

**IN THE MISSOURI COURT OF APPEALS**  
**EASTERN DISTRICT**

ROBIN WRIGHT-JONES,	)	
	)	
Respondent,	)	
	)	Appeal No. ED91368
vs.	)	
	)	
CONNIE L. JOHNSON,	)	
	)	
Appellant.	)	

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**Appeal from the Twenty-Second Judicial Circuit**  
**Hon. Douglas E. Long, Special Judge**  
**Case No. 0822-CC01491**  
**Division 1**

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**Brief of Appellant Connie L. Johnson**

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## **JURISDICTIONAL STATEMENT**

This honorable Court is authorized to hear and determine this appeal pursuant to sections 115.526.2 and 115.551 RSMo<sup>1</sup> as well as Rule 81.01. In light of section 115.551, the trial court requiring immediate review is situated within the eastern district of the court of appeals. Section 115.551 also authorizes this honorable Court to issue any and all appropriate scheduling Orders under the circumstances. Moreover, because the trial court denied Appellant's petition for a writ of prohibition, Rule 84.22 also provides an additional basis for this honorable Court to hear and determine this action.

The issue here is whether, in the absence of strict compliance with sections 115.526.3, 115.531.1, and 115.535, the trial court exceeded its jurisdiction when it (i) declared that section 115.531.1 was not applicable to Respondent's petition, (ii) entered a scheduling Order setting a hearing on May 9, 2008, (iii) held a hearing on May 9, 2008, (iv) based upon such hearing, entered a Judgment against Appellant on May 15, 2008, which directed the Secretary of State to remove Appellant's name from the primary election ballot, (v) violated Appellant's right to a jury trial on her counter-claims and (vi) declared that Appellant was not a "resident" of the 5<sup>th</sup> senatorial district.

Time is of the essence because the Board of Election Commissioners must finalize its ballot print request on or before June 6, 2008.

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<sup>1</sup> All statutory reference shall be to RSMo Supp. 2008 unless otherwise indicated.

## STATEMENT OF FACTS

State Representative Connie L. Johnson has been a state lawmaker for approximately eight (8) years. On a professional level, Representative Johnson has earned the confidence and respect of her colleagues in the House of Representatives as evidenced by their selection of her as Minority Whip. She is also a member of the Missouri state bar as well as an officer of the court. On a personal level, Representative Johnson, an only child, has demonstrated unconditional love for her mother when her mother needed her most. Representative Johnson has never at any time abandoned her responsibilities to her mother, her legislative responsibilities, her constituents, or her domicile at 5969 Tara Lane.

Representative Johnson (hereinafter Appellant) timely filed a declaration of candidacy for the office of state senator for the 5<sup>th</sup> senatorial district in the pending Democratic Party Primary Election on August 5, 2008. On Tuesday, April 22, 2008, Robin Wright Jones, Respondent, filed a verified petition in the Twenty-Second Judicial Circuit challenging Appellant's qualifications pursuant to section 115.526.2. L.F. 5-9. Respondent essentially alleged that Appellant was not qualified to be a candidate for office because she was not a "resident" of the 5<sup>th</sup> senatorial district as required in section 21.070. *Id.*

On April 23, 2008, Respondent filed a motion to set the hearing on her petition. L.F. 10. Respondent requested time to conduct pre-trial discovery. *Id.* Appellant immediately objected. L.F. 12-14. Appellant's objection relied upon the plain and unambiguous terms of the election contest statutes. *Id.* More specifically,

Appellant advised the trial court that the primary election contest statutes (i) clearly and unambiguously required a hearing to be set not later than five (5) days of filing Respondent's petition pursuant to section 115.531 RSMo, and (ii) provided no other authority to hold any hearing beyond that date. *Id.*

On April 24, 2008, the trial court entered an Order scheduling a hearing on Respondent's petition seventeen (17) days later on May 9, 2008, despite the clear mandate of section 115.526.3. L.F. 15. On April 28, 2008, Appellant filed a Motion to Dismiss which challenged the trial court's authority to enter the April 24th scheduling Order. L.F. 16-20. On April 28, 2008, Appellant also filed an Answer to Respondent's petition in accordance with sections 115.526.2 and 115.533. L.F. 23-35. Pursuant to Rules 55.27 and 55.32, Appellant's answer also included compulsory counter-claims. *Id.*

On April 30, 2008, Appellant called up her Motion to Dismiss. L.F. 21. On April 30, 2008, the trial court denied Appellant's motion to dismiss. L.F. 36. The trial court also entered an Order severing Appellant's counter-claims for a separate trial. *Id.* Appellant's oral motion to stay the proceedings was likewise denied. L.F. 37.

On or about May 9, 2008, Appellant filed both a petition for a writ of prohibition and a corresponding Rule 73.01 request for findings of fact and conclusions of law in accordance with *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 76[5] (Mo.banc 1972). L.F. 38-56. The petition alleged that the trial court lacked

subject matter jurisdiction to set and initiate any hearing on Respondent's petition after April 29, 2008. *Id.*

On May 9, 2008, the trial court summarily denied the writ of prohibition in chambers. L.F. 57. The trial court ordered that the hearing would proceed immediately thereafter. *Id.* Prior to the hearing, Appellant also renewed her prior objections on the record.

