

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC95793**

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**DONI R. MILLER AND BRUCE C. COHEN  
Plaintiffs/Appellants**

**v.**

**MS. GENEVIEVE M. FRANK,  
ST. LOUIS COUNTY CLERK  
Defendant/ Respondent**

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**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
CAUSE NO. 16SL-CC00298**

**HONORABLE MICHAEL T. JAMISON**

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**RESPONDENT'S BRIEF**

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## **STATEMENT OF FACTS**

Respondent is dissatisfied with the accuracy of the Statement of Facts in Appellants' Brief because it is essentially a complete reiteration of Appellants' verified petition that was filed in the Circuit Court and consists primarily of legal arguments and conclusions. In accordance with Rule 84.04(f) (Appendix, p A2), Respondent includes the following as additional or supplemental facts.

Doni R. Miller and Bruce C. Cohen were write-in candidates for the November 4<sup>th</sup>, 2014 elections for St. Louis County Executive and St. Louis County Prosecuting Attorney, respectively. LF 6. On November 18, 2014, the St. Louis County Board of Election Commissioners (hereinafter "Board") certified the results of the November 4<sup>th</sup> election declaring Steve Stenger as the winner of the election for County Executive and Robert McCulloch as the winner of the election for Prosecuting Attorney. LF 13, 16.

Appellants filed their lawsuit on January 27, 2016, more than 14 months after the November 4<sup>th</sup> election, challenging those results. LF 4, 5-19. The Board was not named. LF 5. Instead, Appellants only named St. Louis County Clerk, Genevieve Frank. LF 5.

On March 10, 2016, Respondent filed a motion to dismiss and memorandum in support of the motion to dismiss on the grounds of the verified petition being filed after the required statutory period and as the improper party to suit. LF 32-33. On March 17, 2016, Appellants filed a memorandum in opposition to the Respondent's motion to dismiss and a motion to disqualify the presiding judge, as well as all St. Louis County judges who have ever been up for retention, claiming they are "de facto" judges. LF 27-

31. On April 22, 2016, the motions were argued orally and the Honorable Michael T. Jamison denied Appellants' motion to disqualify him as a "de facto" judge and granted Respondent's Motion to Dismiss. LF 34. On May 10, 2016, Appellants filed a motion to vacate judgment. LF 35-40. Respondent timely responded and the matter was heard for oral argument on May 25, 2016, at which time the Honorable Michael T. Jamison denied Appellants' motion to vacate judgment. LF 41.

Appellants filed their notice of appeal to the Missouri Supreme Court on June 2, 2016 asserting Supreme Court Appellate Jurisdiction because this appeal involves the validity of a statute or provision of the Constitution of Missouri. LF 42-56.



## **JURISDICTIONAL STATEMENT**

Respondent is dissatisfied with the accuracy or completeness of the Jurisdictional Statement in Appellants' Brief, and Respondent is including the following Jurisdictional Statement as part of Respondent's Brief under Rule 84.04(f). (Appendix, p A2)

Supreme Court Appellate jurisdiction is not appropriate in this matter since the actual constitutional validity of the relevant statutes is never at issue in this appeal nor was a constitutional question ever raised or preserved in the trial court. This Court has exclusive appellate jurisdiction over all cases involving the validity of a Missouri Statute. Mo. CONST. Art. V, §3. (Appendix, p A6) An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W. 3d 260, 268-70 (Mo. banc. 2014). The Supreme Court will not entertain the appeal if the allegation is pretextual; that is, the allegation concerning the constitutional validity of the statute must be real and substantial for jurisdiction to vest in the Supreme Court. *Sharp v. Curators of Univ. of Mo.*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003).

To properly preserve a constitutional issue, a party is "required to: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate

review.” *Mayes*, 430 S.W.3d at 266. The purpose of this rule is “to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue. *Id.* Failure to do so constitutes a waiver of the objection. *Id.* at 267 citing *Pollard v. Whitener*, 965 S.W.2d 281, 291 (Mo. App. W.D. 1998).

