

IN THE TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

STATE ex rel. CONNIE L. JOHNSON,	}	Cause No. 0822-CC01491
	}	
Relator,	}	Division No. 1 (Douglas E. Long, SJ)
	}	
	}	
	}	
ROBIN WRIGHT-JONES,	}	
	}	
&	}	
	}	
THE PRESIDING JUDGE OF THE	}	
TWENTY-SECOND JUDICIAL CIRCUIT,	}	
	}	
Respondents.	}	

PETITION FOR ORIGINAL WRIT OF PROHIBITION

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WRIT SUMMARY

Identity of the parties and their attorneys in the underlying action, if any:

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Nature of underlying action, if any:

Contestant filed a Primary Election Contest pursuant to Section 115.526.2 challenging the qualifications of Connie L. Johnson to appear on the Democratic Party primary election ballot. Specifically, Contestant alleges that Contestee was not a “resident” of the senatorial district for one year.

Action of Respondent being challenged, including the date thereof:

Trial judge (Neill, J.) failed to set the hearing within five (5) days of the filing of the petition as required by sections 115.531 and 115.535. Upon Contestant’s specific request, without any supporting statutory authority, the court set the matter for hearing on Friday, May 9, 2008 at 9:30 a.m.

Relief sought by Relator:

Contestee respectfully requests that this honorable Court issue findings of facts and conclusions of law granting the original writ of prohibition and dismissing the Contestant’s petition forthwith for lack of subject-matter jurisdiction.

Date set for trial and date of any other event bearing upon relief sought:

The Court set the matter for trial on May 9, 2008. The Court has allowed Contestant to conduct pre-trial discovery and depositions through May 8, 2008. Contestant purports to take an additional deposition of a witness on May 8th at 7:30 pm. Contestant has issued numerous trial subpoenas. Contestee has requested, but not received, trial subpoenas issued since Saturday, May 3, 2008. Contestee cannot, therefore, prepare proper motions to quash.

Date, court and disposition of any previous or pending writ proceeding concerning the action:

Contestee filed a motion to dismiss herein on Monday, April 28, 2008. The Court denied Contestant’s motion to dismiss on April 30, 2008. The Court denied Contestee’s request to stay the proceedings pending review.

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Statement of Material and Undisputed Facts

- 1) State Representative Connie L. Johnson, Relator, (Contestee) timely filed a declaration of candidacy for the office of State Senate for the 5th Senatorial District in the pending Democratic Party Primary Election in August, 2008 in accordance with section 21.070 RSMo;¹

- 2) Pursuant to § 115.526.2 RSMo, Robin Wright Jones, Respondent, (Contestant) filed, on Tuesday, April 22, 2008, an election contest challenging the qualifications of Contestee;

- 3) The parties appeared by Counsel in the chambers of the Hon. Mark Neill on the morning of Wednesday, April 23, 2008, in response to Contestant’s written request for a hearing date;

- 4) Contestant specifically requested a hearing date after Tuesday, April 29, 2008;

¹ All statutory references shall be to RSMo Supp. 2008, unless otherwise indicated.

- 5) Contestee objected and advised the 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 contestant's petition pursuant to section 115.531 RSMo, and (ii) provided no other authority to hold any primary election contest hearing for the office of state senator;
- 6) Contestee also clearly advised the Neill Court that she had come from Jefferson City to be available and would remain so for any deposition and/or preliminary hearing authorized by section 115.531 RSMo not later than April 29, 2008;
- 7) Contestant clearly rejected Contestee's offer to honor any deposition request made prior to Tuesday, April 29, 2008 and urged the Court to grant her additional time to complete pre-trial discovery;
- 8) Over objection, the Neill Court granted Contestant's request by setting the hearing on May 9, 2008;
- 9) Contestee filed her Motion to Dismiss herein on April 28, 2008;
- 10) The Neill Court denied Contestee's (i) motion to dismiss and (ii) motion to stay the proceedings on April 30, 2008;

Relief Sought

Pursuant to Rules 84.22 and 97, Contestee respectfully requests that this honorable Court issue findings of facts and conclusions of law (i) Staying the proceedings pending consideration of the petition for an extraordinary relief, (ii) Granting the original writ of

prohibition, and (iii) Dismissing Contestant's petition forthwith for lack of subject-matter jurisdiction.

Reasons Why the Writ Should Issue

When trial courts have acted without authority in primary election contest proceedings, reviewing courts have consistently issued Writs of Prohibition. In this case, Contestant filed a qualifications-challenge pursuant to the primary election contest statutes. A duly-filed qualifications-challenge otherwise secured unto Contestant a right to a statutory hearing not later than five days after the filing of her petition in the circuit court pursuant to Section 115.531.1.

