

IN THE SUPREME COURT OF THE STATE OF MISSOURI

Case No. SC 96865

STATE ex rel. JENNIFER HENDERSON,

Relator,

v.

THE HONORABLE JODIE ASEL,
Judge of the Circuit Court of Boone
County, Missouri Division 4

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
CAUSE NO. 16BA-CV00074
HONORABLE JUDGE JODIE ASEL

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On or about April 20, 2015, the City Council for Columbia, Missouri approved Ordinance No. 022415, Bill No. B83-15, which created the Business Loop Community Improvement District (the “District”). Relator’s Ex. 1, p.1. The District includes 88 different parcels of real estate, which are all located along the “Business Loop” in Columbia, Missouri. Respondent’s Ex. 1, District0005-0009. The District was formed for the purpose of improving the Business Loop area and such improvements were to be funded by property tax assessments and sales tax assessments within the District. Respondent’s Ex. 1, District0011-0013.

In December 2015, the District conducted a sales tax election by mail-in ballot as required by RSMo. § 67.1545. On December 10, 2015, four election judges tabulated the vote and announced the results: the sales tax measure passed 4-3. Relator’s Ex. 1, ¶ 38. After the vote, Relator publicly announced that she had voted against the sales tax. Respondent’s Ex. 9.

Twenty-nine days later, Relator filed her election contest, alleging violations of the general election procedures set forth in Chapter 115 of the Missouri Revised Statutes.

The District filed its Motion to Dismiss, which argued that there was no statutory authority for Relator’s election contest. Relator’s Ex. 2, p. 2 (“Because there is no statutory authority for a challenge to a CID sales tax election, [Relator’s] Verified Petition must be dismissed in its entirety.”).

On March 8, 2016, the Respondent trial court sustained the District's Motion and dismissed Relator's Petition in its entirety.

On March 14, 2016, Relator filed her "Motion to Reconsider" in the trial court, which she later characterized as an "After-Trial Motion." *See* Respondent's Ex. 4, District0085.

On March 14, 2016, Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals challenging Respondent's dismissal of Relator's election contest. *State ex rel. Jennifer Henderson v. Hon. Jodie Asel*, WD79492. On March 16, 2016, Relator's Petition for Writ of Prohibition was denied.

On March 29, 2016, Relator filed a Petition for Writ of Prohibition in this Court, which also challenged the dismissal of her election contest. *State ex rel. Jennifer Henderson v. Hon. Jodie Asel*, SC95603. On March 31, 2016, Relator's writ petition was denied.

On April 1, 2016, the sales tax went into effect. Relator's Ex. 1, ¶ 39. The District has used the sales tax revenue to hire design consultants and engineers and to move forward with the improvement of the Business Loop area. Respondent's Ex. 10, 11. The District performed traffic studies and design review in order to prepare its long-term master plan. Respondent's Ex. 10, 11. The master plan includes proposed safety improvements, pedestrian improvements and infrastructure improvements, among other projects.

On July 12, 2016, Relator filed a "Notice of Appeal" which purported to appeal the Respondent Trial Court's dismissal. Respondent's Ex. 2, District0082. In her Notice

of Appeal, Relator characterized Respondent's dismissal as a "final judgment." *Id.* Relator also filed on July 12, 2016 a "Motion for Relief from Judgment Pursuant to Missouri Civil Rule 74.06(b)." Respondent's Ex. 3. From March 8, 2016 through the filing of her Notice of Appeal, Relator did not seek to amend or modify the dismissal.

On July 28, 2016, Relator filed her Motion to Modify Respondent's March 8, 2016 dismissal (the "July 2016 Motion to Modify"). On August 30, 2016, Respondent denied Relator's July 2016 Motion to Modify and explained that her denial was based on Relator's unexplained delay in seeking the modification and in light of the intervening activity such as the writ petitions, the notice of appeal and the sales tax taking effect.

Relator filed a notice of appeal directly in this Court. Relator appealed from the trial court's August 30, 2016 order denying her July 2016 Motion to Modify and the dismissal of her election contest. On December 22, 2016, this Court dismissed the appeal.

Between December 22, 2016 and May 10, 2017, Relator took no action in this matter.

