend's filing, Townsend filed her prepared petition for a writ of mandamus fifteen minutes later at 4:58 p.m. on that same day. Although Townsend sought an expedited resolution of the case before the circuit court and before this court[5] so that she could obtain relief prior to June 22, 2010, her last-minute attempt to file her declaration of candidacy does not make the resolution of the ensuing

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[3]All parties agree that any order entered after June 22, 2010, would be moot.

[4]Section 115.345, says:

> 1. Not later than the third Monday in December immediately preceding the primary election, the secretary of state shall prepare and transmit to each election authority a notice, in writing, designating the offices for which candidates are to be nominated at the primary election.
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> 2. Upon receipt of notice, the election authority shall publish the notice and the date by which candidates must file for such offices in a newspaper of general circulation in its jurisdiction.

[5]This court granted Townsend's motion for expedited briefing and consideration of this case.

controversy this court's emergency. That Townsend cannot obtain a final judgment before her appeal is rendered moot is a consequence she must accept in light of her actions.

Moreover, even if we were to consider the merits of Townsend's appeal, she would not prevail. Given the conflict between section 56.010 and the Jackson County Charter provision regarding the cycle for the election of a prosecuting attorney, a mandamus action is not appropriate. Mandamus will lie only where it is shown that the one requesting the writ has "a clear and unequivocal right to the relief requested" and that the respondent has "a corresponding present, imperative, and unconditional duty imposed" upon him or her which the respondent has breached. *Naugher v. Mallory*, 631 S.W.2d 370, 374 (Mo. App. 1982). Because of the difference between the two provisions concerning the timing of an election for prosecuting attorney, Spino's obligation to accept Townsend's filing for declaration of candidacy is anything but clear and unequivocal. The interpretations of the provisions are open for debate. "That debate, however, may not utilize as a forum the vehicle of a petition for mandamus." *Farnsworth v. Wee*, 743 S.W.2d 115, 117 (Mo. App. 1988) (mandamus not appropriate because it was debatable under the Sunshine Law statutes whether the Kansas City Police Department had to produce original 911 tapes to the appellant).

Further, to the extent that Townsend is challenging the validity or constitutionality of the county charter provision and state statute regarding Spino's alleged ministerial duty, such a challenge is not appropriate in a mandamus action. Mandamus is not available "'to directly challenge and determine the validity or constitutionality of an ordinance or statute respecting the duty involved.'" *State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 888 (Mo. App. 2002) (quoting *State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819, 825 (Mo. App. 1996)). We believe the same would be true regarding a challenge to determine the validity or

constitutionality of a county charter provision. The purpose of a mandamus action is to execute and enforce a claimed right, not adjudicate and establish that right. *Id*. at 889. The relief sought by Townsend would require a judicial determination of the validity or constitutionality of the county charter provision versus section 56.010. Thus, an action in mandamus is not appropriate.

CONCLUSION

The circuit court's judgment does not become final in this case for the purposes of appeal until thirty days after its entry, which is June 23, 2010. Because a final judgment is a prerequisite to appellate review, this court is without jurisdiction to review Townsend's claim. To the extent that Townsend asks us to reinstate her application for writ of mandamus in the event we find that we lack jurisdiction to review the circuit court's judgment on direct appeal, we decline as an action in mandamus is not appropriate in this case. We, therefore, dismiss the appeal.

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James Edward Welsh, Judge

All concur.