Appellants’ brief fails to make any challenge to the validity of a statute. Appellants invoke Supreme Court Appellate Jurisdiction on the basis that “this case involves a challenge to the validity of Missouri Revised Statutes §§115.015 and 115.017 (Appendix, p A17 and A18) “as applied” by the trial court in granting Respondent’s Motion to Dismiss.” LF. 47. On its face, Appellants appear to be challenging the validity of §§115.015 and 115.017, RSMo (Appendix, p A17 and A18) which if true, would be appropriate for Supreme Court review. However, nowhere in Appellants’ brief are any arguments presented challenging those statutes nor is the validity of those statutes ever brought into question. Appellants’ brief is entirely based on whether those statutes designate the Board or St. Louis County Clerk Genevieve Frank as the recognized election authority for St. Louis County. This is not enough to constitute a challenge to the validity of a statute that would vest appellate jurisdiction in the Supreme Court.

Further, Appellants failed to preserve any constitutional challenge in the trial court despite having several opportunities to do so. A review of the Legal File will reveal that Appellants could have presented or introduced their challenge in their verified petition, in any of the numerous motions they filed, or during the two oral arguments that were conducted before this appeal. Instead, Appellants raise this challenge for the first time on

appeal, without giving the trial court an opportunity to have heard and ruled on the issue. Since Appellants raise this constitutional challenge for the first time on appeal, this matter has not been properly preserved for review.

Therefore, Appellants do not present real and substantial constitutional claims made in good faith that should invoke the jurisdiction of this Court. In accordance with Mo. CONST. Art. V, §11 (Appendix, p A16), this case should be transferred to the Missouri Court of Appeals, Eastern District for lack of jurisdiction.

## **INTRODUCTION**

Appellants attempt to address their arguments in separate points. However, Appellants' points are circular and overlapping as they are essentially making the same argument in both points. Further, Appellants convolute their brief by fundamentally misunderstanding the law they are asserting and by referencing arguments and law that have no bearing on the actual issues at hand. For example, Appellants state in their brief that the motion to dismiss was granted by a "de facto judge" and also include lengthy case law regarding the validity of statutes without ever making the argument that the relevant statutes are unconstitutional. The crux of Appellants' argument really boils down to: (1) whether the Board is the election authority for St. Louis County and (2) whether Appellants timely filed their petition, both of which are clearly delineated by the statutes.

Because Appellants' brief fails to directly deliver a clear and concise message, Respondent believes that it is more logical to address the points by the relevant issues.

### **STANDARD OF REVIEW**

The standard of review for a trial court's grant of a motion to dismiss is de novo. *Lang v. Goldsworthy*, 470 S.W.3d 748, 750 (Mo. banc 2015) citing *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). In determining the appropriateness of the trial court's dismissal of a petition, an appellate court reviews the grounds raised in the defendant's motion to dismiss. *Lang*, 470 S.W.3d at 750 citing *In re Estate of Austin*, 389 S.W.3d 168, 171 (Mo. banc 2013). If the motion to dismiss can be sustained on any ground alleged in the motion, the trial court's ruling will be affirmed. *Farm Bureau Town and County Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995).

Where the trial court does not provide reasons for its dismissal of the petition, "we presume the dismissal was based on at least one of the grounds stated in the motion to dismiss, and we will affirm if dismissal was appropriate on any grounds stated therein." *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. E.D. 2008).

**POINTS RELIED ON**

**I. THE TRIAL COURT DID NOT ERR IN GRANTING GENEVIEVE FRANK'S MOTION TO DISMISS BECAUSE PURSUANT TO §§ 115.015 AND 115.017(4), RSMO, THE ST. LOUIS COUNTY BOARD OF ELECTION COMMISSIONERS IS THE ELECTION AUTHORITY FOR ST. LOUIS COUNTY (In response to Appellants' Points I-II).**

*Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. E.D. 2008)

§115.015, RSMo

§115.017, RSMo

§115.027, RSMo

Mo. CONST. Art. IV, §12

Mo. CONST. Art. IV, §14

*Omnibus State Reorganization Act of 1974 (OSRA)*; Appendix B § 1.4 RSMo 2000.