On May 10, 2017, Relator filed a second Motion to Modify which sought the same relief as the prior Motion to Modify. On June 5, 2017, Respondent denied Relator's May 2017 Motion to Modify.

On June 20, 2017, Relator filed a Petition for Writ of Mandamus in the Missouri Court of Appeals which sought the same relief as that sought in the instant petition. On July 19, 2017, the Court of Appeals denied Relator's petition.

Between July 19, 2017 and December 28, 2017, Relator took no action in this matter.

On December 29, 2017, Relator initiated this writ proceeding.

POINTS RELIED ON

RESPONSE TO RELATOR'S POINT I

I. Relator is not entitled to a writ of mandamus because Respondent properly denied Relator's Motion to Modify in that certain dismissals must be without prejudice, Rule 67.06 has no application to a dismissal for lack of subject matter jurisdiction or lack of statutory authority and Respondent's March 8, 2016 dismissal satisfied Rule 74.01(a)'s requirements

Rule 67.03

Rule 67.06

Chromalloy American Corp. v. Elyria Foundry Co., 955 S.W.2d 1 (Mo. banc 1997)

Kessinger v. Kessinger, 935 S.W.2d 347 (Mo.App. S.D. 1996)

RESPONSE TO RELATOR'S POINT II

II. Relator is not entitled to a writ of mandamus because Respondent's denial of Relator's motion to modify was a discretionary judicial decision in that ruling on a motion to modify involves a discretionary application of the law to a specific set of facts and Respondent's denial was not an abuse of discretion

Bethman v. Faith, 462 S.W.3d. 895, 905 (Mo.App. E.D. 2015)

Jones v. Carnahan, 965 S.W.2d 209, 213 (Mo.App. W.D. 1998)

ADDITIONAL ARGUMENT IN RESPONSE TO RELATOR’S POINTS I AND II

III. Relator is not entitled to a writ of mandamus because Relator is guilty of laches in that Relator failed to timely file her motion to modify and her petition for writ of mandamus

State ex rel. City of Monett v. Lawrence County, 407 S.W.3d 635 (Mo.App. S.D. 2013)

State ex rel Lowry v. Yates, 251 S.W.2d 834 (Mo. App. 1952)

IV. Relator is not entitled to a writ of mandamus because Relator lacks standing in that Relator is no longer a registered voter within the District

State ex rel. Mathewson v. Board of Election Com’rs of St. Louis Co., 841 S.W.2d 633 (Mo. banc 1992)

RESPONSE TO RELATOR’S POINT III

V. Relator is not entitled to a writ of mandamus overruling Respondent’s dismissal because mandamus cannot be used as a substitute for an appeal in that mandamus is limited to ministerial decisions and sustaining a motion to dismiss is a discretionary judicial decision

State ex rel. Missouri Growth Ass’n v. State Tax Com’n, 998 S.W.2d 786 (Mo. banc 1999).

State ex rel. Hart v. City of St. Louis, 204 S.W.2d 234 (Mo. banc 1947)

VI. Relator is not entitled to a writ of mandamus overruling Respondent's dismissal because there is no statutory authority for an election contest in that RSMo. § 67.1545 exempts such elections from Missouri's general election procedures

Hockemeier v. Berra, 641 S.W.2d 67 (Mo. banc 1982)

Clark v. City of Trenton, 591 S.W.2d 257 (Mo.App. W.D. 1979)

RSMo. § 67.1545

ARGUMENT

RESPONSE TO RELATOR'S POINT I

- I. Relator is not entitled to a writ of mandamus because Respondent properly denied Relator's Motion to Modify in that certain dismissals must be without prejudice, Rule 67.06 has no application to a dismissal for lack of subject matter jurisdiction or lack of statutory authority and Respondent's March 8, 2016 dismissal satisfied Rule 74.01(a)'s requirements**

In Point I of her brief, Relator urges the Court to conclude Rule 67.06 and Rule 74.01 require the modification of Respondent's dismissal because Relator stood on her pleadings, requested entry of judgment, filed a notice of appeal and re-filing would have been futile in that re-filing the action would not cure the jurisdictional issue. Relator's argument is without merit for four reasons: 1) Rule 67.06 has no application to this case; 2) Respondent's docket entry satisfies Rule 74.01(a)'s requirements; 3) Relator understood and treated Respondent's dismissal as a final judgment; and 4) Relator represented to the trial court, in open court, that re-filing the action would not have been futile and was in fact an avenue available to Relator.

