



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

H. SCOTT SUMMERS,)
)
 Appellant,) WD76053
)
 vs.) Opinion filed: December 24, 2013
)
 BREE SHAW and)
 LINDSAY GRAVETT,)
)
 Respondents.)

**APPEAL FROM THE CIRCUIT COURT OF SCHUYLER COUNTY, MISSOURI
The Honorable Jack N. Peace, Judge**

Before Division II: Victor C. Howard, Presiding Judge,
Joseph M. Ellis, Judge and Anthony Rex Gabbert, Judge

H. Scott Summers appeals the trial court’s judgment denying his petition for declaratory judgment. He asserts that the court erred in finding that the county clerk of Schuyler County had authority to place the office of prosecuting attorney on the 2012 election ballot because that office was not up for election until 2014 under section 105.050, RSMo 2000. The judgment is reversed, and the case is remanded with directions.

The parties stipulated to the facts in this case. On November 6, 2010, an election was held for the office of Schuyler County prosecuting attorney. No resident of Schuyler County filed to be a declared candidate. Because there was no declared candidate for the office, voters

wrote in their choice with attorney Benjamin Gray receiving the most write-in votes. Gray declined to assume the office.

Following Gray's declination, no resident of Schuyler County sought appointment. On December 30, 2010, Governor Jay Nixon appointed Summers to the position for a term commencing January 1, 2011. Although Summers did not possess all of the qualifications for that position because he was not a resident of Schuyler County, his appointment was authorized pursuant to section 105.050, which provides an exception to the residency requirement where there is a prosecutorial vacancy and no qualified person in the county can or will accept appointment to the position. Summers was not appointed to fill an unexpired term of a previous prosecuting attorney. Regular elections for prosecuting attorneys occur every four years, and they coincide with election of the attorney general and associate circuit judges. The next regular election of the office of prosecuting attorney will occur in the general election of 2014.

Thereafter, the Schuyler County clerk, Bree Shaw, placed the position of prosecuting attorney on the ballot for the 2012 general election. Lindsay Gravett's name appeared on the 2012 Schuyler County primary and general election ballot as a candidate for the office. Gravett received the most votes in the primary and general election, and the county clerk certified the results.

On November 7, 2012, the day after the election, Summers filed his petition for declaratory judgment against the county clerk Shaw and Gravett (collectively Respondents) asking the trial court to declare that the 2012 election of prosecuting attorney was void because the position was not properly up for election at that time and that Gravett was prohibited from assuming the office. Respondents filed their answer and also contended that Summers failed to state a claim upon which relief could be granted because he failed to comply with the statute of

limitations in section 115.526, RSMo 2000, in challenging the election. Further, they asserted that declaratory judgment was not available because Summers had an adequate remedy at law under section 115.526 to address his complaint.

Following a hearing, the trial court entered judgment denying Summers's petition for declaratory judgment. This appeal by Summers followed.

"The standard of review in a declaratory judgment case is the same as in any other court-tried case." *Levinson v. State*, 104 S.W.3d 409, 411 (Mo. banc 2003). As such, the judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The issue in this appeal involves the interpretation of statutes and their application to the particular facts in this case. Interpretation of a statute and its application are questions of law that are reviewed *de novo*. *Dodson v. City of Wentzville*, 216 S.W.3d 173, 176 (Mo. App. E.D. 2007).

In his sole point on appeal, Summers contends that the trial court erred in finding that the county clerk had authority to place the office of prosecuting attorney on the 2012 election ballot. He asserts that the office was not up for election in 2012 because under section 105.050, his term in the office does not expire until the next regular election for prosecuting attorney in 2014. Section 105.050 provides:

If any vacancy shall happen from any cause in the office of the attorney general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney general, prosecuting attorney or assistant prosecuting attorney, as the case may be; provided, in the case of a vacancy in the office of prosecuting attorney, if there is no qualified person in the county who can or will accept such appointment, then the governor may appoint any person who possesses all the qualifications set forth in section 56.010, except the qualification as to residence.

Respondents counter that the county clerk had statutory authority to conduct the election pursuant to section 105.030, RSMo 2000, which provides, in relevant part:

Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the city of St. Louis, the vacancy shall be filled by appointment of the governor...and the person appointed after duly qualifying and entering upon the discharge of his duties under the appointment shall continue in office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of the term, or for the ensuing regular term, as the case may be....

