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

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. Rule 67.06 applies even though Respondent did not fulfill her duty under that rule.

The judicial policy for Missouri Civil Rule 67.06 is clear, sensible, and sound as a matter of due process in a system of governance committed to the rule of law. All trial court rulings are subject to review as a matter of law to assure the accurate application of law and to protect against decisions based on arbitrariness and caprice. Therefore, at some point, a party is entitled to entry of judgment, win or lose, in order provide the opportunity for this appellate review. Rule 67.06 must be read to ensure that result—even where a court fails to do its part.

Rule 67.06 sets out these steps:

1. Defendant files "a motion to dismiss a claim, counterclaim or cross-claim.
2. The court grants that motion.
3. The court "grant[s] leave to amend and … specif[ies] the time within which the amendment shall be made.
4. "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."

Here, 1 and 2 happened; 3 and 4 did not.

Though 3 and 4 are the legal responsibility of the circuit court, Respondent argues that her failure to take those steps means that the

rule does not apply. But as the circumstances of this case show, such a reading leads to an absurd result: depriving a party of an appeal---through no fault of its own.

In this case, the trial court sustained Respondent's motion to dismiss Relator's claim for lack of subject matter jurisdiction. As discussed in Relator's Brief, Relator moved for entry of judgment twice, Rule 67.06 applies, and Respondent Judge has a duty to enter that judgment under the rule. Because she has consistently refused to enter judgment as requested, in the face that duty, it is appropriate for this Court to issue the writ of mandamus. *See Maxwell v. Daviess County*, 190 S.W.3d 606, 610 (Mo.App. W.D. 2006)

Respondent cites neither a rationale nor authority to the contrary, for good reason: There is none. Instead, Respondent changes the subject and cites the principle that an involuntary dismissal without prejudice can be appealed where the dismissal has the practical effect of terminating the litigation in the form cast or in the plaintiff's chosen forum, citing *Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997). Resp. Br. at 16.

At one time, Relator agreed. In fact, she relied on this very argument and case in directly appealing the trial court's order of dismissal. However, this Court determined the exception does not apply when it dismissed the appeal for "lack of a final appealable judgment." If Respondent's argument was valid, this Court would have reviewed this matter on direct appeal more than a year ago, and there would have been no need for Relator's petition for a writ of mandamus.

Respondent's additional argument—that Rule 67.06 does not apply because "the trial court is not required to grant relief under Rule 67.06 in

the absence of a specific request"—simply does not apply under these facts. There was "a specific request." Two, in fact. Relator stood on her pleadings and specifically asked Respondent twice to enter judgment against her. And standing on pleading is a practice Missouri law has long permitted. *E.g. Galvin v. Kansas City,* 122 S.W.2d 379 (Mo.App. 1938). This case demonstrates why the law must permit one to stand on their pleading: There is no other claim that can ethically be brought because there is only one cause of action. To stand on one's pleadings, satisfies the requirements that Rule 67.06 imposes on the dismissed party.

The plain text of Rule 74.01(a) also belies Respondent Judge's argument that her docket entry meets the requirements for an appealable judgment. In relevant part, Rule 74.01(a) says, "A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed." To this day, Respondent has never denominated her order of dismissal as a "judgment" or "decree." In fact, she has refused to do so three times, including in response to this Court's preliminary writ.

Finally, Respondent's concern about Relator's off-the-cuff comment regarding her ability to refile is irrelevant. While Relator could have refiled the claim, refiling would have been futile: it would have been rejected as both time-barred and, again, beyond the subject matter jurisdiction of the court. There was, in fact, there was only one cause of action available to Relator, regardless of what Relator's counsel might have said during argument on a motion.

II. Entry of a final appealable judgment is a now a ministerial, not a discretionary act.

This Court has long recognized that the entry of the judgment can be compelled by writ when there is nothing left to be done in the trial court. *State ex rel. St. Louis, K & N.W. Ry. Co. v Klein*, 41 S.W. 895 (Mo. 1897) is particularly instructive. This Court recognized that there, as here, the trial court had "found all the facts essential to the entry of a final judgment appears from the record made. Nothing remains to be done but the *ministerial duty* of entering a final judgment in favor of plaintiff on the facts found." *Id.* at 898 (emphasis added).

That Respondent here dismissed the case without prejudice in its entirety as a matter of law before any facts could be found should not make a difference. The question decided by the circuit court was a purely matter of law about the jurisdiction of that court, and that decision effectively resolved the case because no new action could be brought. Entry of judgment at that point can only be a ministerial act. Respondent exhausted her discretion when she dismissed Relator's election contest "in its entirety" as a matter of law for want of subject matter jurisdiction. There were no further legal or factual arguments to consider and apply her discretionary judgment. "Nothing remains to be done but the ministerial duty of entering a final judgment in favor of [defendant] on the [rule of law] found," *i.e.,* on the erroneous conclusion that the circuit court does not have *subject matter jurisdiction* to hear an election contest.

That general principle has been applied by the Eastern and Western districts of the Court of Appeals to situations similar to this one. The lead case is *Welch v. City of Blue Springs*, 526 S.W.2d 379 (Mo. App. W.D. 1975), in which the question was whether an order dismissing a second amended

petition, with leave to amend, was an appealable order when the next record entry is a notice of intent to appeal. In permitting the appeal without a formal entry of judgment, the court said: "Although the matter is not free from doubt, it does appear that, under Rule 67.06, the entry of judgment upon motion would be a ministerial act. By filing notice of appeal, plaintiffs in effect acknowledge the final nature of the dismissal." *Id.* at 381. *See also Mitchell v. St. Louis Business Journal*, 689 S.W.2d 389 (Mo. App. E.D. 1985); *Zippay v. Kelleher*, 638 S.W.2d 292, 293 (Mo. App. E.D. 1981).