Standard of Review – Response to Relator's Point One

“There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). Accordingly, “[m]andamus will only lie when there is a clear, unequivocal, specific right to be enforced.” *State ex rel. Missouri Growth Ass'n v. State Tax Com'n*, 998 S.W.2d 786, 788 (Mo. banc 1999). If the writ petition challenges a public official's

discretionary decision or judgment, the writ petition must be denied. *Id.* A writ of mandamus will not issue except to compel a simple and definite ministerial duty. *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854. 857 (Mo. 1913).

a. Rule 67.06 Does Not Require Modification of the Dismissal

Relator urges the Court to find that Rule 67.06 creates a ministerial obligation for circuit courts to convert a dismissal without prejudice into a dismissal with prejudice because “a dismissal without prejudice is not an appealable judgment.” Relator’s Brief, p. 14. This is simply not true.

The Missouri Supreme Court rules contemplate that litigation can – and will – terminate in dismissal without prejudice. Rule 67.01 specifically provides for dismissal without prejudice. Similarly, Rule 67.03 provides:

Any involuntary dismissal shall be without prejudice unless the court in its order specifies otherwise.

MO.SUP.CT.R. 67.03. In light of these rules, this Court has recognized that, in certain cases, a dismissal without prejudice is an appealable decision and need not be converted to a dismissal with prejudice. *See, e.g. Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997). Simply put, a direct appeal from a dismissal without prejudice is authorized where the dismissal has the practical effect of terminating the litigation in the form cast or in the plaintiff’s chosen forum. *Id.*

Relator relies on Rule 67.06 as authority for her writ of mandamus, but Rule 67.06 has no application to the facts of this case. Rule 67.06 is entitled “Final Dismissal on Failure to Amend.” MO.SUP.CT.R. 67.06. Here, Relator did not seek leave to amend

under Rule 67.06 and the trial court is not required to grant relief under Rule 67.06 in the absence of a specific request. *Sisco v. James*, 820 S.W.2d 348, 351 (Mo.App. S.D. 1991) (dismissing election contest for failure to state a claim and noting “Inasmuch as [plaintiff] did not request leave to amend, Rule 67.06 did not bar the trial court from dismissing [plaintiff]’s petition without first granting leave to amend.”) “[Rule 67.06] does not require a court to grant such leave *sua sponte*... if the aggrieved party does not request leave to file an amended petition, he cannot later complain about the court’s failure to grant leave.” *Central Production Credit Ass’n of St. Louis v. Pennewell*, 776 S.W.2d 21, 23 (Mo.App. E.D. 1989).

Finally, even if Rule 67.06 applied, ruling on a Rule 67.06 motion is a discretionary decision left to the trial court – it is not merely a ministerial action. *Rhodes v. Westoak Realty & Inv., Inc.*, 983 S.W.2d 565, 568 (Mo.App. E.D. 1998) (decision under Rule 67.06 is “primarily a matter within the sound discretion of the trial court, reviewable only for abuse.”).

Rule 67.06 provides no basis for requiring the Respondent trial court to modify her dismissal of Relator’s election contest.

b. The March 8, 2016 Dismissal Satisfies Rule 74.01(a) and Relator treated the March 8, 2016 Dismissal as the Final Judgment

Rule 74.01(a) permits a docket entry to serve as a judgment as long as it is clear from the context that the docket entry is intended to constitute a judgment. *Kessinger v. Kessinger*, 935 S.W.2d 347, 350 (Mo.App. S.D. 1996); *M&H Enterprises v. Tri-State Delta Chemicals, Inc.*, 35 S.W.3d 899, 901-02 (Mo.App. S.D. 2001).

In determining whether a docket entry satisfies Rule 74.01(a), “the apparent intent of the trial judge as to whether an entry is the judgment remains an appropriate consideration.” *Kessinger*, 935 S.W.2d at 350. For example, in *M&H Enterprises*, the Court of Appeals concluded that a docket entry granting summary judgment was sufficient to satisfy Rule 74.01(a)’s denomination requirement.

