

**IN THE SUPREME COURT OF MISSOURI**

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**No. 83901**

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**JAMES L. DRURY, et al.,**

**Respondents/Cross-Appellants,**

**v.**

**CITY OF CAPE GIRARDEAU, MISSOURI,**

**Appellant/Cross-Respondent.**

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**Appeal from the Circuit Court of Cape Girardeau County, Missouri**

**The Honorable Robert C. Stillwell, Presiding**

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**BRIEF OF AMICUS CURIAE**

**SOUTHEAST MISSOURI STATE UNIVERSITY**

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**Joseph J. Russell # 14179**

**J. Brian Baehr # 47272**

**LIMBAUGH, RUSSELL, PAYNE & HOWARD**

**2027 Broadway, P.O. Box 1150**

**Cape Girardeau, MO 63702-1150**

**Telephone: (573) 335-3316**

**Facsimile: (573) 335-0621**

**Attorneys for Amicus Curiae**

**Southeast Missouri State University**

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## **JURISDICTIONAL STATEMENT**

Amicus Curiae Southeast Missouri State University (hereinafter “University”) adopts the jurisdictional statement of Appellant/Cross-Respondent City of Cape Girardeau, Missouri (hereinafter “City”).

## STATEMENT OF FACTS

The University adopts the Statement of Facts of the City. For the purposes of this brief, the University calls the attention of the Court to the following facts.

The City entered into an agreement with the University for the development of a performing arts center. L.F. 136-142. As part of this project, the City passed Ordinance No. 2403, which called for an election to decide whether to increase the City's hotel/motel/restaurant tax in order to fund the project. L.F. 114-118. The ballot question called for by Ordinance No. 2403 was put to the voters during the election held on November 3, 1998. L.F. 33. The voters of the City approved the tax increase called for by Ordinance No. 2403 by a vote of 53% in favor of the measure. L.F. 33. Respondents/Cross-Appellants James Drury and Midamerica Hotels (hereinafter "Plaintiffs") raise no issue concerning the election process nor the official announcement of the result of the election.

Plaintiffs filed their Petition for Declaratory Judgment and Injunctive Relief attacking the validity of Ordinance No. 2403 on April 5, 1999. L.F. 1. The trial court granted summary judgment in favor of Plaintiffs on the issue of the validity of Ordinance No. 2403 in its Judgment and Order dated October 4, 2000. L.F. 372-374. That judgment was upheld by the Court of Appeals. *Drury v. City of Cape Girardeau*, 2001 WL 709438 (Mo.App. E.D. 2001).

Plaintiffs have consented to the filing of this brief by the University as amicus curiae.

**POINT RELIED ON**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BECAUSE THE TRIAL COURT DID NOT HAVE JURISDICTION TO ENTER SAID JUDGMENT IN THAT RESPONDENT'S CHALLENGE TO APPELLANT'S ORDINANCE CONSTITUTED AN ELECTION CONTEST THAT FAILED TO COMPLY WITH MISSOURI'S LAW GOVERNING ELECTION CONTESTS.**

**Principal Authorities Relied Upon**

Section 115.577 R.S.Mo.

*State ex rel Industrial Services Contractors, Inc. v. County Commission of Johnson County*, 918 S.W.2d 252 (Mo. banc 1996).

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

**Additional Authorities Relied Upon**

*Beatty v. Metropolitan Sewer Dist.*, 700 S.W.2d 831 (Mo. banc 1985).

Section 115.507 R.S.Mo.

## ARGUMENT

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BECAUSE THE TRIAL COURT DID NOT HAVE JURISDICTION TO ENTER SAID JUDGMENT IN THAT PLAINTIFFS' CHALLENGE TO THE CITY'S ORDINANCE CONSTITUTED AN ELECTION CONTEST THAT FAILED TO COMPLY WITH MISSOURI'S LAW GOVERNING ELECTION CONTESTS.**

The University joins in the arguments of the City and other amici curiae regarding the “clear title” issues relating to Ordinance No. 2403. The University has filed this brief in order to discuss issues relating to the subject matter jurisdiction of the trial court in this case. These issues were not specifically addressed by either the trial court or the Court of Appeals.<sup>1</sup> The issue of subject matter jurisdiction may be raised at any point in a proceeding. *Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo.App. E.D. 1984).

Plaintiffs in this case are attempting to overturn the result of the election held on November 3, 1998. The exclusive procedure for the prosecution of election contests in Missouri is provided in Sec. 115.577 R.S.Mo. *State ex rel Industrial Services Contractors, Inc. v. County Commission of Johnson County*, 918 S.W.2d 252, 254 (Mo. banc 1996). Section 115.577 requires that an election contest be commenced in the appropriate circuit court not later than thirty days after the official announcement of the election result by the election authority. *Id.*,

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<sup>1</sup> The issue was pleaded by the City in its Answer. L.F. 86.