15CSR 30-1.010(1)(E)

Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014, UNITED

STATES CENSUS BUREAU,

<http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=b>

kmk (last visited September 14, 2016).

St. Louis County Board of Election Commissioners, MISSOURI BOARDS & COMMISSIONS,

<https://boards.mo.gov/userpages/Board.aspx?123> (last visited September 20,

2016).

**II. THE TRIAL COURT DID NOT ERR IN GRANTING GENEVIEVE FRANK'S MOTION TO DISMISS BECAUSE THE VERIFIED PETITION WAS NOT FILED WITHIN THE 30 DAY PERIOD REQUIRED BY §115.577, RSMO (In response to Appellants' Point II).**

*Board of Election Comm'rs of St. Louis County v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990)

*Heintz v. Swimmer*, 922 S.W.2d 772, 775-76 (Mo. App. E.D. 1996)

*K.G. v. R.T.R.*, 918 S.W.2d 795, 797 (Mo. banc 1996)

*Wells v. Nolden*, 679 S.W. 2d 889, 891 (Mo. App. E.D. 1984)

§115.577, RSMo

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ERR IN GRANTING GENEVIEVE FRANK’S MOTION TO DISMISS BECAUSE PURSUANT TO §§ 115.015 AND 115.017(4), RSMO, THE ST. LOUIS COUNTY BOARD OF ELECTION COMMISSIONERS IS THE ELECTION AUTHORITY FOR ST. LOUIS COUNTY (In response to Appellants’ Points I-II).**

#### **A. Standard of Review**

Where the trial court does not provide reasons for its dismissal of the petition, “we presume the dismissal was based on at least one of the grounds stated in the motion to dismiss, and we will affirm if dismissal was appropriate on any grounds stated therein.” *Fenlon*, 266 S.W.3d at 854.

#### **B. Argument**

Genevieve Frank was properly dismissed as a party since she is not the recognized election authority for St. Louis County. The Board was specifically created by statute and no further action is required to authorize its activities. All election activities are set forth in Chapter 115, RSMo. Chapter 115 is an extensive statutory chapter covering everything imaginable regarding elections including Election Authorities, Election Judges, challengers, precincts, polling places, elections, qualifications of voters and more.

Appellants contend that the proper election authority for St. Louis County is the County Clerk. §115.015, RSMo (Appendix, p A17) defines the election authority: “The county clerk shall be the election authority, **except that in a city or county having a**



**board of election commissioners, the board of election commissioners shall be the election authority.”** §115.017, RSMo (Appendix, p A17) states, “There shall be a board of election commissioners:

(1) In each county which has or hereafter has over nine hundred thousand inhabitants.”

According to the 2010 Federal Census, St. Louis County’s population exceeds nine hundred thousand inhabitants<sup>1</sup>. Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014, UNITED STATES CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited September 14, 2016). (Appendix, p A29) Therefore, the Board is **innately authorized by statute**.

Appellants argue that the Governor’s actions or inactions have somehow rendered the Board powerless or ineffective. Nothing in the entire chapter, spanning approximately 360 statutes, even remotely suggests that action by the governor or anyone else is required to establish a Board of Election Commissioners. In fact, the only statute in

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<sup>1</sup> In fact, the Federal Census estimates that as of July 1, 2014, St. Louis County’s population was 1,001,876. Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014, UNITED STATES CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited September 14, 2016). (Appendix, p A29)

