

IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC96865

STATE OF MISSOURI ex rel. JENNIFER HENDERSON

Relator,

v.

THE HONORABLE JODIE ASEL, JUDGE,
CIRCUIT COURT OF BOONE COUNTY

Respondent.

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

BRIEF OF RELATOR JENNIFER HENDERSON

James R. Layton, No. 45631
Tueth Keeney Cooper Mohan
Jackstadt P.C.
34 N. Meramec Ave., Ste. 600
St. Louis, MO 63015
Tel: (314) 880-3619
Fax: (314) 880-3601
Email:
JLayton@TuethKeeney.com

Richard C. Reuben,
No. 63665
University of Missouri School of
Law
Hulston Hall
Columbia, MO 65211
Tel: (573) 882-5204
Fax: (573) 882-3343
Email: ReubenR@missouri.edu

Attorneys for Relator

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JURISDICTIONAL STATEMENT

This is a proceeding for a writ of mandamus pursuant to Rule 94.

The underlying action in this case presents state constitutional and statutory challenges to a sales tax election conducted pursuant to the Missouri Community Improvement District Act, as well as an as-applied challenge to the constitutionality of the Act, which would fall within this Court's jurisdiction under Art. V, § 3 of the Missouri Constitution. The initial question before the Circuit Court for Boone County, though, was whether it has subject matter jurisdiction over the election contest brought by Relator.

But the question that actually brought this matter to this Court on a writ petition is whether the circuit court can, by refusing to enter an appealable judgment, preclude an appeal of its decision that it lacked subject matter jurisdiction. "This Court has the authority to 'issue and determine original remedial writs,' such as the extraordinary writ of mandamus. See Mo. Const., art. V, § 4.1." *State ex rel. Reg'l Convention v. Burton*, 553 S.W.3d 223, 225 (Mo. 2017).

STATEMENT OF FACTS

The Petition for Writ of Mandamus arose out of a civil action filed in January 2016 by Relator, Jennifer Henderson, in the Circuit Court of Boone County, *Henderson v. Business Loop Community Improvement District*, No. 16BA-CV0074 (“the Action”). See Petition Exhibit 1, p. 1.¹ The Action named as defendants the Business Loop CID, its president Tom May, and its executive director, Carrie Gartner (collectively, “Business Loop CID”).

The Action was brought as an election contest alleging constitutional and statutory irregularities in a sales tax election conducted by Business Loop CID in December 2015 that were sufficient to cast doubt on the outcome of the election approving the tax.

Because it was decided below on a motion to dismiss, “[t]he facts alleged in the petition are assumed to be true, and all reasonable inferences are liberally construed in favor of the plaintiff.” *Smith v. Humane Soc’y of the U.S.*, 519 S.W.3d 789 (Mo., 2017). Among the facts alleged are:

- Relator was registered to vote as a resident of the Business Loop CID (Petition ¶¶ 14, 27), though there had been efforts to persuade her to “unregister,” on the theory that if she did, there would be no individual voters in the sales tax election (Petition ¶¶ 15-24).
- Business Loop CID held an election by mail in December 2015 to approve a sales tax. Petition ¶¶ 31-38.

¹ Relator incorporates by reference all documents filed with this Court relating to the instant writ petition, as well as her earlier appeal in this matter, SC95296. Citations are to Exhibits, with the page number in the set of exhibits attached to the Petition.

- Rather than have the election run by the County Clerk, Business Loop CID chose to run the election itself, and used its own office as the polling place. Petition ¶¶ 30-32.
- Business Loop CID announced the sales tax election on December 1, 2015; ballots were then due on December 10, 2015; ¶¶ 75-81.
- Business Loop CID's ballot required voters to put their name and address on the ballot. Petition ¶¶ 43-49.
- Business Loop CID did not keep the submitted ballots secure; they were available to Loop CID personnel. Petition ¶¶ 33, 37.
- Of the 13 registered voters in the Business Loop CID (Petition ¶ 28), seven voted—and the tax passed by a vote of 4-3 (Petition ¶ 38).

Business Loop CID moved to dismiss on the basis that the circuit court lacked subject matter jurisdiction to hear an election contest for a community improvement district sales tax election. Exhibit 2, p. 22. Judge Asel “sustained” that Motion to Dismiss—in a docket entry, not a document that she signed, stating:

Respondent Business Loop CID's amd [sic]
Respondent Tom May's Motion to Dismiss for Lack of
Subject Matter Jurisdiction filed January 22, 2016,
and Respondent Carrie Gartner's Motion to Dismiss
filed January 25, 2016, (incorporating the motion and
suggestions filed by Business Loop Community
Improvement District and Tom May) are sustained.
Cause is dismissed in its entirety without prejudice.
Court costs taxed to Petitioner/Contestant Jennifer
Henderson. JCA/IV (mln).