At the conclusion of Respondent's case, Appellant moved for a directed verdict based upon Respondent's failure to prove that Appellant was not a resident as required in *State ex rel. King v. Walsh*, 484 S.W.2d 641 (Mo.banc 1972). The trial court denied the motion for a directed verdict. L.F. 57. Testimony was then adduced by Appellant. The testimony demonstrated that Appellant (i) continues to be the rightful and legal owner of 5969 Tara Lane, (ii) never declared the residence as anything other than her true, fixed and permanent home and (iii) purchased an additional residence closer to key medical providers solely because of her mother's increasingly urgent health care needs. Appellant further produced corroboration of ownership and residency at 5969 Tara Lane including, but not limited to, warranty deed, utility bills, voter registration, automobile registration, personal property tax receipts, and current operator's license. App. A26-30. At the conclusion of all the evidence, Appellant moved again for a directed verdict in light of *King*. The trial court again denied said motion. L.F. 57.

On May 15, 2008, the trial court entered its Judgment in accordance with its interpretation of section 115.545. L.F. 58-66. The trial court also entered a monetary

Judgment against Appellant for “costs of \$1872.87 and for any additional costs of court herein.” *Id.* at 65.

On May 23, 2008, solely in reliance on the “Judgment,” the Secretary of State removed Appellant’s name from the certified list of eligible candidates. App. A20-23. Consequently, the responsible election authority, the City of St. Louis Board of Election Commissioners, sent their ballot orders to the printer on May 30, 2008 without Appellant’s name. App. A24-25. The print order will be processed not later than June 6, 2008. *Id.* Such ballots will be made available to prospective absentee voters on June 24, 2008. App. A22. Because the trial court committed reversible error, absent this honorable Court’s immediate intervention, the printed ballot will not include Appellant’s name resulting in a manifest injustice.

Appellant filed a notice of appeal on May 23, 2008. L.F. 67-70. On May 30, 2008, in light of Rule 41.03, Appellant also filed an application for stay of Judgment without bond as well as a motion for an expedited review and oral argument pursuant to section 115.551 and Rules 84.02 and 84.12.

**POINTS RELIED ON**

**I. The trial court erred when it declared that section 115.531.1 was not applicable to Respondent’s petition. Section 115.526.1 has no meaning independent of section 115.531.1. In the context of this case, the trial court would not have been authorized to hear Respondent’s petition without specific reference to section 115.531.1.**

*Reeves v. Bockman*, 101 S.W.3d 280 (Mo.App. 2002)

*State ex rel. Bouchard v. Grady*, 86 S.W.3d 121 (Mo.App. 2002)

*State ex rel. Wilson v. Hart*, 583 S.W.2d 550 (Mo.App. 1979)

Sections 115.526.1 and 115.531.1

Rule 73.01

- II. The trial court erred by acting in excess of its subject matter jurisdiction by entering a scheduling Order on April 24, 2008. Section 115.526.3 incorporates section 115.531.1, which specifically directs the trial court to schedule the hearing “not later than five days after the petition was filed.” The failure to apply section 115.531.1 resulted in the court issuing a scheduling Order that failed to comply with the election contest statutes.**

*Foster v. Evert*, 751 S.W.2d 42, (Mo.banc 1988)

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

*State ex rel. Bouchard v. Grady*, 86 S.W.3d 121 (Mo.App. 2002)

Sections 115.526.3, 115.531.1, and 115.535

- III. The trial court erred by acting in excess of its subject matter jurisdiction when it held a hearing on May 9, 2008. Because no statute specifically authorized the trial court to hold a hearing on May 9, 2008, the trial court lacked power to enter a Judgment on May 15, 2008.**

*State ex rel. Holland v. Moran*, 865 S.W.2d 827 (Mo.App. 1993)

*American Indus. Resources, Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806

(Mo.App. 1986)

*Dally v. Butler*, 972 S.W.2d 603 (Mo.App. 1998)

*Wells v. Nolden*, 679 S.W.2d 889 (Mo.App. 1984)

Sections 115.526.3, 115.531.1 and 115.535

Rule 55.27(g)(3)

- IV. The trial court erred when it severed Appellant's counter-claims for a separate trial and dismissed same as moot without a hearing. Rules 55.27 and 55.32 required Appellant to file any compulsory-counter-claims with her answer on April 28, 2008. Dismissing the counter-claims without a hearing violated Appellant's right to a jury trial in accordance with section 527.090.**

*Laclede Gas Company v. Solon Gershman, Inc.*, 539 S.W.2d 574

(Mo.App. 1976)

*State ex rel. Bouchard v. Grady*, 86 S.W.3d 121 (Mo.App. 2002)

MO Const. art. I, § 22

Sections 115.526.2, 115.533, 115.551, and 527.090

Rules 41.02, 44.01, 55.27, 55.32, 66.02, 69.01

- V. The trial court erred when it entered a Judgment on May 15, 2008 directing the Secretary of State to remove Appellant's name from the certified list of candidates for the primary election on August 5, 2008. In the absence of specific statutory authority for the hearing on May 9<sup>th</sup>, the trial court's May 15, 2008 Judgment was null and void.**

*State ex rel. Gralike v. Walsh*, 483 S.W.2d 70 (Mo.banc 1972)

*State ex rel. Holland v. Moran*, 865 S.W.2d 827 (Mo.App. 1993)