Here, the March 8, 2016 docket entry disposed of the entire lawsuit. The docket sheet was updated to reflect that the case was disposed of, and Relator’s lawsuit was dismissed in its entirety, on March 8, 2016. There was no indication that a separate formal judgment would be entered. “One way an intent is rather clearly expressed that a particular entry is *not* to constitute the judgment occurs when the judge includes in the entry a directive that a formal judgment be prepared for subsequent execution and entry.” *Kessinger*, 935 S.W.2d at 350 (italics original). The effect of the dismissal was so clear in this case that Relator repeatedly referred to the March 8, 2016 dismissal as a “final judgment” in both her Notice of Intent to Appeal and her Rule 74.06 motion for relief. Respondent’s Ex. 2, 3. For these reasons, the trial court’s March 8, 2016 dismissal satisfies Rule 74.01(a).

c. Relator represented to the Respondent trial court that re-filing the action was an opportunity available to Relator

Finally, Relator contends that converting the dismissal without prejudice to a dismissal with prejudice is Relator’s only option. Yet this was not Relator’s only option when the election contest was initially dismissed in March of 2016. To the contrary, Relator represented in open court that re-filing was an opportunity available to Relator.

Respondent's Ex. 5, District0103. The trial court later explained that her dismissal without prejudice was intentional in that the trial court wanted to allow Relator to re-file the action if Relator had different theories or different arguments. Respondent's Ex. 5, District0107. It seems manifestly unjust to accuse the Respondent trial court of error when the Respondent's ruling was based in large part on Relator's representation that re-filing was an option available to her.

RESPONSE TO RELATOR'S POINT II

II. Relator is not entitled to a writ of mandamus because Respondent's denial of Relator's motion to modify was a discretionary judicial decision in that ruling on a motion to modify involves a discretionary application of the law to a specific set of facts and Respondent's denial was not an abuse of discretion

Relator asks the Court to conclude that Relator abused her discretion in denying Relator's motions to modify. However, mandamus is not available to remedy an alleged abuse of discretion. Further, even if mandamus were an available remedy, Respondent did not abuse her discretion.

Standard Of Review – Response to Relator's Point Two

Mandamus is an extraordinary remedy that is available only under limited circumstances. A party seeking relief must allege and prove that he has a clear, unequivocal, and specific right to the relief sought. Mandamus will not lie if the right to relief is doubtful. 'The purpose of the writ is to execute, not adjudicate...and mandamus cannot be used to control the judgment or discretion of a public official....Rather mandamus will only issue when there is an unequivocal showing that the public official failed to perform a ministerial duty imposed by law.'

Bethman v. Faith, 462 S.W.3d. 895, 905 (Mo.App. E.D. 2015) (internal citations omitted). "A ministerial act is defined as an act that law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case." *Jones v. Carnahan*, 965 S.W.2d 209,

213 (Mo.App. W.D. 1998) (citations omitted). Mandamus will not lie to review “an application of specific factual circumstances and/or a combination of facts and law.” *Bethman*, 462 S.W.3d at 905.

a. Denial of Relator’s Motion to Amend was a discretionary decision and denial was not an abuse of discretion.

Relator contends that ruling on Relator’s Motion to Modify was a ministerial decision. Missouri cases hold otherwise: A trial court is vested with broad discretion in ruling on motions to amend and modify judgments and orders. *See, e.g. Autumn Ridge Homeowners Ass’n v. Occhipinto*, 311 S.W.3d 415, 420 (Mo.App. W.D. 2010) (“A trial court is ‘vested with considerable discretion in ruling on a motion to amend judgment.’”); *Bruce v. Small*, 936 S.W.2d 157, 158 (Mo.App. E.D. 1996) (trial court has “broad discretion” in ruling on motion for relief from judgment under Rule 74.06); *Jeffries v. Jeffries*, 840 S.W.2d 291, 293 (Mo.App. E.D. 1992) (“trial court is vested with broad discretion when acting on a Rule 74.06 motion.”). Similarly, trial courts have a great deal of discretion in ruling on Rule 67.06 motion. Ruling on a request pursuant to Rule 67.06 is “primarily a matter within the sound discretion of the trial court...” *Rhodes v. Westoak Realty & Inv., Inc.*, 983 S.W.2d 565, 568 (Mo.App. E.D. 1998). In this case, Relator filed successive motions to modify the trial court’s dismissal and the trial court denied those motions. The trial court’s denial was based in part on the unexplained, months-long delay in filing the motion to modify. Respondent’s Exhibit 5, District0107 (“Typically these motions for a final, appealable order are most immediate, and this is