Respondent claims that entry of judgment under Rule 67.06 was not ministerial, but instead "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." Resp. Br. at 20. But Respondent dismissed the case without prejudice "in its entirety" prior to the initiation of discovery and other elements of legal fact-finding. That decision precluded Respondent from finding any facts to which her discretionary judgment could apply.

Respondent's argument also fails as a matter of law. Rule 67.06 states, in relevant part, "If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice *shall be entered* on motion." (Emphasis added). Again, the plain language of the rule is clear and unambiguous.

The case that Respondent cites, *Rhodes v. Westoak Realty & Inv., Inc.*, 983 S.W.2d 565, 568 (Mo. App. E.D. 1998), does not fully support Respondent's claim that "[r]uling on a request pursuant to Rule 67.06 is 'primarily a matter within the sound discretion of the trial court….'" (Resp. Br. at 21.) What was "within the sound discretion" according to that decision was whether to allow a party to amend her pleadings. *Id.* Where amendment

would be futile, as here (according to the circuit court, having adopted the defendants' rationale), it makes sense not to allow amendment. But that does not absolve the circuit court from its obligation to continue to the end of Rule 67.06's logic and enter a final, appealable judgment.

III. This Court should not, in the first instance, invoke the equitable doctrine of laches to entirely prevent Relator from obtaining review of the circuit court's jurisdictional decision.

Respondent has never ruled—never exercised her equitable powers—based on laches. Nonetheless, she claims here, represented by defendants' counsel, that the writ is barred by laches. That is ironic given that the defendants have been the primary cause of any delay in the progress of this case. For nearly two years, they have vigorously opposed entry of judgment and appellate review of Respondent Judge's decision that a Missouri circuit court does not have subject matter jurisdiction to hear a contest to an election held by a community improvement district.

There is no basis on this record to accept a laches defense. After all, "[t]here is no fixed period within which a right or claim must be asserted in order that it avoid being barred by laches; temporal limits are drawn in light of the circumstances of the particular case; mere delay, in and of itself, does not constitute laches…." *Kimble v. Worth County R-III Board of Education*, 669 S.W.2d 949, 954 (Mo. App. 1984). Rather, there must be culpable delay *and* harm: "invocation of laches requires that a party with knowledge of the facts giving rise to his rights delays assertion of them for an excessive time and the other party suffers legal detriment therefrom." *Lyman v. Walls,* 660 S.W.2d 759, 761 (Mo.App. 1983). *See Blackburn v. Richardson,* 849 S.W.2d 281, 289 (Mo.App. 1993). The burden of proof falls on the party asserting

laches as a defense, and that party "must show that the unreasonable delay operates to their prejudice." *McNulty v. Heitman,* 600 S.W.2d 168, 173 (Mo.App. 1980).

Respondent does not argue that the delay was unreasonable, nor that defendants suffered legal detriment as a result. Nor can she. After all, the tax has been collected since the first possible opportunity.

IV. If this Court decides to consider the standing question in the first instance—which it should not—the Court should recognize that Relator has continuing standing even if she has moved outside the Business Loop Community Improvement District

Nor was the basis for the circuit court's order defendants' argument that Relator later lost her standing. We say "later" because defendants and Respondent did not and do not question that Relator had standing at the time she filed suit and for some time thereafter. Respondent nonetheless asserts that this Court should deny the writ that would allow Relator to appeal because, Respondent claims, sometime after suit was filed Relator was no longer a voter in the community improvement district.

It is well established in Missouri that a party has standing if it has "a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,* 102 S.W.3d 10, 25 (Mo. banc 2003). A party establishes standing by showing it has "some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Mo. State Med. Ass'n v. State,* 256 S.W.3d 85, 87 (Mo. banc 2008). To have standing to appeal, "an appellant must have been a party to the suit below and aggrieved by the

judgment of the trial court." *Charnisky v. Chrismer*, 185 S.W.3d 699, 702 (Mo. App. 2006).

Again, there is no dispute that at the time Relator filed suit, she was a party—one who alleged that she was a resident and voter in the District. She was aggrieved by the trial court's judgment that it had no subject matter to hear her election contest, as well as its later decisions refusing to enter final judgment to perfect her right to appeal. Though perhaps she, personally, will not be eligible to *vote* in a new election, as Respondent acknowledges, Relator still resides in Columbia, s*ee* Resp. Br. at 26, and is further aggrieved every time she is forced to *pay the tax* when she shops in the District.

Even if continued purchases were not enough, this Court has already rejected the theory that a person such as Relator necessarily loses her standing if she moves, assuming others similarly aggrieved remain or may replace her. In *Committee for Educational Equality v. State of Missouri,* 294 S.W.3d 477 (2009), the so-called "school funding case," some of the student plaintiffs graduated and were no longer in school. The Court unanimously agreed the students who had graduated still had standing because other students still in school were similarly aggrieved. *Id.* at 486.

Just as there were students in public schools after the named plaintiffs in school funding suit who had graduated, so too there are still residents in the CID affected by this highly irregular election. To paraphrase this Court's language from the school-funding case, "plaintiff [voters] who are no longer in [the district] have claims that are not moot because they present claims capable of repetition that otherwise may evade review." *Id.* That a new voter may have replaced Relator in a particular residence should not be enough to prevent the circuit court from considering the legitimacy of an election that resulted in continuing higher taxes.

CONCLUSION

For the reasons stated above and in the Relator's opening brief, 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 alleged lack of subject matter jurisdiction in the circuit court 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 Reply 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 2,995 words as determined by the Microsoft Office word-counting system.

/s/ James R. Layton