Chapter 115 that could be interpreted to assume the Governor has anything to do with the creation of a Board of Election Commissioners is §115.027, RSMo. (Appendix, p A19) §115.027, RSMo (Appendix, p A19) states that “each board of election commissioners shall be composed of four members, appointed by the Governor with the advice and consent of the senate.” The Governor has appointed commissioners, with senate approval, to St. Louis County’s Board as recently as April 2015 and January 7, 2014.<sup>2</sup> St. Louis County Board of Election Commissioners, MISSOURI BOARDS & COMMISSIONS, <https://boards.mo.gov/userpages/Board.aspx?123> (last visited September 20, 2016). (Appendix, p A34) While §115.027, RSMo (Appendix, p A19) has nothing to do with the actual creation of a Board of Election Commissioners, the continuous actions of Missouri Governors appointing commissioners to St. Louis County’s Board only affirms its legitimacy.

Appellants further claim that due to the Governor’s action or inaction, the Omnibus State Reorganization Act of 1974 (hereinafter “OSRA”) (Appendix, p A35) has

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<sup>2</sup> In fact, the St. Louis County Board of Election commissioners is featured on the official government website “Missouri Boards & Commissions,” including information on the board’s authority, function, makeup and members. St. Louis County Board of Election Commissioners, MISSOURI BOARDS & COMMISSIONS, <https://boards.mo.gov/userpages/Board.aspx?123> (last visited September 20, 2016). (Appendix, p A34)

some bearing on the Board's existence and authority. Appellants' cited authority is irrelevant since election authorities are governed by §§115.001 through 115.801, RSMo. As asserted above, nothing in those statutes suggests action by the Governor is required to establish a Board of Election Commissioners.

Furthermore, the purpose of OSRA (Appendix, p A35) is "to provide for the improved accountability in performance of service to the citizens of the state and for the most efficient and economical operations possible in the administration of the executive branch of the state government." *Omnibus State Reorganization Act of 1974 (OSRA)*; Appendix B § 1.4 RSMo 2000. (Appendix, p A35) No part of this act mentions the process of elections or the boards of election commissioners, nor is it clear that the intent of this act was meant to change the make and management of the existing boards of election. Therefore, Chapter 115, RSMo governs and prevails over the Appellant's application of OSRA. (Appendix, p A35)

Appellants argue that because of the Missouri Constitution Article IV, §12 (Appendix, p A20), Appendix B of OSRA (Appendix, p A35), and Missouri Manual pages 871 and 932 (Appendix, p A27 and A28), that the Board is not assigned to the Governor. Appellants make the creative argument that, even though St. Louis County's Election Board exists, and even though it is authorized by statute, that Article IV, §14 (Appendix, p A21) should be interpreted such that the Board is not valid. They further argue that if it is a valid Board then the Legislature has amended the Constitution. Appellants' argument is misguided.

Whether assigned by the Governor or by the law, the Board is administratively assigned to the Secretary of State. Article IV, §12 (Appendix, p A20) of the Missouri Constitution creates the position of Secretary of State. Article IV, §14 (Appendix, p A21) of the Missouri Constitution prescribes the duties of the Secretary of State, including “custodian of such records, and documents and perform such duties in relation thereto, and in relation to **elections**.” Further, the Missouri Code of State Regulations provides that “the Missouri Secretary of State is the chief election official.” See 15CSR 30-1.010(1)(E). (Appendix, p A22) The Regulations describe the functions and relationships of the Secretary of State to “election boards,” specifically stating:

(E) Elections. The Elections Division administers all statewide elections for both candidates and issues. The division administers the filing of candidates for governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, United States senators and congressmen, Missouri state senators and representatives and certain judicial candidates. The division also prepares ballots, certifies lists of candidates for primary elections to the county clerks and **election boards**, certifies nominees following the primary election, prepares ballots for the general election, canvasses returns, and publishes returns.