Exhibit 4, p. 34.

When Relator sought to appeal to this Court, No. SC95296, this Court dismissed the appeal “for lack of a final judgment.” Exhibit 7, p. 58.

So Relator asked Respondent Judge to enter a final judgment. *See* Exhibit 8, p. 59. Respondent Judge declined. Exhibit 10, p. 71.

Relator petitioned the Court of Appeals, Western District, for a writ of mandamus directing Respondent Judge to enter judgment. Exhibit 11. The Court of Appeals denied Relator's petition. Exhibit 13, p. 86.

Relator then filed the instant petition with this Court. The Court issued a preliminary writ, commanding Respondent Judge Asel "to vacate [her] order of March 8, 2016, dismissing the case without prejudice ... and, in lieu thereof, enter a final, appealable judgment, or show cause... why you should not do so." Instead of entering such an order, Respondent Judge Asel chose to have counsel for Business Loop CID file a response in this Court, leading to briefing pursuant to Rule 84.24(h).

POINTS RELIED ON

- I. Relator is entitled to a writ of mandamus requiring Respondent Judge Asel to vacate her order of dismissal without prejudice and to enter a final, appealable judgment because Respondent has a clear duty to enter judgment in that Relator stood on her pleadings, requested entry of judgment against her, and filed notice of appeal.

Rule 74.01(a)

Rule 67.06

Welch v. City of Blue Springs, 526 S.W.2d 379 (Mo. App. W.D. 1975)

- II. Even if Respondent Judge Asel had discretionary authority over the case when Relator stood on her pleadings and moved for entry of judgment, Relator is entitled to an order requiring Respondent to enter a final judgment because Respondent's continued refusal to enter judgment is an abuse of discretion in that no issues remain, the alleged lack of subject matter jurisdiction is entirely dispositive, and the basis for the dismissal was not remediable.

State ex rel. St. Louis, K & N.W. Ry. Co. v Klein, 41 S.W. 895 (Mo. 1897)

- III. Relator is entitled to a writ of mandamus requiring Respondent to vacate her order of dismissal without prejudice and proceed to take up the case before her because that court has subject matter jurisdiction in that this is a civil case, not outside the general civil jurisdiction of the circuit court.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009)

State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3d 239 (Mo. 2016)

ARGUMENT

Ultimately, Relator seeks appellate review of Respondent's decision to sustain Business Loop CID's Motion to Dismiss for Lack of Subject Matter Jurisdiction—a motion claiming that the circuit court lacks subject matter jurisdiction to hear contests of tax elections conducted by community improvement districts. So far, Relator has been unable to obtain appellate review of the jurisdictional holding. That is because, as this Court previously said, Respondent's order of dismissal without prejudice has never been replaced or supplemented by nor transformed into a final, appealable judgment.

In Point I, we discuss why the judgment was not final and why the circuit court had a duty to enter such a judgment rather than leave the docket order dismissing without prejudice in place indefinitely.

In Point II, we discuss, in the alternative, why refusing to enter a judgment was an abuse of discretion.

In Point II, we discuss the circuit court's subject matter jurisdiction—the alleged lack of which was the basis for the circuit court's dismissal.

STANDARD OF REVIEW

“A litigant seeking ‘relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.’” *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. 2015). But this Court has also recently held that in at least one instance where the question raised on mandamus is a legal one, review is *de novo*: “This court reviews whether a circuit court should have granted a motion to compel arbitration *de novo*.” *State ex rel. Reg'l Convention v. Burton*, 553 S.W.3d 223, 225 (Mo. 2017). The same should be true here as to Point I.

To the extent the Court takes up this matter beyond the specific scope of mandamus—*i.e.*, to address the alternative argument in Point II or the substantive argument in Point III—the Court would ask whether the trial court’s continued refusal to enter a final, appealable judgment “‘erroneously declares the law, or ... erroneously applies the law.’” *Bowers v. Bowers*, 2018 WL 1599861 (Mo. 2018), quoting *Brown v. Brown*, 423 S.W.3d 784, 787 (Mo. 2014), and *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

That issue and the underlying jurisdictional issue were preserved for appellate review through repeated motions to the circuit court, as described in the Statement of Facts.