*Wells v. Nolden*, 679 S.W.2d 889 (Mo.App. 1984)

Sections 115.526.3, 115.531.1 and 115.535

Rule 55.27(g)(3)

- VI. The trial court erred by declaring that Appellant was not a “resident” of the 5<sup>th</sup> senatorial district. Appellant has never “through the exercise of choice, change[d] her domicile by abandonment of the former and acquisition of a new one,” or acquire the second residence with the “present intention to remain there, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode.”**

*In re Toler’s Estate*, 325 S.W.2d 755 (Mo 1959)

*State ex rel. King v. Walsh*, 484 S.W.2d 641 (Mo.banc 1972)

*State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409 (Mo.banc 2007)

MO Const. arts. III, § 6 and IV, § 3

Section 21.070

Rules 73.01 and 84.14

### **STANDARD OF REVIEW**

“Appellate courts review a court-tried case under the standard elucidated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976).” *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 411 (Mo.banc 2007). “This Court will affirm the judgment of the trial court unless it is not supported by substantial evidence, it is

against the weight of the evidence, or it erroneously declares or applies the law.” *Id.*  
“Statutory interpretation...is an issue of law that this Court reviews de novo.” *Id.*

## **ARGUMENT**

### **I. The trial court erred when it declared that section 115.531.1 was not applicable to Respondent’s petition.**

The trial court erred when it declared that section 115.531.1 did not apply to Respondent’s petition. More specifically, the trial court erred by declaring that there was a distinction between the procedure relating to a section-115.526 “challenge to the qualifications of a candidate” and a section-115.531.1 “suit contesting the results of a primary election.” L.F. 65, ¶ 6. Consequently, the trial court declared that the procedure in section 115.531.1 did not apply to Respondent’s petition. *Id.* However, the trial court failed to identify any election contest statute on which it did rely in lieu of section 115.531.1. Such failure violated Rule 73.01 in light of Appellant’s petition for a writ of prohibition. L.F. 38-56.

“The primary rule of statutory construction is to ascertain the legislature’s intent from the language used and give effect to that intent if possible.” *State ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123 (Mo.App. 2002) (citing *Murray v. Missouri Highway and Transp. Comm’n*, 37 S.W.3d 228, 233 (Mo.banc 2001)). “The words used should be considered in their plain and ordinary meaning.” *Id.* “The entire legislative act must be construed together, and if reasonably possible, all provisions must be harmonized,” *Id.* “The legislature is not presumed to have intended a meaningless act.” *Id.*

A careful review of the plain and unambiguous terms of section 115.526 exposes the error of the trial court's declaration. Section 115.526, by its own terms, expressly incorporates the jurisdictional procedure codified at "sections 115.527 to 115.601." The procedure contained in sections 115.527 to 115.601 has been judicially recognized as the "election contest statutes." *State ex rel. Wilson v. Hart*, 583 S.W.2d 550, 551[1]-[3] (Mo.App. 1979). Therefore, according to the express terms of section 115.526, the very act of filing an election challenge in the circuit court simultaneously invokes the election contest procedure which specifically includes section 115.531.1.

Moreover, without section 115.531.1's procedure regarding jurisdiction and venue, the trial court would not have had any subject matter jurisdiction to set the hearing on Respondent's petition. Section 115.526.1 commanded that Respondent's qualifications-challenge "shall be made by filing a verified petition with the appropriate court as is provided for in case of a contest of election for such office in sections 115.527 to 115.601." *Id.* However, section 115.526.1 left the term "appropriate court" undefined. Section 115.531.1 provided the necessary definition where it commanded that Respondent "shall file a verified petition in the office of the clerk of the circuit court of any circuit in which part of the election was held." *Id.*

The 5<sup>th</sup> senatorial district is wholly situated within the City of St. Louis. The Twenty-Second Judicial Circuit is situated within the City of St. Louis. Therefore, in light of section 115.531.1, section 115.526.1 required Respondent to file her petition in the Twenty-Second Judicial Circuit. § 115.526.1; cf. *Reeves v. Bockman*, 101

S.W.3d 280, 286 (Mo.App. 2002) (dismissing for lack of subject-matter jurisdiction a primary-election-contest petition filed in the wrong judicial circuit court). It is clear that section 115.526.1 would lack any relevant meaning in the absence of section 115.531.1.

Furthermore, the holding in *Reeves* supports the foregoing analysis that section 115.531 is applicable to and not in conflict with section 115.526. *Reeves*, 101 S.W.3d at 286. In *Reeves*, the court of appeals specifically held that “§ 115.531 deals specifically with contested primary elections...its application...is mandated...” *Id.* at 286. On April 22, 2008, Respondent filed a qualifications-challenge petition relating to Appellant’s nomination at the Democratic Party Primary election, i.e., a primary election contest. L.F. 5-9. Therefore, in light of section 115.526.1 and *Reeves*, section 115.531.1’s jurisdictional procedure was not only applicable to but also controlled the question of jurisdiction and venue relating to Respondent’s petition.