918 S.W.2d at 255. An election contest need not be called an election contest to fall under the requirements of § 115.577. The scope of what constitutes an election contest was defined by *Beatty v. Metropolitan Sewer Dist.*, in which this Court stated, “An election contest properly encompasses those issues which affect the conduct and outcome of an election.” 700 S.W.2d 831, 838 (Mo. banc 1985). This rule was cited again by this Court in *State ex rel Industrial Services Contractors*, 918 S.W.2d at 255.

Applying the test described in *Beatty* and *State ex rel Industrial Services Contractors* to the facts of this case, it is clear that Plaintiffs’ action filed on April 5, 1999 was an election contest. Plaintiffs claim the election is invalid because of an alleged error in the title of Ordinance No. 2403, which called the election. The validity of that ordinance is one of those issues that certainly would affect the “conduct” of the election. An invalid ordinance would not support conducting an election. Likewise, the “outcome” of the election would be nullified by an invalid ordinance. Plaintiffs are seeking to overturn the outcome of the election by challenging the validity of the ordinance that put the tax issue on the ballot in the first place. Therefore, Respondent’s lawsuit is governed by § 115.577.

The right to contest an election did not exist at common law. *Wells v. Noldon*, 679 S.W.2d at 890. Thus, a plaintiff filing an election contest must strictly comply with the statutes that create the right to file such an action. *Id.*, 679 S.W.2d 891. The election contest statute defines the jurisdiction of the trial court in an election contest, and the letter of the law is the limit of the court’s power. *Id.*

Failure to comply with the requirements of § 115.577 deprives the trial court of subject matter jurisdiction in an election contest. *Id.* The only power of a court without subject matter jurisdiction is to dismiss the action. *Id.* Lack of subject matter jurisdiction may be raised at any time during the proceedings. *Id.*

The election was held, the votes were cast, and the result announced. The City's tax increase passed by a margin of 53% in favor and 47% opposed. L.F. 30, 33, 92. The election result was announced by the Cape Girardeau County Clerk, the proper election authority under § 115.015 R.S.Mo., on November 5, 1998.<sup>2</sup> Plaintiffs filed their lawsuit on April 5, 1999, which was five months after the result of the election was announced and four and a half months after the statutory deadline for announcing the result of the election. Plaintiffs' lawsuit was filed well in excess of the thirty-day limitations period created by § 115.577. Plaintiffs failed to comply with the election contest statute. As a result, the trial court lacked

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<sup>2</sup> No issue has been raised concerning the date of the official announcement of the result of the November 3, 1998 election. The record on appeal does not contain the actual date. Rule 81.12(e) authorizes supplementation of the record on appeal. The official announcement of the election result by the County Clerk is attached to this brief to reflect the actual date of the official announcement. If there is an objection to the supplementation of the record on appeal with the contents of Appendix A, the University requests the Court to take judicial notice of the fact that the Circuit Clerk must have certified and announced the result of this election by November 17, 1998 at the latest. § 115.507 R.S.Mo.

subject matter jurisdiction over the claims made by Plaintiffs. *Wells v. Noldon*, 679 S.W.2d at 890.

For all of these reasons, the trial court erred in granting summary judgment in favor of Respondent in its Judgment and Order dated October 4, 2000. This Court should reverse the decisions of the Court of Appeals and the trial court and enter its Order dismissing Respondent's action in its entirety.

**CONCLUSION**

Respondent's lawsuit filed in this case was an election contest governed by § 115.577. As such, it must have been filed within thirty days of the announcement of the election result Plaintiffs seek to overturn. Respondent did not file this action within the time limit created by § 115.577. Therefore, the trial court lacked subject matter jurisdiction to enter its Judgment and Order dated October 4, 2000. For these reasons, this Court should reverse the decisions of the Court of Appeals and the trial court and enter its Order dismissing Respondent's action in its entirety.

Respectfully submitted,

LIMBAUGH, RUSSELL, PAYNE & HOWARD  
2027 Broadway, P.O. Box 1150  
Cape Girardeau, MO 63702-1150  
Telephone: (573) 335-3316  
Facsimile: (573) 335-0621

By \_\_\_\_\_  
Joseph J. Russell #14179  
J. Brian Baehr #47272

ATTORNEYS FOR AMICUS CURIAE  
SOUTHEAST MISSOURI STATE UNIVERSITY