

**MISSOURI COURT OF APPEALS--WESTERN DISTRICT
DIVISION TWO
GARY D. WITT, CHIEF JUDGE, PRESIDING
ALOK AHUJA, JUDGE
MARK D. PFEIFFER, JUDGE
NOVEMBER 8, 2023
UNIVERSITY OF MISSOURI LAW SCHOOL
COLUMBIA, MISSOURI**

WD85625

**State of Missouri, Appellant,
v.
Chad J. Thomas, Respondent.**

Appellant Chad Thomas appeals from the judgment of the Circuit Court of Lafayette County finding him guilty of one count of possession of a controlled substance and one count of unlawful possession of drug paraphernalia. As alleged at trial, on February 2, 2021, Thomas was pulled over for his passenger-side headlight being out. Thomas was unable to locate his license and wallet, and the officer asked Thomas to exit his vehicle. Thomas consented to a pat-down search for weapons. The officer felt an object in Thomas's sweater pocket and asked for permission to retrieve the item. Thomas declined. The officer testified that Thomas was acting nervous, and the officer asked Thomas to sit in the patrol car, but Thomas declined. Thomas asked permission to look for his ID in his vehicle. The officer consented. Thomas got back into the driver's seat of the vehicle. At this point, Thomas was either pulled from or exited the vehicle and was handcuffed by the officer. The officer stated that Thomas was given permission to look for his ID but not reenter his vehicle. Thomas asked the officer if he was being arrested. The officer responded that he was being detained for a traffic violation. A second officer arrived, and the first officer asked for permission to search Thomas's car for his ID. Thomas consented but then revoked his consent, stating that the officer was not permitted to search the center console. The officer obtained Thomas's personal information and radioed that information to check for a license and warrants. The officer was informed that Thomas had a non-extraditable warrant in Kansas. Approximately 16 minutes after the stop began, the officer informed Thomas that he was writing him a ticket for operating a motor vehicle without a license. While the officer was writing the ticket, the K-9 unit arrived. According to testimony, as the dog approached the vehicle, the dog alerted or acted in a way consistent with alert behavior. The dog then jumped into the vehicle through the open door without command. A search of the center console reveals a drug pipe and a brown drip bottle and hypodermic needle, which were later determined to contain methamphetamine. Thomas sought to suppress the evidence found in the vehicle, alleging that the officer wrongfully extended the traffic stop. The circuit court disagreed, finding the delay was due to Thomas's behavior. A jury found Thomas guilty of both counts charged. The court sentenced Thomas to ten years' imprisonment for the possession of a controlled substance and a fine of \$50 for the possession of drug paraphernalia. This appeal followed.

Appellant's point on appeal:

1. The trial court clearly erred in overruling Mr. Thomas's objections to allowing the jury to hear evidence of an illegal search, in violation of his rights to due process and a fair trial under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 15, and 18(a) of the Missouri Constitution, because the evidence presented at trial was fruit of the poisonous tree after an illegal search based on no articulable facts of reasonable suspicion that criminal activity was afoot to perform a K9 sniff test in that it should have been excluded from being heard by the jury when determining Mr. Thomas's guilt.

WD86029

Vernell Beach, by and through his Natural Mother and Legal Guardian, Yolanda Walton, Respondent,

v.

Kenneth Zellers, Commissioner, Office of Administration State of Missouri, and Andrew Bailey, Attorney General, State of Missouri, Appellants.

Appellants Kenneth Zellers, Commissioner, Office of Administration, State of Missouri ("Office of Administration"), and Andrew Bailey, Attorney General, State of Missouri ("Attorney General"), appeal the judgment of the Circuit Court of Cole County entering judgment granting a writ of mandamus in favor of Respondent Vernell Beach, by and through his Natural Mother and Legal Guardian, Yolanda Walton. As alleged in a related underlying civil suit, Beach is profoundly intellectually disabled and cannot speak. Beginning in 1990, Beach began receiving treatment at the Southeast Missouri Residential Services, operated by the Missouri Department of Mental Health ("DMH"). In 2017, a developmental assistant employed by DMH, Rita Davis, assaulted Beach. One year later, Beach's mother sued Davis, DMH, and another DMH employee, Myeshia Miller, on Beach's behalf alleging negligence, assault, and battery. DMH asked the Missouri Attorney General to represent it. The case against DMH was eventually dismissed on the basis of sovereign immunity. Neither Davis nor Miller asked the Attorney General to represent them or otherwise answer the suit. The circuit court entered default judgment against Davis and Miller. After the default judgment was entered, Davis asked the Attorney General to represent her. The Attorney General entered its appearance on behalf of Davis and moved to set aside the default judgment. Pursuant to Missouri statute, when the Attorney General agrees to represent a state employee, the state employee incurs the obligation to cooperate with the Attorney General. The day the default judgment was set aside, without the Attorney General's knowledge, Davis pled guilty to pending criminal charges stemming from the assault. The Attorney General sought to withdraw from the civil case due to Davis's alleged non-cooperation, arguing that the guilty plea made it impossible for the Attorney General to defend the civil suit. The Attorney General was allowed to withdraw. Davis again defaulted, and the court awarded a judgment against Davis in the amount of \$8 million dollars. Counsel for Beach then sought payment of the judgment from the State Legal Expense Fund ("LEF") rather than from Davis herself. Counsel for Beach then filed an application for a writ of mandamus and a petition for declaratory judgment and equitable garnishment against the Attorney General and the Office of Administration seeking payment from the LEF. The Attorney General filed a joint

motion to quash the writ application and motion to dismiss the petition. The circuit court denied the motions and, without hearing, issued the writ of mandamus, holding that the judgment was to be paid from the LEF. This appeal followed.