In accordance with the rules of statutory construction articulated in *Bouchard*, one can easily ascertain that the Legislature intended that section 115.526.1, by expressly referencing section 115.531.1, controls the jurisdictional procedure Respondent must follow when filing her petition. Construing the entire legislative act together, this honorable Court can “reasonably harmonize” section 115.526.1 with section 115.531.1. *Bouchard*, 86 S.W.3d at 123. To interpret it otherwise would be to presume the Legislature intended a meaningless act. *Id.* This honorable Court should not indulge such a presumption. *Id.* There is no statutory support for the trial court’s declaration that section 115.531.1 does not apply to section 115.526. *Id.*

Therefore, this honorable Court should (i) reverse the trial court's holding that section 115.531.1 was not applicable to Respondent's petition pursuant to Rule 84.14.

**II. The trial court erred by acting in excess of its subject matter jurisdiction by entering a scheduling Order on April 24, 2008.**

Because the trial court declared that section 115.531.1 did not apply to Respondent's petition, it erred by acting in excess of its subject matter jurisdiction by entering a scheduling Order on April 24, 2008 which set the hearing on May 9, 2008. Prior to the entry of the April 24<sup>th</sup> scheduling Order, Appellant advised the trial court that it lacked authority to set the hearing after April 29, 2008. L.F. 12-14.

“The primary rule of statutory construction is to ascertain the legislature's intent from the language used and give effect to that intent if possible.” *Bouchard*, 86 S.W.3d at 123. “The words used should be considered in their plain and ordinary meaning.” *Id.* “The entire legislative act must be construed together, and if reasonably possible, all provisions must be harmonized,” *Id.* “The legislature is not presumed to have intended a meaningless act.” *Id.*

Notably, section 115.526 contains no independent provision for setting the hearing date on Respondent's petition. When section 115.526 is silent on a material question, section 115.526.3 commands, in pertinent part, “[t]he procedure in such matters shall be the same as that provided in sections 115.527 to 115.601, to the extent that it is applicable and not in conflict with the provisions of this section.” Clearly, section 115.531.1 does contain such a hearing-setting provision. Section 115.531.1 authorized the trial court “to set a date for hearing” on Respondent's

petition “not later than five days after the petition was filed.” *Id.* (five-day rule). Thus, unless section 115.531.1’s five-day rule conflicted with an express provision of section 115.526, the trial court did not have any discretion to set a hearing date more than five days after the petition was filed. § 115.526.3.

In the instant case, Respondent filed her petition on April 22, 2008. L.F. 5-9. April 29, 2008 was the fifth day after the petition was filed. Rule 44.01. Therefore, the trial court had no discretion to set the date for hearing beyond April 29, 2008. Thus, the trial court exceeded its jurisdiction on April 24, 2008, when it scheduled the hearing on Respondent’s petition on May 9, 2008.

Moreover, Respondent’s petition “shall have preference in the order of hearing to all other cases and shall be commenced at the date set and heard day to day, including evenings and weekends if necessary, until determined. There shall be no continuances except by consent...” § 115.535. In light of section 115.535, the Legislature clearly contemplated that a section-115.526 hearing would interrupt or disrupt a trial court’s docket. Sections 115.531 and 115.535 do not conflict with section 115.526 because section 115.526 does not contain any conflicting provision. Thus, the preference given to Respondent’s petition is statutorily mandated.

The Supreme Court’s holding in the election case of *Hockemeier* further supports Appellant’s position. *Hockemeier* compels that, in a qualifications challenge, “[t]he relief the courts may grant is limited to what the statutes specifically authorize.” *Hockemeier v. Berra*, 641 S.W.2d 67, 68 (Mo.banc 1982). Here, the trial court did not identify any statutory authority for the May 9th hearing date. The trial

court also failed to indicate whether and how the hearing procedure expressed in section 115.531.1 conflicted with any provision in section 115.526. In the absence of such a conflict, the failure of the trial court to set a hearing date on Respondent's petition in accordance with the specific statutory authority contained in sections 115.531.1 and 115.535 constituted "reversible error." See, *Foster v. Evert*, 751 S.W.2d 42, 45[6] (Mo.banc 1988) (reversing trial court which failed to set the date "immediately" in accordance with a similar election statute).

In accordance with the rules of statutory construction articulated in *Bouchard* relating to the election contest statutes, one can easily ascertain that the Legislature realized that the hearing-setting procedure expressed in section 115.531.1 did not conflict with section 115.526. Construing the entire legislative act together, it is reasonably possible to harmonize section 115.526 with sections 115.531.1 and 115.535 because no other applicable primary election contest statute sets a date for hearing on Respondent's petition. *Bouchard*, 86 S.W.3d at 123. Furthermore, it is incontrovertible that section 115.535's hearing-procedures would have no meaning without incorporating the language in section 115.531.1. In light of sections 115.531 and 115.535, there is no statutory support for the trial court's April 24th scheduling Order.

Therefore, pursuant to Rule 84.14, this honorable Court should declare as null and void the trial court's April 24th Order scheduling the section-115.526 hearing on May 9, 2008.

**III. The trial court erred by acting in excess of its subject matter jurisdiction when it held a hearing on May 9, 2008.**

Because the trial declared that section 115.531.1 did not apply to Respondent's petition, it erred by acting in excess of its subject matter jurisdiction by holding a hearing on May 9, 2008. Contrary to the plain and unambiguous terms of sections 115.526.3, 115.531.1, and 115.535, the trial court held a hearing more than five days after the filing of Respondent's petition on April 22, 2008. L.F. 57.