Thus, Respondents contend that because the first ensuing general election after the prosecutorial vacancy was the 2012 general election, the county clerk had authority to place that office on the 2012 ballot.

Both section 105.030 and section 105.050 govern how vacancies in certain state and county offices are filled. Section 105.050 specifically covers the office of the attorney general, circuit attorney, prosecuting attorney, or assistant prosecuting attorney while section 105.030 generally covers “any state or county office originally filled by election of the people” with certain exceptions. “[I]t is a well established rule of statutory construction that specific designations will control over general terms.” *Terminal R.R. Ass’n of St. Louis v. City of Brentwood*, 230 S.W.2d 768, 781 (Mo. 1950). “When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general.” *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996). The plain language of section 105.050 evidences a clear legislative intent to set apart prosecutors from the general rule in section 105.030.

In this case, Summers was appointed by Governor Nixon to fill the Schuyler County prosecutor vacancy under the residency exception in section 105.050. There is no reason not to

apply the clear language of the same statute in determining how long the appointment continues. Section 105.050 provides that the governor shall appoint a competent person to fill a vacancy in the office of prosecuting attorney until the next regular election for prosecuting attorney. Section 56.010, RSMo 2000, provides, and Respondents stipulated, that the next regular election for prosecuting attorney is in 2014. County prosecutors shall be elected “[a]t the general election to be held in this state in the year A.D. 1982, and every four years thereafter.” *Id.* The dissent contends that when the legislature amended section 56.010 in 1982 changing prosecutor elections from every two years to every four years, it did not intend to “collaterally designate Section 105.050 an exception to Section 105.030 where, for over a century, it never was before.” But as the dissent acknowledges, an appellate court “must presume the legislature was aware of the state of the law at the time of its enactment.” *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988). Thus, we must presume that when the legislature amended section 56.010, it was aware of sections 105.030 and 105.050. If the legislature did not intend that section 105.050 apply to fill a prosecutor vacancy after changing when regular elections for prosecutor would occur, it could have provided so. It did not. Summers is correct that his term as prosecuting attorney of Schuyler County continues until the next regular election for prosecuting attorney in 2014. The county clerk, therefore, did not have authority to place the office on the 2012 ballot, and Gravett was prohibited from assuming the office after that election. The trial court erroneously declared and applied the law in denying Summers’s petition for declaratory judgment.

Alternatively, Respondents contend that the trial court properly denied Summers’s petition for declaratory judgment because Summers failed to state a claim upon which relief could be granted in that he failed to comply with the statute of limitations in section 115.526 in

challenging the election and, additionally, declaratory judgment was not available because Summers had an adequate remedy at law under section 115.526 to address his complaint.

Section 115.526 provides, in pertinent part,

1. Any candidate for nomination to an office at a primary election may challenge the declaration of candidacy or qualifications of any other candidate for nomination to the same office to seek or hold such office, or to have his name printed on the ballot, and any candidate for election to an office at a general or special election may challenge the declaration of candidacy or qualifications of any other candidate for election to the same office to seek or hold such office or to have his name printed on the ballot.

Subsection 2 provides the timetable for making a challenge, in pertinent:

2. In the case of challenge to a candidate for nomination in a primary election, the petition shall be filed not later than thirty days after the final date for filing for such election. Except as otherwise provided by law, in the case of challenge to a candidate for election to an office in a general or special election, the petition shall be filed not later than five days after the latest date for certification of a candidate by the officer responsible for issuing such certification.

Section 115.526 is inapplicable in this case. By its plain language, the statute allows a candidate for nomination to an office at a primary, general, or special election to challenge the declaration of candidacy or qualifications of any other candidate for election to the same office. Summers was not a candidate in the 2012 election, and could not have qualified for candidacy as he was not a resident of Schuyler County. He, therefore, had no standing to pursue redress under section 115.526. Declaratory judgment was a proper remedy under the facts of this case. *See City of Lexington v. Seaton*, 819 S.W.2d 753, 757 (Mo. App. W.D. 1991)(“Briefly, the potential common law equitable remedies in an election are quo warranto, writ of mandamus, writ of prohibition, and a declaratory judgment.”)