Point I: Relator is entitled to a writ of mandamus requiring Respondent Judge Asel to vacate her order of dismissal without prejudice and to enter a final, appealable judgment because Respondent has a clear duty to enter judgment in that Relator stood on her pleadings, requested entry of judgment against her, and filed notice of appeal.

I. Having chosen to stand on her pleadings and ask for entry of judgment, Relator is clearly entitled to a final, appealable judgment so that she can take up on appeal the question of circuit court jurisdiction.

As discussed further below, Respondent Judge Asel dismissed Relator's case for lack of subject matter jurisdiction. When Relator tried to appeal, this Court said, "the appeal filed herein is hereby dismissed" because it found there was not "a final appealable judgment." Exhibit 7, p. 58.

The bases for this Court's decision were, presumably, twofold. One that goes to finality, and one that goes to appealability.

First, the absence of signed writing denominated "judgment."

Only a final judgment can be appealed. In Rule 74.01(a), the Court sets out two requirements for when a "judgment" is "rendered" and thus "entered": "A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." Thus a "final judgment" must be in writing, signed, and denominated "judgment" or "decree."

Here, Respondent did not sign a written order dismissing Relator's case. Rather, she entered on the docket that the "Respondent Business Loop CID's and Respondent Tom May's Motion to Dismiss for Lack of Subject Matter Jurisdiction ... and Respondent Carrie Gartner's Motion to Dismiss ...

are sustained. Cause is dismissed in its entirety without prejudice.” Though she also included initials (“JCA/IV”), she did not “in writing, sign[]” an order, nor denominate it a “judgment.”

Twice since then, Relator has appeared before Respondent and asked that the docket-entry dismissal be transformed into a final, appealable judgment. Twice Respondent has responded by recording on the docket, “Motion denied.” See August 30, 2016, and June 5, 2017 docket entries. Still there is no writing, signed by Respondent or any other judge, denominated “judgment.” There was and is no final judgment, appealable or not.

Second, dismissal declared to be “without prejudice.”

If a docket entry granting a motion to dismiss could be a final judgment, this one, a dismissal without prejudice, still might not be appealable. “The general rule is that a dismissal *without prejudice* is not a final judgment and, therefore, is not appealable.” *City of Kansas City v. Ross*, 508 S.W.3d 189, 192 (Mo. App. W.D. 2017) (emphasis added). Mo. Civil Rule 74.01. *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. 1997). And again, the docket entry said, “Cause is dismissed in its entirety *without prejudice*.” Exhibit 4, Record p. 34 (emphasis added).

Relator’s only course: ask for final judgment.

That leads to this question: How could Relator obtain a final, appealable judgment, thus qualifying for appellate review of the circuit court’s purported lack of subject matter jurisdiction over a challenge to a community improvement district sales tax election?

Because a dismissal without prejudice is not an appealable judgment, upon receiving such a judgment a plaintiff typically has four options:

1. Abandon the claim.
2. Fix the problem that led to dismissal by amending the petition.

3. Fix the problem by filing a new action.
4. Have the circuit court transform the judgment to one with prejudice.

Relator was unwilling to abandon her claim. As shown on the dockets of this Court, the Court of Appeals, and the Circuit Court, she has continued to pursue it zealously.

Relator did not have any method of fixing the purported jurisdictional problem by amendment. Missouri law only permits one cause of action for a legal challenge to an election after an election has been conducted: the election contest. § 115.529.² That was the cause of action that Relator timely brought in January 2016, and that Respondent dismissed without prejudice on March 8, 2016, for lack of subject matter jurisdiction.

Similarly, Relator could not have fixed the problem by filing a new action. By the time her action was dismissed, the 30-day statutory window for filing the election contest had already expired—in fact, as would be expected with such a short filing window, it had expired shortly after the filing of Relator’s initial petition. *See* § 115.557; *Foster v. Evert*, 751 S.W.2d 42, 44 (Mo. banc 1988) (election contest procedures are “exclusive and must be strictly followed as substantive law.”). But even if the window were still open, filing a new action would have been futile because Respondent Judge Asel had already ruled that she did not have subject matter jurisdiction to hear the election contest.

To proceed, then, Relator was left with just the last option, to have the dismissal without prejudice transformed into a dismissal with prejudice (and entered as a writing signed by a judge and denominated “judgment”).

In Rule 67.06, this Court set out the usual course to accomplish the fourth option:

² Statutory citations are to the Revised Statutes of Missouri (2000), as supplemented through 2017.