months and months late.”). The trial court therefore acted well within her discretion in denying the motions to modify.

Relator cites *Welch v. City of Blue Springs* for the proposition that granting Relator’s Motion to Modify was a ministerial act and the trial court therefore had no discretion to deny it. This is a misreading of *Welch*. The court in *Welch* was analyzing whether a separate judgment of dismissal was required *if* leave to amend under Rule 67.06 was granted but the party failed to amend the pleading within the time allowed. *Welch*, 526 S.W.2d 379, 381 (Mo.App. 1975) (citing Mo.Sup.Ct. R. 67.06). As discussed above, Rule 67.06 has no application here because no leave to amend was requested or granted. In sum, the trial court's denial of the motion to modify was a discretionary ruling and does not constitute an abuse of discretion.

ADDITIONAL ARGUMENT IN RESPONSE TO RELATOR’S POINTS I AND II

III. Relator is not entitled to a writ of mandamus because Relator is guilty of laches in that Relator failed to timely file her motion to modify and her petition for writ of mandamus

The Court should quash its preliminary writ and deny Relator’s request for a permanent writ in light of Relator’s unexplained delay between filings and in light of the ongoing collection and expenditure of the sales tax proceeds.

Standard of Review – Equitable Defenses

Equitable defenses, including laches and estoppel, apply to petitions for writs of mandamus. *See, e.g. State ex rel. City of Monett v. Lawrence County*, 407 S.W.3d 635, 638 (Mo.App. S.D. 2013) (affirming denial of writ petition challenging TIF projects on basis of laches and estoppel); *State ex rel Lowry v. Yates*, 251 S.W.2d 834, 835 (Mo. App. 1952) (“among the things appealing to the discretion of the court are laches.”). Laches is intended to “address unreasonable or unexcused delay and the inequity of enforcing a claim due to changed conditions or relations...” *Monett*, 407 S.W.3d at 640 (citing *Troll v. City of St. Louis*, 168 S.W. 167, 175-76 (Mo. banc 1914)).

a. Relator is guilty of laches given the lengthy delay between filings

Relator is guilty of laches, which operates to bar Relator’s request for a writ of mandamus. Initially, Relator represented that “time is of the essence in this matter” and that “[t]he imposition of the tax on April 1, 2016 must be viewed as a point of no return.” [District0110, District0115]. Relator claimed that failing to resolve her lawsuit prior to April 1, 2016 would result in irreparable harm to a variety of individuals and businesses. Accordingly, Respondent heard argument on the motion to dismiss at a special setting

and ruled on the motion to dismiss on an expedited basis. [District0105] The trial court dismissed Relator's action in its entirety on March 8, 2016. Yet Relator did not take any issue with the form of the March 8, 2016 dismissal until July 28, 2016.

Similarly, when this Court dismissed Relator's appeal in December 2016, she did not seek rehearing or clarification and did not take any action in the underlying lawsuit until May 10, 2017 when she filed a new motion to modify. Following the Court of Appeals' denial of her Petition for Writ of Mandamus on July 19, 2017, Relator did not file this writ petition until December 29, 2017. While Relator claimed that every day mattered on the one hand, she inexplicably let months and months pass on the other.

b. Changed conditions justify the application of laches

It has been nearly two and a half years since the election at issue. The sales tax went into effect on April 1, 2016. Individuals have been paying the sales tax, businesses have been collecting the sales tax and the District has been using the sales tax proceeds to meet its financial obligations and to further its mission of improving the areas located within the District. Respondent's Ex. 10, 11. The District has hired an executive director, paid the expenses associated with establishing the District and has engaged design professionals to assist with creating design plans for improving property located within the District. Respondent's Ex. 10, 11. The members of the District's Board of Directors have changed - a majority of the current Board members were not on the Board when the election occurred in December 2015. These changed conditions justify the application of the doctrine of laches, which requires that Relator's writ petition be denied.