Appellants' points on appeal:

1. The trial court erred in issuing the writ of mandamus because it did so without issuing a preliminary order in mandamus, in that (a) this violates Rule 94.05, and the Missouri Supreme Court requires courts and parties to follow writ procedure in writ cases, (b) failing to issue the preliminary order in mandamus deprived Appellants of the opportunity to file an Answer and the opportunity to point out all of the factual disputes which should have prevented the trial court from issuing a writ of mandamus, (c) Appellants did not waive their right to issuance of or service with the preliminary order because they could not waive noncompliance with Rule 94.05, and because they never indicated an express or implicit intent to relinquish their rights.
2. The trial court erred in issuing the writ of mandamus because it violated Due Process, in that the Circuit Court deprived the Attorney General of an opportunity to try the case.
3. The trial court erred in issuing a writ of mandamus because the writ petition failed to state a claim for recovery under the LEF, in that (a) the LEF is a partial waiver of sovereign immunity; (b) the LEF does not cover civil awards where, as here, the state employee did not promptly tender the suit to the Attorney General, (c) the LEF does not cover civil awards where, as here, the state employee does not cooperate with the Attorney General, and (d) Davis's actions were not performed in connection with her official duties.
4. The trial court erred in issuing the writ of mandamus because Respondent failed to establish the requisite elements for such a writ, in that (a) courts cannot issue a writ when adequate alternative legal remedies exist, and here declaratory relief was an adequate alternative remedy, and (b) mandamus requires a clear and unequivocal right to relief, which Respondent could not establish because there were outstanding questions of fact.
5. The trial court erred in awarding attorney's fees because there was no basis on which to award them, in that (a) Respondent withdrew his claim for attorney's fees and so waived it; (b) there is no contract between Respondent and the Appellants, and the LEF statute, § 105.711 RSMo, et seq., does not provide attorney's fees in suits like this one; and (c) the doctrine of sovereign immunity prohibits Missouri courts from ordering the State to pay attorney's fees unless the legislature expressly waives sovereign immunity for the State, and the LEF statute contains no such waiver.

WD86035

State of Missouri ex rel., Dennis R. Di Ricco, Appellant,

v.

**Missouri Secretary of State, John R. Ashcroft, and Missouri Commissioner of Securities,
Douglas Jacoby, Respondents.**

Appellant Dennis Di Ricco appeals the judgment of the Circuit Court of Cole County denying Di Ricco's petition for a writ of prohibition. The facts as alleged in the case below are that Di Ricco is a resident of the State of Washington and previously resided in California. He has never been a resident of Missouri. Di Ricco served as a managing member of a California limited liability company known as Until Tomorrow Drivetrains ("UTD"). On February 1, 2022, the Enforcement Section of the Missouri Secretary of State's Office submitted to the Missouri Commissioner of Securities ("Commissioner") a petition alleging that UTD and Di Ricco had violated Missouri's securities laws. The Commissioner issued a cease and desist order and show cause order. Di Ricco then filed a petition for preliminary and permanent writ of prohibition in the circuit court alleging that the Commissioner lacked personal jurisdiction over Di Ricco for the administrative proceeding. The circuit court entered a preliminary writ but, ultimately, granted the Commissioner's motion to dismiss finding that the allegations of conduct on the part of Di Ricco, if true, would subject him to jurisdiction in Missouri. The preliminary writ was quashed, and the permanent writ denied. This appeal followed.

Appellant's point on appeal:

1. The circuit court erred in granting the Commissioner's motion to dismiss and to quash the preliminary writ, because a court considering a motion to dismiss a petition in prohibition should not accept as true the allegations set forth in an administrative petition in an underlying administrative proceeding but instead should rely on the allegations pled in the petition in prohibition, in that in resolving the motion to dismiss the circuit court was required to accept the allegations in Di Ricco's Petition in Prohibition as true rather than the allegations in the Commissioner's Administrative Petition.

WD86185

GFS II, LLC, Appellant,

v.

Janelle Carson, Respondent.

Appellant GFS II, LLC ("GFS") appeals the judgment of the Circuit Court of Jackson County denying GFS's request to compel arbitration and stay the pending lawsuit. Respondent Janelle Carson entered into a retail installment contract to purchase a vehicle with Rightway Automotive Credit, an affiliate of GFS, on June 17, 2019. The contract contained an arbitration agreement. The contract was assigned to GFS. Carson defaulted on her monthly payments under the contract. Her vehicle was repossessed and sold at auction, but GFS filed a petition in the circuit court seeking to recover the deficiency balance under the contract. Carson filed an answer and asserted two counterclaims against GFS. Carson asserted one claim for violation of the Missouri Motor Vehicle Time Sales Act and one for claim for breach of express and implied warranties.

Although GFS initially filed the petition in circuit court, it later moved to compel arbitration and stay the circuit court proceedings. Carson opposed the motion, contending that GFS waived its right to arbitrate. The circuit court denied GFS's motion to compel arbitration and stay proceedings. This appeal followed.

Appellant's points on appeal:

1. The circuit court erred in its March 27, 2023 order because it denied GFS's motion to compel arbitration in that any arbitrability issues, including waiver, were delegated to the arbitrator. 1. The arbitration agreement delegates issues of arbitrability to the arbitrator through its express terms. 2. Respondent failed to challenge the delegation provision in the arbitration agreement and may not avoid its application. 3. Missouri courts have expressly found that arbitrability issues reserved for the arbitrator include the issue of waiver.
2. The circuit court erred in its March 27, 2023 order because it denied GFS's motion to compel arbitration in that even if arbitrability issues were not delegated to the arbitrator, waiver did not occur.