On sustaining a motion to dismiss a claim, counterclaim or cross-claim the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect; in which cases amendment shall be made promptly by the party in default.

Respondent Judge Asel did not set a deadline for Relator to amend her pleadings. But Relator still triggered the application of Rule 67.06 when she moved for entry of judgment against her and filed Notice of Appeal. Because there were no other claims to be brought, and any new case would be time-barred, how else was she to proceed to vindicate her statutory right of appeal? *See* RSMo § 115.551 (“Either party to the [election] contest may appeal the judgment of the circuit court to the court of appeals”).

The circuit court’s ministerial duty: enter judgment.

Again, Relator had just one option: ask the circuit court to amend or replace its decision with a judgment that was appealable—*i.e.*, a “final judgment of dismissal with prejudice,” as Rule 67.06 would usually require. And as discussed above, Relator did that—repeatedly, but to no avail. Respondent Judge Asel refused, and still refuses, to enter judgment.

Rule 67.06 imposes a duty upon a trial judge to enter judgment upon motion by a party whose case has been dismissed without prejudice. *Welch v. City of Blue Springs*, 526 S.W.2d 379, 381 (Mo. App. W.D. 1975) (“under Rule, the entry of judgment upon motion would be a ministerial act”). Because Respondent Judge Asel has repeatedly violated this duty by refusing to enter judgment against Relator, it is necessary and appropriate for this Court to issue a writ of mandamus directing her to do so.

Point II: Even if Respondent Judge Asel had discretionary authority over the case when Relator stood on her pleadings and moved for entry of judgment, Relator is entitled to an order requiring Respondent to enter a final judgment because Respondent's continued refusal to enter judgment is an abuse of discretion in that no issues remain, the alleged lack of subject matter jurisdiction is entirely dispositive, and the basis for the dismissal was not remediable.

II. In the alternative, refusing to enter final judgment was an abuse of discretion.

If the trial court did not have a clear duty to enter judgment, her persistent refusal to enter judgment would still constitute an abuse of discretion.

“A trial court abuses its discretion when its ruling shocks the sense of justice, shows a lack of consideration, and is obviously against the logic of the circumstances.” *Burrows v. Union Pacific R. Co.* 218 S.W. 3d 527, 533-34 (Mo. App. E.D. 2007) (internal quotation omitted); see also *Brizendine v. Bartlett Grain Co.*, 477 S.W.3d 719, 714 (Mo. App. W.D. 2015). To refuse to enter judgment here is “obviously against the logic of the circumstances.”

Once she made her docket entry dismissing the case, Respondent Judge Asel had resolved all the issues that she could resolve, were she right about her jurisdiction. Then, as this Court observed nearly a century ago, “nothing remain[ed] but the ministerial duty of entering a final judgment.” *State ex rel. St. Louis, K & N.W. Ry. Co. v. Klein*, 41 S.W. 895, 898 (Mo. 1897). The consistent position of Business Loop CID reaffirms that conclusion: Never, during the many filings and arguments in this case, did Business Loop CID budge from its position that circuit courts lack subject matter jurisdiction over contests to community improvement district sales tax elections. And if

Respondent and Business Loop CID were right and there was no such jurisdiction, the circuit court could do nothing but dismiss the case.

The failure to enter a judgment of dismissal in that circumstance is an appropriate target of a writ. Upon a finding of lack of jurisdiction, dismissal is ministerial. And Relator has no adequate remedy for dismissal except by writ. Appeal remains unavailable because the case remains open—apparently in perpetuity. Such a situation frustrates the most basic tenet of this nation’s commitment to the rule of law: “every right, when withheld, must have a remedy and every injury its proper redress.” *Marbury v. Madison*, 1 Cranch 137, 147 (1803).

This Court should grant the petition and issue a writ requiring the circuit court to, as this Court said in its preliminary writ, “enter a final, appealable judgment,” *i.e.*, a judgment in writing, signed by a judge, denominated “judgment,” with prejudice.

Point III: Realtor is entitled to a writ of mandamus requiring Respondent to vacate her order of dismissal without prejudice and proceed to take up the case before her because that court has subject matter jurisdiction in that this is a civil case, not outside the general civil jurisdiction of the Circuit Court.

III. The Circuit Court has subject matter jurisdiction.

Because it is purely a question of law—and because the question is simple to answer, and one that should not require another appeal—we turn to the merits of the circuit court’s decision.