In *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70, 76 [5] (Mo.banc 1972), the Supreme Court advised that applications for extraordinary relief "should be directed to the Circuit Court" where "qualification questions for membership in the General Assembly arise in connection with a Primary Election." *Id.* "The issue raised by the writ of prohibition is whether the circuit court acted in excess of its jurisdiction...[I]f the court acted in excess of the jurisdiction with which it was vested, the writ will lie." *State ex rel. Holland v. Moran*, 865 S.W.2d 827, 831 (Mo.App. 1993) (citing *State ex rel. Vogel v. Campbell*, 505 S.W.2d 54, 58 (Mo.banc 1974)).

To determine whether the trial court had jurisdiction to hold the hearing on May 9, 2008, "[t]he traditional concept of subject matter jurisdiction in a statutory proceeding is that strict compliance with the statutory requirements set out by the legislature is necessary to confer subject matter jurisdiction upon the trial court. Restated, where a trial court's subject matter jurisdiction arises solely by statutory creation, absent conformity with the statute, no such jurisdiction exists in the trial court." *American Indus. Resources, Inc. v. T.S.E. Supply Co.*, 708 S.W.2d 806, 808

[1] (Mo.App. 1986); *Dally v. Butler*, 972 S.W.2d 603, 608-09 [6]-[7] (Mo.App. 1998) (one seeking relief under any election contest statute must bring himself strictly within its terms) (citing *State ex rel. Conaway v. Consolidated School Dist. No. 4 of Iron County*, 417 S.W.2d 657, 659[4] (Mo.banc 1967)). It is incontrovertible that “[t]he right to contest an election exists by virtue of statute only and is not a common law or equitable right.” *Bouchard*, 86 S.W.3d at 123 (citing *Board of Election Com'rs of St. Louis County v. Knipp*, 784 S.W.2d 797, 798 (Mo.banc 1990)). “The election contest statutes, Sections 115.526 through 115.601 RSMo....are *sui generis* and the requirements of the statute must be rigidly adhered to.” *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 232 [2]-[4] (Mo.App. 1978).

In light of *Bouchard*, Respondent was not entitled to any relief. She did not identify any statute in conflict with the hearing-setting procedures expressed in section 115.531.1. She also did not identify any statute otherwise applicable and which authorized a hearing date on May 9, 2008. § 115.526.3; *Bouchard*, 86 S.W.3d at 123. In light of *Bushmeyer*, no other statute could provide Respondent the relief she sought because the elections contest statutes are “*sui generis*.” *Bushmeyer*, 575 S.W.2d at 232[2]-[4]. For all of the foregoing reasons expressed in Points I and II, *supra*, the trial court did not have subject matter jurisdiction when it held a hearing on May 9, 2008. *American Indus. Resources*, 708 S.W.2d 808[1]. Furthermore, whether the error was caused by Respondent’s intentional failure to comply with the law or the trial court’s erroneous declaration of the law, it “should not work to [Appellant’s] prejudice.” *Wilson*, 583 S.W.2d 550, 552-53[5]-[6]. Under the circumstances, on

May 9, 2008, the writ of prohibition was the “appropriate remedy.” *Holland*, 865 S.W.2d at 831.

The holding and rationale in *Dally* also support the foregoing conclusion. In *Dally*, the Respondent also filed an election contest in the wrong judicial circuit because she applied for relief under an election contest statute which was inapplicable to her petition because it conflicted with the procedure expressed in the appropriate statute. The Court dismissed the case for “lack of subject matter jurisdiction” and expressly denied Respondent’s suggestion that her error was not “jurisdictional.” *Dally*, 972 S.W.2d at 607-608[3]-[4]. The Court reasoned that:

[W]e note that a candidate for nomination to public office has no inherent right to contest his opponent's nomination at a primary election. *State ex rel. and to Use of Conran v. Duncan*, 333 Mo. 673, 63 S.W.2d 135, 137[1] (banc 1933). Where statutes afford such right, they are controlling and exclusive. *Id.* at 138. One seeking relief under any such statute must bring himself strictly within its terms. *State ex rel. Conaway v. Consolidated School Dist. No. 4 of Iron County*, 417 S.W.2d 657, 659[4] (Mo. banc 1967). Inasmuch as statutes governing election contests are a code unto themselves, *Id.* at 660[5], 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. *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 232[3] (Mo.App.1978).

*Dally*, 972 S.W.2d at 607-608[3]-[4]. The court of appeals upheld the dismissal. It also held that “[s]ubject matter jurisdiction cannot be conferred by consent or agreement of the parties, by appearance or answer, or by estoppel.” *Id.* at 608[3]-[4] (citing *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72[3] (Mo. banc 1982)). Thus, the fact that Appellant participated in the hearing on May 9th did not, by some fiction, confer jurisdiction on the trial court. To the contrary, “[t]he only power a court without subject matter jurisdiction possesses is the power to dismiss the action.” Rule 55.27(g)(3); *Wells v. Nolden*, 679 S.W.2d 889, 891[5]-[8] (Mo.App. 1984). “Any actions or proceedings of a court without subject matter jurisdiction are null and void.” *Id.*

Respondent failed to strictly comply with the election contest statutes when she requested a hearing on May 9, 2008, as the election-contest procedures clearly did not authorize that date. Accordingly, the trial court lacked subject matter jurisdiction to enter its April 24th scheduling Order granting the relief Respondent requested. In light of sections 115.526.3, 115.531.1, and 115.535, the trial court’s April 24th scheduling Order setting the hearing date on May 9, 2008, was “void.” *Wells*, 679 S.W.2d at 891[5]-[8]. Therefore, any and all subsequent proceedings were “void.” *Id.* When the parties appeared before the trial court on May 9, 2008, the court lacked the power to conduct a section 115.526 hearing. *Id.* Therefore, the trial court should

have granted a writ of prohibition prior to the May 9th hearing. *Holland*, 865 S.W.2d at 831.

