OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION ONE

STATE OF MISSOURI ex rel., KIMBERLY GARDNER, in her capacity as the Circuit Attorney for the City of St. Louis,	)	No. ED108380
Appellant,	)	Appeal from the Circuit Court of the City of St. Louis
vs.	)	1922-CC01013
GERARD T. CARMODY, in his capacity as Special Prosecutor,	)	Honorable Joan L. Moriarty
Respondent.	)	Filed: December 1, 2020

Kimberly Gardner, in her capacity as the Circuit Attorney for the City of St. Louis ("Gardner" or "the Circuit Attorney"), appeals the trial court's judgment on the pleadings in favor of Gerard T. Carmody, in his capacity as Special Prosecutor ("Gerard T. Carmody" or "Carmody") on Gardner's petition in *quo warranto*.

On June 29, 2018, the Honorable Michael K. Mullen of the Circuit Court of the City of St. Louis ("Judge Mullen") entered an order, (1) disqualifying the Circuit Attorney's Office from the investigation and possible pursuit of criminal charges arising from the prosecution of former Governor Eric Greitens; and (2) "appoint[ing] Gerard T. Carmody, and Carmody MacDonald P.C. and its resources as Special Prosecutor" to the matter ("Judge Mullen's June 2018 Order" or "the June 2018 Order"). Subsequently, Gardner filed the instant petition in *quo warranto* requesting the trial court to, *inter alia*, remove Carmody from his appointed office of special prosecutor on the grounds he "named or appointed his adult children, Ryann Carmody and Patrick Carmody, to the public office or employment, as members of his prosecutorial team, in violation of Article VII[,] Section 6 of the Constitution of Missouri."[1]

On appeal, Gardner argues the trial court erred in granting judgment on the pleadings in favor of Gerard T. Carmody on Gardner's petition in *quo warranto* because: first, Carmody had the power to appoint his children as special prosecutors; and second, the face of the pleadings show Carmody is not entitled to judgment as a matter of law. With respect to her second argument, Gardner specifically alleges the face of the pleadings show: Carmody violated Missouri's Constitutional ban on nepotism in that "[he] used his position as special prosecutor to

[1] Article VII, Section 6 of the Missouri Constitution provides: "[a]ny public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment" ("Missouri's constitutional ban on nepotism"). Mo. Const. Art. VII, Section 6; *see Dryer v. Klinghammer*, 832 S.W.2d 3, 4 (Mo. App. E.D. 1992) (referring to this constitutional provision as "the Missouri constitutional ban on nepotism").

appoint his children to public office"; to the extent Carmody did not appoint his children to public office, Judge Mullen's June 2018 Order is ambiguous as to who was appointed special prosecutor; and, to the extent Judge Mullen's June 2018 order appointed the law firm of Carmody MacDonald P.C. as a special prosecutor, the order is unlawful.

AFFIRMED.

Division One holds:

(1) Missouri law is clear that only a court has the power to appoint one or more special prosecutors to a case where a prosecuting attorney or circuit attorney is disqualified.

(2) The pleadings in this case show Judge Mullen acted within his authority and discretion in appointing multiple special prosecutors to the case in which the Circuit Attorney's Office was disqualified.

(3) Judge Mullen's June 2018 Order is not ambiguous, and Judge Mullen intended to appoint "Gerard T. Carmody, and Carmody MacDonald P.C. and its resources as Special Prosecutor."

(4) Judge Mullen acted within his authority and discretion in appointing the law firm of Carmody MacDonald P.C. as a special prosecutor because Missouri law provides a trial court has both inherent and statutory authority to appoint more than one attorney, and even an entire office or law firm, as a special prosecutor.

(5) At the time Judge Mullen's June 2018 Order was entered, "resources" of Carmody MacDonald P.C. were attorneys then-employed at the firm, including Gerard T. Carmody's children Ryann Carmody (an attorney and employee of the firm continuously since September 2013) and Patrick Carmody (an attorney and employee of Carmody MacDonald P.C. continuously since March 2015). It was Judge Mullen – in other words, a court – who appointed these resources of Carmody MacDonald P.C. as special prosecutors.

(6) Because the law provides for the appointment of the resources of Carmody MacDonald P.C. (including Carmody's children Ryann and Patrick Carmody) by a court, because there is no provision in the law for such an appointment by Gerard T. Carmody acting as a public officer, and because there are no facts showing Carmody participated in the appointing process by casting a vote for the appointment, Gardner's claim of nepotism against Carmody set forth in her petition in *quo warranto* must fail as a matter of law. In other words, the face of the pleadings show Gerard T. Carmody did not "by virtue of his office or employment name[ ] or appoint[ ] to public office or employment any relative within the fourth degree, by consanguinity or affinity, [and] thereby forfeit his office or employment" within the meaning of Article VII, Section 6 of the Missouri Constitution. *See* Mo. Const. Art. VII, Section 6. Finally, because there was no forfeiture to enforce, the face of the

pleadings show Gerard T. Carmody is entitled to judgment as a matter of law on Gardner's petition in *quo warranto*.

Opinion by: Robert M. Clayton III, J.
Colleen Dolan, P.J., and Mary K. Hoff, J., concur.

Attorney for Appellant:	Dawn M. Parsons, Stephen W. Miller, Roy L. Austin, Jr.,
Attorney for Respondent:	Gerard T. Carmody, Ryan M. Prsha, Patrick G. Carmody, Ryann C. Carmody

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.