Missouri Constitution confers upon circuit courts original jurisdiction over “all cases and matters, civil and criminal.” Mo. Const. Art. V, Sec. 14(a). This was a civil case within the circuit court’s jurisdiction.

As noted above, the circuit court did not write anything with regard to jurisdiction when it dismissed Relator’s election contest without prejudice.³ It simply “sustained” “Respondent Business Loop CID's and Respondent Tom May's Motion to Dismiss for Lack of Subject Matter Jurisdiction ..., and Respondent Carrie Gartner's Motion to Dismiss filed January 25, 2016, (incorporating the motion and suggestions filed by Business Loop Community Improvement District and Tom May).” Exhibit 4, p 34. To determine the basis for the dismissal, we look to the motion.

³ In later proceedings, Respondent Judge Asel did express a viewpoint about why she refused to enter judgment, stating: “If the motion to dismiss itself is appealed, then you are months and months down the road until you get a decision on that. If it’s reversed, what happens? It comes back to me. You already know what I think of your lawsuit, because I dismissed it from the git-go. And so it wouldn’t be productive to have your lawsuit aback [sic] understanding what I did with it the first time.” Transcript at 21 (filed in SC95926).

The motion stated its basis in its name: “Lack of Subject Matter Jurisdiction.” Exhibit 2, p. 22. It restated that basis in a preliminary section titled, “Standard,” which in its entirety said:

Rule 55.27 provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” MO. SUP. CT. R. 55.27(g)(3). “A motion to dismiss should be granted when it appears that the trial court lacks subject matter jurisdiction. ‘As the term appears suggests the quantum of proof is not high.’ *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1, 4 (Mo. App. 2000).

Exhibit 2, p. 23. It restated that basis again in the next heading:

“Contestant’s Petition Must be Dismissed for Lack of Subject Matter Jurisdiction.” *Id.*

The basis for dismissal, then, was a lack of subject matter jurisdiction. But “[t]rue jurisdictional prerequisites in our courts are rare.” *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238 (Mo. 2014).

If statutory authorization were also required, it is found in the election contest statute, RSMo § 115.575.2 (“All contested elections on any office or question other than those provided for in sections 115.555, 115.563 and subsection 1 of this section shall be heard and determined by the circuit court....”).

But it is now well-established that the source of a Missouri circuit court’s general subject matter jurisdiction is the Missouri Constitution, not a statute. And the Constitution confers upon circuit courts original jurisdiction over “all cases and matters, civil and criminal.” Mo. Const. Art. 5, Sec. 14(a). Indeed, this Court rejected the equivalent of Respondent Judge Asel’s conclusion in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009). As recently restated by this Court:

Missouri courts recognize two kinds of jurisdiction: subject matter and personal. ... Subject matter jurisdiction refers to a court's authority to render judgment in a particular category of cases. ... The Missouri constitution provides circuit courts with subject matter jurisdiction over all civil and criminal cases. ...

State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3d 239, 241 (Mo. 2016) (citations omitted). This is a “civil case.” It falls within the circuit court’s subject matter jurisdiction.

This Court, in issuing a writ, can and should decide the jurisdictional question, declare that the Circuit Court has subject matter jurisdiction, and instruct the circuit court to allow the matter to proceed. *See* Rule 81.14. Relator has been trying to move this case to trial for more than two years. There is no need for any further delay.

CONCLUSION

For the reasons stated above, the Court should issue a writ of mandamus ordering Respondent to vacate her dismissal without prejudice and proceed to take up the matter as one that falls within the subject matter jurisdiction of the circuit court—or at least to enter a final appealable judgment so that the question of her alleged lack of jurisdiction can be tested on appeal.

Respectfully submitted,

By: /s/ James R. Layton
 James R. Layton, No. 45631
 Tueth Keeney Cooper Mohan Jackstadt P.C.
 34 N. Meramec Ave., Ste. 600
 St. Louis, MO 63015
 Tel: (314) 880-3619
 Fax: (314) 880-3601
 Email: JLayton@TuethKeeney.com

/s/ Richard C. Reuben
 Richard C. Reuben, No. 63665
 University of Missouri School of Law
 Hulston Hall
 Columbia, MO 65211
 Tel: (573) 882-5204
 Fax: (573) 882-3343
 Email: ReubenR@missouri.edu
Attorneys for Relator

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that Brief of Relator Jennifer Henderson includes the information required by Supreme Court 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4,499 words as determined by the Microsoft Office word-counting system.

/s/ James R. Layton