15CSR 30-1.010(1)(E). (Appendix, p A22)

The Board was created pursuant to Chapter 115, RSMo and pursuant to the express language of the Missouri Constitution and the Missouri Code of State Regulations, the Secretary of State is the administrative department of the Board.

Therefore, the Board is the recognized election authority of St. Louis County and Genevieve Frank was properly dismissed as an improper party.

**II. THE TRIAL COURT DID NOT ERR IN GRANTING GENEVIEVE FRANK'S MOTION TO DISMISS BECAUSE THE VERIFIED PETITION WAS NOT FILED WITHIN THE 30 DAY PERIOD REQUIRED BY §115.577, RSMO (In response to Appellants' Point II).**

**A. Standard of Review**

Whether the statute of limitations applies to an action is a question of law that is reviewed de novo. *Warren County Concrete, L.L.C. v. Peoples Bank & Trust Co.*, 340 S.W.3d 289, 290 (Mo. App. E.D. 2011). Where a statute of limitations is asserted as a defense, the suit may only be dismissed by a motion to dismiss where the petition establishes on its face that the action is time-barred. *K.G. v. R.T.R.*, 918 S.W.2d 795, 797 (Mo. banc 1996). In reviewing the dismissal, this court must give the petition its broadest intendment, and allegations therein must be construed favorably to the plaintiff. *Heintz v. Swimmer*, 922 S.W.2d 772, 775–76 (Mo. App. E.D.1996).

Where the trial court does not provide reasons for its dismissal of the petition, “we presume the dismissal was based on at least one of the grounds stated in the motion to dismiss, and we will affirm if dismissal was appropriate on any grounds stated therein.” *Fenlon*, 266 S.W.3d at 854.

## B. Argument

Appellants' election contest was properly dismissed because it is clearly established by the face of the petition that Appellants filed their election challenge almost 14 months after the official announcement of the election results. The right to contest an election exists by virtue of statute; it is not a common law or equitable right. *Board of Election Comm'rs of St. Louis County v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990). Thus, the statutes governing election contests are a code unto themselves and one seeking relief under such provisions must come strictly within their terms. *Wells v. Nolden*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984).

Chapter 115 addresses the issues that could surround election contests involving issues such as qualifications of candidates, recounts of votes, and irregularities in the election. The statutes address contests for elections of senators, representatives, circuit judges and other offices. §115.577, RSMo (Appendix, p A41) clearly and unambiguously tells when an election contest can be filed.

§115.577, RSMo (Appendix, p A41) provides in relevant part that the time in which an election contest may be filed is not later than 30 days after the official announcement of the election result by the election authority, any person authorized by §115.553, RSMo (Appendix, p A42) who wishes to contest the election for any office or any question provided in §115.575, RSMo (Appendix, p A43) shall file a verified petition in the office of the clerk of the appropriate circuit court.

As the election authority for St. Louis County, the Board certified the results of the November election for county executive and prosecuting attorney on November 18<sup>th</sup>. Therefore, following the clear and express language of the statute, any challenge to the November election must have been filed by December 18, 2014. Appellants filed their petition more than a year later, on January 27, 2016. Therefore, Appellants' petition is barred by the statute of limitations and was properly dismissed by the Circuit Court.

### **CONCLUSION**

This matter should be transferred to the Missouri Court of Appeals, Eastern District since Appellate Jurisdiction is not vested in this Court. However, if this Court chooses to retain jurisdiction, the Judgment of the Trial Court dismissing the Appellants' Verified Petition should be affirmed because the St. Louis County Board of Election Commissioners is the election authority for St. Louis County and because Appellants' failed to file their petition within the required 30 day statutory period.

**RESPECTFULLY SUBMITTED,**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of September, 2016, a true and correct copy of the foregoing was served via the Court's electronic filing system upon Bruce Cohen.

/s/ Shalini Devabhaktuni

Shalini Devabhaktuni

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2010 and contains 3,849 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type.

/s/ Shalini Devabhaktuni

Shalini Devabhaktuni