Based on the foregoing and pursuant to Rules 84.14 and 84.18, this honorable Court should reverse the trial court's decision not to grant the writ of prohibition; and remand to the trial court with directions to enter an Order of "dismissal" along with any other relief this honorable Court deems necessary and appropriate.

**IV. The trial court erred when it severed Appellant's counter-claims.**

The trial court erred when it severed Appellant's counter-claims for a separate trial and dismissed same as moot without a hearing. On April 28, 2008, Appellant filed her Answer and Counter-claims to Respondent's petition. L.F. 23-35. On April 30, 2008, the trial court severed Appellant's counter-claims for a separate trial. L.F. 36. On May 15, 2008, the trial court ruled in favor of Respondent on her petition and simultaneously dismissed Appellant's counter-claims as moot. L.F. 65.

"The primary rule of statutory construction is to ascertain the legislature's intent from the language used and give effect to that intent if possible." *Bouchard*, 86 S.W.3d at 123. "The words used should be considered in their plain and ordinary meaning." *Id.* "The entire legislative act must be construed together, and if reasonably possible, all provisions must be harmonized," *Id.* "The legislature is not presumed to have intended a meaningless act." *Id.*

Section 115.526.2 expressly authorizes Appellant to file an answer to Respondent's petition "at the time and as provided in sections 115.527 to 115.601." *Id.* Section 115.533 states in pertinent part that "[n]ot later than four days after the

petition is filed, [Appellant] may file an answer to the petition, specifying reasons why [her] nomination should not be contested...” *Id.* Rule 55.27 requires, in pertinent part, that “[e]very defense, in law or fact, to a claim in any pleading...shall be asserted in the responsive pleading thereto...” Rule 55.32 commands, in pertinent part, that “[a] pleading shall state as a counter-claim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.” Rule 66.02 authorizes the trial court “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any...counterclaim...” *Id.*

Pursuant to section 115.533, Appellant was authorized to file an answer not later than four days after the petition was filed on April 22, 2008. April 28, 2008, was the fourth day after the petition was filed. Rule 44.01. Appellant was authorized to file her answer and compulsory counter-claims on April 28, 2008. Rules 55.27 and 55.32; §§ 115.526.2 and 115.533. Therefore, Appellant timely filed her Answer and compulsory counter-claim(s). L.F. 30-35

The counter-claims sought a declaratory judgment that Appellant was qualified to hold the office of State Senator for the 5th senatorial district in light of MO. Const. art. III, section 6 and section 21.070. L.F. 27. If successful, Appellant’s right to be a candidate would surely defeat Respondent’s claim under section 115.526. A successful ruling would also protect Appellant’s rights afforded by the due process

clauses of the federal and state constitutions. *See*, § 115.526.2. Neither section 115.526 nor the due process clause permits the trial court to dismiss Appellant’s counter-claims without a meaningful opportunity to be heard.

Moreover, Appellant’s counter-claims also included a demand for a jury trial as authorized by section 527.090. *Id*; Mo. Const. art. I, § 22(a); Rule 69.01 (“the right to trial by jury...as given by statute shall be preserved to the parties inviolate.”). Again, due process protects Appellant’s right to a jury trial. *Id*. Notably, neither section 115.526 nor 115.533 suggests that the trial court shall treat either claim as a non-jury case in equity. Cf. § 115.551 (“the court of appeals...shall... hear the case in the manner of appeals of cases in equity...”).

Appellant’s counter-claims were “compulsory” because they arose out of the same subject matter as Respondent’s claim and they did not require the presence of any additional party over which the trial court could not acquire jurisdiction. *See*, Rule 55.32. Although Rule 66.02 authorized the trial court to sever Appellant’s counter-claim(s) for a separate trial, that authority was limited to circumstances “in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy...” *Id*.

The trial court dismissed Appellant’s counter-claims as moot without a hearing. L.F. 65. The trial court’s decision to dismiss Appellant’s counter-claim(s) as “moot” evinces an abuse of discretion. Simply put, the difficulty the trial court expressed in separating the merits of Respondent’s claim from those of Appellant suggest that its Order severing the trials did not (i) further the convenience of

Appellant, (ii) avoid prejudice to Appellant, and/or (iii) was conducive to the expedition and economy of Appellant.

Furthermore, the trial court's Judgment produced a fundamentally unfair result because Appellant was denied the right to a separate trial on her claims. *Laclede Gas Company v. Solon Gershman, Inc.*, 539 S.W.2d 574, 577-78[2] (Mo.App. 1976). Because Appellant did not waive her right to a jury trial, she was denied a trial by jury as required in Rule 69.01.