ADDITIONAL ARGUMENT IN RESPONSE TO RELATOR’S POINTS I AND II

IV. Relator is not entitled to a writ of mandamus because Relator lacks standing in that Relator is no longer a registered voter within the District

Because Relator is no longer a registered voter in the District, Relator lacks standing and the Court should deny Relator’s request for a writ of mandamus.

Standard of Review – Standing

“[T]he question of a party’s standing can be raised at any time, even *sua sponte*...” *State ex rel. Mathewson v. Board of Election Com’rs of St. Louis Co.*, 841 S.W.2d 633, 634 (Mo. banc 1992). A party must have a “real, live, and personal stake in the outcome of the litigation that grants him the standing necessary to become a party...” *Id.* Stated differently, a party must have “a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief.” *Schweich v. Nixon*, 408 S.W.3d 769, 775 (Mo. banc 2013).

In the context of special tax districts, generalized grievances will not suffice to establish standing. *See, e.g. Lohmeier v. Gallatin County*, 135 P.3d 775, 777 (Mont. 2006) (noting that voters that “do not live in, own property in, or have to the right to vote in the election for creation of the District, can only assert a generalized grievance; the same as other voters not in the District. Thus, they do not have standing to challenge the creation of the District.”); *Biedermann v. Wasatch County*, 362 P.3d 287, 290-91 (Utah Ct.App. 2015) (challengers who did not own lots in special service district lacked standing to challenge creation of district); *City of Spartanburg v. County of Spartanburg*,

401 S.E.2d 158, 159 (S.C. 1991) (City lacked standing to file challenge of creation of special tax district in county but outside of city limits).

a. Relator is no longer a qualified voter within the District

Relator filed this original Petition for Writ of Mandamus and the underlying election contest using an address of “317 Business Loop 70W, Columbia, MO 65203.” This address is located within the boundaries of the District and Relator was registered to vote at this address at one point in time. However, Relator is not currently a registered voter at 317 Business Loop 70W, Columbia, MO 65203. According to public information available from the Boone County Clerk, Relator is a registered voter at 306 N. William Street, Columbia, Missouri. *See* Boone County Clerk – Search Voting Records, https://report.boonecountymmo.org/mrcjava/servlet/VR01_MP.I00680s (last visited May 21, 2018). Previously, Relator was registered to vote at 213 Hirth Avenue. *See* Boone County Democratic Party Central Committee – Committee List, <https://www.boonecountydems.org/wp-content/uploads/2017/04/Central-Committee-List-from-spreadsheet-1.pdf> (last visited May 21, 2018). The property located at 213 Hirth Avenue and the property located at 306 N. William are not located within the boundaries of the District.

Relator must be a registered voter in the District to have standing. Relator is no longer a registered voter in the District. Relator’s requested relief – setting aside the December 10, 2015 election and conducting a new election using different procedures - would have no real, direct impact on Relator. “When an event occurs that makes a court’s decision unnecessary or makes granting effectual relief by the court impossible,

the case is moot and generally should be dismissed.” *Kinsky v. Steiger*, 109 S.W.3d 194, 195 (Mo.App. E.D. 2003). Because Relator is not a registered voter in the District and because she was not a registered voter in the District as of the filing of this original petition for writ of mandamus, Relator lacks standing and her petition for writ of mandamus should be denied.

RESPONSE TO RELATOR'S POINT III

- V. Relator is not entitled to a writ of mandamus overruling Respondent's dismissal of Relator's election contest because mandamus cannot be used as a substitute for an appeal in that mandamus is limited to ministerial decisions and sustaining a motion to dismiss is a discretionary judicial decision**

Point III of Relator's brief is an appeal of the trial court's dismissal. Mandamus is not intended to serve as a substitute for an appeal of a discretionary trial court decision. Accordingly, the Court should summarily reject Point III of Relator's brief. Additionally, Point III seeks reversal of the trial court's dismissal yet the relief sought in Relator's writ petition was a final judgment dismissing Relator's lawsuit with prejudice. Relator cannot seek new relief – which is outside the scope of the writ petition - by way of her appellate brief.