Finally, we address the dissent’s proposition that Summers in some way waived his declaratory judgment action because he did not file it before the election. That issue was never a

part of this appeal. Respondents did not assert or brief such a claim. We decline to independently research and decide the issue. An appellate court should not act as an advocate.

The judgment of the trial court is reversed. The case is remanded to the trial court to enter declaratory judgment in favor of Summers, declaring that the 2012 election of prosecuting attorney was void and that Gravett was prohibited from assuming the office.

/s/
VICTOR C. HOWARD, JUDGE

Ellis, J., concurs in majority opinion
Gabbert, J., dissents in separate opinion



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DISSENTING OPINION

I respectfully dissent. The majority opinion holds that the plain language of Section 105.050 evidences a clear legislative intent to set apart prosecutors from the general rule in Section 105.030. I find that the legislative history of these statutes proves no such intent.

Both of these statutes, in identical form, date to 1879.¹ At the time these statutes were enacted and for the next century, Section 105.050 did not serve to “set apart prosecutors” from the general rule in Section 105.030. This is because from 1880 to 1982, county prosecutors were elected every two years and, therefore, “regular elections” for prosecutor were always held

¹See R. S. 1879 § 5527 (now Section 105.030) and R. S. 1879 § 527 (now Section 105.050). In 1879, Section 105.030 was found at R. S. 1879 § 5527 in the chapter titled “Elections,” and Section 105.050 was found at R. S. 1879 § 527 in the chapter titled “Attorney General and Prosecuting Attorneys.” These statutes remained in separate sections until approximately 1947. In the 1949 statutes they are first found together, with their present codifications, in the chapter titled “Public Officers and Employees” under “Miscellaneous Provisions.”

during the next “ensuing general election.”² However, in 1982, the statute governing county prosecutor elections was amended to provide that prosecutors would be elected every four years instead of every two. § 56.010, RSMo 2000. With that amendment, the regular election for county prosecutor will no longer always occur at the same time as the next ensuing general election as general elections continue to be held every two years.

While we presume the legislature is aware of the present state of the law when enacting legislation, I cannot conclude that, by changing prosecutor elections from every two to every four years, the legislature intended to collaterally designate Section 105.050 an exception to Section 105.030 where, for over a century, it never was before. I cannot agree, therefore, that Section 105.050 deprived Shaw of her authority under Section 105.030 to place the office of prosecuting attorney on the 2012 election ballot to fill the original term expiring in 2014. In *Bothwell v. Green*, 180 S.W.2d 12, 14 (Mo. 1944), our Supreme Court stated:

Originally special elections were provided for to fill vacancies, so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused the Legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the state has been to fill the vacancy for an elective office by election as soon as practicable after the vacancy occurs.

(Internal quotations and citations omitted).

Additionally, the record reflects that Summers was put on notice in March of 2012, if not sooner, that a general election for prosecuting attorney would be held in November of 2012 and that a viable candidate was seeking that post.³ Yet, Summers waited until after the general

²The 1879 statute governing county prosecutorial elections, which remained unchanged until 1982, except for the addition of residency requirements, provided that “[a]t the general election to be held in this state in the year A.D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney who . . . shall hold his office for two years” R. S. 1879, § 507. General elections in Missouri have always been held every two years, in even numbered years. Mo. Const. 1865, art. II, sec. 2; Mo. Const. art. VIII, sec. 1; § 115.121, RSMo 2000.

³The final date for filing for the primary election was March 27, 2012.

election to assert that the county clerk should not have put the office of prosecuting attorney on the 2012 ballot. He now asks for reinstatement to, and lost wages for, a position that Gravett has assumed for nearly a year. The record gives no indication that the county clerk, who undoubtedly expended time and resources in placing the office of prosecuting attorney on the ballot, or Gravett, who undoubtedly expended time and resources in pursuing the office, were given any pre-election notice of Summers's claims.

“Where actionable election practices are discovered prior to the election, injured persons must be diligent in seeking relief.” *Moore v. City of Pacific*, 534 S.W.2d 486, 498 (Mo. App. 1976). While declaratory judgment may be a common law equitable remedy for Summers's dispute, such was available to Summers prior to the election. Given the record, I would find that, even if Summers's statutory claims were found to have merit, he had an obligation to pursue pre-election remedies instead of waiting until after the voters of Schuyler County unwittingly spoke in an election that the majority now voids.

Anthony Rex Gabbert, Judge