In accordance with the rules of statutory construction articulated in *Bouchard*, one can easily ascertain that the Legislature intended that section 115.526.2 contemplated an answer and counter-claims in response to a section 115.526 petition. This is especially true based on the fact that the Supreme Court Rules "supersede all statutes and existing court rules inconsistent therewith." Rule 41.02. Construing the entire legislative act together, it is reasonably possible to harmonize section 115.526 with Rules 55.27 and 55.32 because the only limitation section 115.526.2 imposes on an Answer is the time for filing an Answer. *See*, § 115.533 (four days). *Bouchard*, 86 S.W.3d at 123. No other applicable primary election contest statute sets a limit as to the scope of Appellant's Answer. *Id.* To interpret 115.533 otherwise would be to presume the Legislature intended a meaningless act. *Id.* That is a presumption in which this honorable Court should not indulge. *Id.*

Therefore, pursuant to Rule 84.14, this honorable Court should (i) reverse the trial court's Order to dismiss Appellant's counter-claims as moot, and (ii) remand to the trial court for a jury trial on Appellant's counter-claims.

**V. The trial court erred when it entered a Judgment on May 15, 2008.**

The trial court erred by entering a Judgment on May 15, 2008 which directed the Secretary of State to remove Appellant's name from the certified list of eligible candidates for the primary election on August 5, 2008. The trial court entered a Judgment against Appellant which (i) removed appellant's name from the certified list of eligible candidates at the primary election, (ii) taxed Appellant costs of at least \$1872.87 and (iii) dismissed Appellant's compulsory counter-claims as moot without a hearing. L.F. 65-66. By failing to conduct a hearing within five days of filing the petition, the trial court lacked subject matter jurisdiction to enter any such judgment.

In *Gralike*, 483 S.W.2d at 76 [5], the Supreme Court advised that applications for extraordinary relief "should be directed to the Circuit Court" where "qualification questions for membership in the General Assembly arise in connection with a Primary Election." *Id.* "The issue raised by the writ of prohibition is whether the circuit court acted in excess of its jurisdiction...[I]f the court acted in excess of the jurisdiction with which it was vested, the writ will lie." *Holland*, 865 S.W.2d at 831.

Appellant's petition for a writ of prohibition was considered by the trial court before the hearing on May 9, 2008. L.F. 57. The trial court denied Appellant's petition for extraordinary relief. L.F. 57 and 65. However, for all of the reasons more fully explained in Points I, II, and III, *supra*, the trial court erroneously declared that it had jurisdiction to proceed with the hearing on May 9, 2008. In light of sections 115.526.3, 115.531.1, and 115.535, the trial court's April 24th scheduling Order setting the hearing date on May 9, 2008, was "void." *Wells*, 679 S.W.2d at 891[5]-

[8]. Therefore, any and all subsequent proceedings were “void.” *Id.* The trial court should have granted Appellant a writ of prohibition prior to the May 9<sup>th</sup> hearing. *Holland*, 865 S.W.2d at 831.

As a consequence of the lack of subject matter jurisdiction, the trial court lacked the power to enter any judgment predicated upon a hearing on May 9, 2008. *Wells*, 679 S.W.2d at 891[5]-[8]. Therefore, the proceedings on May 15<sup>th</sup> were also “null and void.” *Id.* Consequently, the trial court lacked the jurisdiction to enter its May 15<sup>th</sup> Judgment. *Id.* The only power the trial court had on May 15<sup>th</sup> was the power to dismiss the action. Rule 55.27(g)(3); *Wells v. Nolden*, 679 S.W.2d at 891[5]-[8]. That power to dismiss is the one power with which the trial court was actually vested on May 15, 2008; and yet it failed to exercise that power. *Id.*

Pursuant to Rules 84.14 and 84.22, this honorable Court should issue (1) a writ of prohibition because the court exceeded its jurisdiction. and (2) remand this action to the trial court with instructions to (i) enter an Order of “dismissal” of Respondent’s claim with prejudice, (ii) vacate the monetary judgment against Appellant, (iii) purge from the record the May 15<sup>th</sup> Judgment, (iv) enter a scheduling Order for Appellant’s counter-claims, and (v) award Appellant any other relief this honorable Court deems necessary and appropriate consistent with this opinion. *Holland*, 865 S.W.2d at 831.

**VI. The trial court erred when it declared that Appellant was not a “resident” of the 5<sup>th</sup> senatorial district.**

Assuming arguendo that the trial court had jurisdiction to enter its Judgment on May 15, 2008, it erred by declaring that Appellant was not a resident for purposes of

section 21.070. Appellant has never “through the exercise of choice, change[d] her domicile by abandonment of the former and acquisition of a new one,” or acquire the second residence with the “present intention to remain there, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode.” *King v. Walsh*, 484 S.W.2d 641, 644[2] (Mo.banc 1972).

Section 21.070 requires, in pertinent part, that Appellant “next before the day of [her] election shall have been a...resident of the district which [s]he is chosen to represent for one year.” *Id.* “Residence or domicile has been defined to be “[t]he place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law” and also as “(t)hat place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.” *King*, 484 S.W.2d 641, 644[2] (Mo.banc 1972). “This definition of residence or domicile expresses the meaning of the word ‘resident’ as it used in [the] Constitution of Missouri; that section of our law does not mean actual, physical presence, continuous and uninterrupted for [one year].” *Id.* (construing a similar residency provision in Mo. Const. art IV, § 3).