Standard of Review – Relator's Point Three

Using mandamus as a substitute for an appeal is inappropriate and contrary to long-standing, well-established Missouri law. *State ex rel. Walnut St. Ry. Co. v. Neville*, 19 S.W. 491, 491-92 (Mo. 1892) (“Where a court is invested with power to determine an issue of law upon a given set of facts, according to its judgment thereof, it cannot rightly be compelled by mandamus to substitute the opinion of another tribunal on that issue for its own.”). The purpose of a writ of mandamus “is to execute, not adjudicate.” *State ex rel. Missouri Growth Ass'n v. State Tax Com'n*, 998 S.W.2d 786, 789 (Mo. banc 1999).

a. A writ of mandamus cannot be used as substitute for an appeal

The Court should summarily reject Point III in its entirety as it is a naked attempt to appeal the trial court's dismissal of her election contest. For example, Relator characterizes Point III of her Brief as a "substantive argument" and characterizes the standard of review as whether Respondent "erroneously declares the law, or ...erroneously applies the law." Relator's Brief, pg. 12. Point III is an impermissible attempt to use mandamus to adjudicate a discretionary decision of the trial court.

Dismissal for lack of subject matter jurisdiction or lack of statutory authority is a discretionary decision by the trial court. *Ground Freight Expeditors, LLC v. Binder*, 359 S.W.3d 123, 126 (Mo.App. W.D. 2011). Relator cites no authority for her attempt to use mandamus as a substitute for an appeal of a discretionary trial court decision. To the contrary, Missouri law is well-established that mandamus is limited to ministerial actions which a respondent is obligated to perform. Stated differently, mandamus is limited to situations where the respondent is presented with a situation in which he or she has no choice – the law either requires respondent to act or it doesn't. Mandamus is not available if the respondent is presented with a situation in which he or she has a choice.

b. Point III requests new and different relief than that requested in Relator's Petition

In addition, Point III of Relator's brief seeks new – and different – relief than that set forth in Relator's writ petition. Relator identified her requested relief in her Petition for Writ of Mandamus: "Relator/Petitioner Henderson respectfully asks this Court to issue a writ of mandamus ordering Respondent Judge to enter a final judgment in this case." Relator's Pet., p. 1. Similarly, in her Writ Summary, Relator requested the following relief: "Relator seeks the Court to issue a Writ of Mandamus directing Respondent Judge to enter a final judgment dismissing this case with prejudice." Relator's Writ Summary, p. 3. In Point III, Relator asks the Court to disregard the relief requested in her Petition and instead enter no judgment at all – i.e., reverse the trial court's dismissal of Relator's election contest. Missouri law does not allow mandamus to be manipulated in this manner. "[T]he rule is well settled that in mandamus he who seeks mandamus must specify just what he wants, nothing more or less." *State ex rel. Hart v. City of St. Louis*, 204 S.W.2d 234, 240 (Mo. banc 1947) (citations omitted).

Simply put, Relator cannot seek a new form of relief in her brief. Relator is limited to that relief set forth in Relator's writ petition.

VI. Relator is not entitled to a writ of mandamus overruling Respondent’s dismissal because there is no statutory authority for an election contest in that Relator has admitted that Missouri’s general election procedures have no application to Community Improvement District elections and RSMo. § 67.1545 exempts such elections from Missouri’s general election procedures

In the absence of statutory authority, there is no right to challenge the outcome of an election. Here, there is no specific authority permitting a challenge to the election at issue and the Missouri legislature specified that Community Improvement District sales tax elections be conducted in accordance with RSMo. § 67.1545 rather than the general election statutes set forth in Chapter 115 of the Missouri Revised Statutes.