“[A] person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead...In order to effectuate the change...it is necessary that there shall be actual personal presence in the new place and also the present intention to remain there, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place

of abode.” *Id.* at 645[3]. “[T]he original domicil [sic] is favored and where the facts are conflicting, the presumption is strongly in favor of an original or former domicil [sic] as against an acquired one.” *Id.* Thus, the question in this case is not whether Appellant ever acquired a residence at 5848 Maple, but whether Appellant, “through the exercise of choice, changed her domicile by abandonment of the former and acquisition of a new one.” *King*, 484 S.W.2d at 645.

There is no question about Appellant’s “domicile of origin.” *Id.* (citing *In re Toler’s Estate*, 325 S.W.2d 755, 759 (Mo 1959)). Appellant had a well-established connection with 5969 Tara Lane since 1999. It is the place she held her first mortgage and has maintained as her true, fixed and permanent home at all times.

To uphold the trial court’s Judgment, this honorable Court would need to determine whether the trial court found both that Appellant (1) had an “actual personal presence in the new place” and (2) had “the present intention to remain there, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode.” Rule 73.01; *Wolfrum*, 225 S.W.3d at 411. However, even accepting as true the trial court’s “Findings of Fact,” none of them establishes (a) Appellant actually had a personal presence at 5848 Maple with an intent to make that her true, fixed and permanent home and/or (b) Appellant “had no fixed or certain purpose to return to the former place of abode” at 5969 Tara Lane. In fact, it is incontrovertible that the only reason Appellant purchased the second residence outside of the district is because she sought a place to better accommodate her mother’s increasingly urgent needs to be closer to her medical providers. App.

A26-28. But for her mother’s medical condition, Appellant would not have chosen to purchase a second residence. *Id.* The second house never replaced 5969 Tara Lane as her permanent residence. *Id.*

Appellant never expressed any intent to abandon 5969 Tara Lane. To the contrary, Appellant expressed an intention to return to 5969 Tara Lane when her mother’s medical needs permitted. *Id.* Furthermore, Appellant has never abandoned her duties in the Legislature where she serves as minority whip, the third highest ranking member of the Democratic party. Her duties in the Legislature required her to remain a resident of her legislative district, which is also within the 5<sup>th</sup> senatorial district. Therefore, any suggestion that Appellant did not have a fixed purpose at all times to return to 5969 Tara would be against the weight of the evidence.

It is incontrovertible that Appellant at all pertinent times has been the sole owner of the residence at 5969 Tara Lane; voted from that address; and maintained her operator’s license and vehicle registration(s) at that address. App. A30. It is important to note that Appellant had lived alone at 5969 Tara Lane well before Respondent’s petition was filed. App. A28-29.

The Missouri Supreme Court articulated the appropriate legal standard to determine one’s rights under section 21.070. *King v. Walsh, supra.* The trial court made no reference whatsoever to this landmark decision. L.F. 58-66. This failure resulted in an erroneous declaration of the law or a mis-application thereof in light of *King*. There is no substantial evidence which would support a requisite “finding of fact” that, in spite of her duties as minority whip in the Legislature, Appellant “had no

fixed or certain purpose to return to the former place of abode” at 5969 Tara Lane. Therefore, Appellant cannot be deemed to have abandoned her domicile and acquired a new one as contemplated in section 21.070. *King*, 484 S.W.2d at 645.

Therefore, pursuant to Rule 84.14, this honorable Court should reverse the trial court’s ruling that Appellant was not a “resident” of the 5th senatorial district. Such a reversal would be just and proper under the circumstances. It would also remove any stigma and/or detrimental impact on Appellant’s professional reputation as well as restore her ability to raise funds to wage a viable campaign.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this honorable Court (1) declare the April 24th scheduling Order null and void, (2) declare the hearing proceedings on May 9th null and void, and (3) declare the May 15th Judgment null and void. Moreover, this honorable Court should remand this action to the trial court with instructions to (a) vacate the Judgment in its entirety, (b) direct the Secretary of State to add Appellant’s name to the certified list of eligible candidates pursuant to section 115.545, (c) dismiss Respondent’s petition with prejudice and award costs in favor of Appellant, (d) enter an appropriate scheduling Order on Appellant’s counter-claims, and (e) award any other relief this honorable Court deems necessary and appropriate under the circumstances.

**RULE 84.06(C) CERTIFICATION**

Pursuant to Rule 84.06(c), I hereby certify that the foregoing complies with Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 754 Lines, 8,559 Words. A virus-free, true and accurate copy of the same was delivered by courier and e-mail in Word 2003 format to the following:

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**IN THE MISSOURI COURT OF APPEALS**  
**EASTERN DISTRICT**

ROBIN WRIGHT-JONES,	)	
	)	
Respondent,	)	
	)	Appeal No. ED91368
vs.	)	
	)	
CONNIE L. JOHNSON,	)	
	)	
Appellant.	)	

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**Appeal from the Twenty-Second Judicial Circuit**  
**Hon. Douglas E. Long, Special Judge**  
**Case No. 0822-CC01491**  
**Division 1**

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**APPENDIX**

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