Standard of Review – Relator’s Point Three

Dismissal for lack of subject matter jurisdiction or lack of statutory authority is reviewed for abuse of discretion or reviewed de novo, depending on the basis of the dismissal. *Ground Freight Expeditors, LLC v. Binder*, 359 S.W.3d 123, 126 (Mo.App. 2011). But, generally, “dismissal for lack of subject matter jurisdiction is a question of fact that will not be reversed absent an abuse of discretion.” *Id.*

a. Grounds for Dismissal – Lack of Subject Matter Jurisdiction and Lack of Statutory Authority

“The right to contest an election is not a common law or equitable right, but, rather the right to contest an election is only conferred by virtue of statute.” *Mosley v. English*, 501 S.W.3d 497, 501 (Mo.App. E.D. 2016) (citations omitted). “Inasmuch as statutes governing election contests are a code unto themselves, the jurisdiction of the trial court is confined strictly to the pertinent statutory provisions, *hence the letter of the law is the*

limit of the court's power.” *Dally v. Butler*, 972 S.W.2d 603, 608 (Mo.App. S.D. 1998) (citations omitted) (emphasis added). “Strict compliance with the election contest statutes is necessary to confer subject matter jurisdiction upon the trial court.” *Mosley*, 501 S.W.3d at 501 (citations omitted).

Relator’s Point III claims that the Respondent had jurisdiction over the election contest pursuant to the Missouri Constitution. Relator’s position, however, ignores a litany of appellate opinions analyzing and dismissing election contests for lack of subject matter jurisdiction if there was no statutory authority for the contest. In 2016, the Court of Appeals noted that statutory authority - and compliance with that statutory authority - is necessary to confer jurisdiction on the trial court. *Mosley*, 501 S.W.3d at 501.

Mosley is consistent with the history of election contests in Missouri. For example, in *Hockemeier v. Berra*, this Court held that it is a “basic precept that the right to contest an election is granted by statute and the courts are without jurisdiction to entertain a petition for relief where none is specifically granted by statute.” *Hockemeier*, 641 S.W.2d 67, 68 (Mo. banc 1982) (citations omitted); *see also Board of Election Com’rs of St. Louis County v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990) (“[T]he relief a court may grant is limited to that specifically authorized by statute.”); *Harter v. Kehm*, 733 S.W.2d 775, 777 (Mo.App. E.D. 1987) (“we are without jurisdiction to entertain a petition for relief in an election contest where none is specifically granted by statute.”).

Even outside the context of election contests, the question of statutory authority and jurisdiction are frequently one and the same. For example, in *Vance Bros., Inc. v.*

Obermiller Constr. Services, Inc., this Court held noted that an alleged lack of statutory authority “questions the jurisdiction of the court to enter the particular judgment in the particular case...” *Vance Bros, Inc.*, 181 S.W.3d 562, 564 (Mo. banc. 2006) Similarly, in *Ground Freight Expeditors, LLC v. Binder*, the Court of Appeals treated a dismissal for lack of subject matter jurisdiction as a dismissal for lack of statutory authority because both lack of jurisdiction and lack of authority address a lack of power to grant relief. *Ground Freight Expeditors, LLC*, 359 S.W.3d 123, 126 (Mo.App. W.D. 2011).

b. Lack of Statutory Authority – Community Improvement District Sales Tax Elections

In the absence of statutory authority, there is no right to contest an election. *Clark v. City of Trenton*, 591 S.W.2d 257, 259 (Mo.App. W.D. 1979) (“Since the right to contest an election is not a natural right, such as the right of life, liberty, and property, but exists, if at all, in the written laws of the state, the rule has always been that no election may be contested except as specifically authorized and provided by statute.”).

Here, there is no statutory authority for an election contest to a Community Improvement District sales tax election. Such sales elections are governed by RSMo. § 67.1545, which provides that CID sales tax elections shall be conducted in accordance with RSMo. § 67.1545 “notwithstanding the provisions of Chapter 115.” Indeed, immediately prior to the sales tax election, Relator conceded that sales tax elections were generally exempt from Chapter 115. In the absence of statutory authority, there is no basis for Relator's election contest.

CONCLUSION

For the reasons set forth above, the Court should quash its preliminary writ and deny Relator's request for a permanent writ of mandamus in its entirety.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that Brief of Respondent includes the information required by Supreme Court 55.03, complies with the limitations contained in Rule 84.06(b), and contains 7,272 words as determined by the Microsoft Office word-counting system.

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