However, ignoring this unambiguous statutory hearing mandate, Contestant requested an unauthorized hearing more than five days after she filed her petition herein. Despite protestations, Contestant successfully urged the Court to disregard the Section 115.531.1 hearing mandate. That the court did so in fact clearly constituted error in light of *Foster v. Evert*.

The Court's error notwithstanding, Contestant's failure to strictly adhere to the unambiguous prescriptions and proscriptions of the primary election contest statutes, by operation of law, divested the Court of any subject-matter jurisdiction in light of *American Indus. Resources, Inc. v. T.S.E. Supply Co.* Consequently, in the absence of express statutory authority to conduct the requested hearing, this honorable Court must grant the Writ of Prohibition for lack of subject-matter jurisdiction in light of *State ex rel. Holland v. Moran* and *State ex rel. Bushmeyer v. Cahill*.

In this case, if the Court continues to act in excess of its jurisdiction, Contestee will face continuing exposure to burdensome discovery requests, absence from her legislative duties, un-reimbursed attorney's fees and litigation costs. "[T]he threatened injury cannot be adequately remedied by appeal." *Id.* (citing *State ex rel. Hayter v. Griffin*, 785 S.W.2d 590, 592 (Mo.App.1990)). Therefore, in this case, prohibition is the proper remedy.

Suggestions in Support of the Writ of Prohibition

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.* (writ of prohibition granted where the local election board acted without authority). "The issue raised by the writ of prohibition is whether the circuit court acted in excess of its jurisdiction. If the trial court had no jurisdiction over the subject matter of this action or if 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.W.D. 1993) (citing *State ex rel. Vogel v. Campbell*, 505 S.W.2d 54, 58 (Mo. banc 1974)).

Question Presented

The primary question to be resolved is whether the mandatory hearing procedure specified in sections 115.531 and 115.535 applies to a Section 115.526.2 qualifications-challenge. If so, the Court lacked jurisdiction to grant the requested hearing on May 9, 2008, because said date was more than five days after the filing of Contestant's petition

herein. For the reasons that follow, this honorable Court must declare that the provisions of Sections 115.531 and 115.535 RSMo do apply to a section 115.526.2 qualifications-challenge.

Analysis

Proper resolution of the question presented requires this honorable Court to construe the election contest statutes. Regarding the election contest statutes “[t]he statutory requirements are clear and unambiguous. ‘It is only by the invention of a tortuous reading that the election contest statutes can be made confusing, indefinite or uncertain. The statute [sic] clearly announces the parties and the procedures by which contests are to be conducted.’” *Foster v. Evert*, 751 S.W.2d 42, 44 (Mo.banc 1988). “The procedures are ‘exclusive and must be strictly followed as substantive law.’” *Id.* “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 121, 123 (Mo.App.E.D. 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.*, because “[t]he legislature is not presumed to have intended a meaningless act.” *Id.*

Reading *in pari materia* Sections 115.526.2, 115.531.1, 115.535, and 115.563.2, the following statutory procedural rules clearly emerge: (i) a qualifications-challenge must be handled by the circuit court as a primary election contest pursuant to Sections 115.526.2, 115.529, and 115.563.2 RSMo, (ii) a qualifications-challenge pursuant to

Section 115.526.2 is a sub-set of the primary election contest statutes in accordance with Section 115.526.3, (iii) the primary election procedure set out in Sections 115.531 through 115.551 control qualifications-challenges pursuant to Section 115.526.3, and (iv) time is of the essence in a primary election contest.

It was incontrovertible that the circuit court initially obtained subject-matter jurisdiction to decide this qualifications-challenge relating to the office of state senator pursuant to §§ 115.526.1 ² and .2 ³ and 115.529.⁴ *See, Gralike*, 483 S.W.2d at 73 [1] (Mo.banc 1972) (“...Primary Election controversies would be decided by the courts.”).

That the procedure to determine whether Contestee may appear on the primary election ballot was contemplated and fully encompassed in sections 115.527 through 115.601 is also incontrovertible in light of section 115.526.3. The unambiguous terms of section 115.526.3 definitively declare that section 115.526 is itself not a controlling procedural statute. Section 115.526.3 specifies that “[t]he procedure in such [section

² Section 115.526.1 RSMo states, in pertinent part: “Except as provided in sections 115.563 to 115.573, challenges 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.”

³ Section 115.526.2 states, in pertinent part, “In the case of challenge to a candidate for nomination in a primary election, the petition shall be filed not later than thirty days after the final date for filing for such election... “

⁴ Section 115.529 states “Circuit courts shall have jurisdiction to hear and determine all primary election contests.”

115.526.2] 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.” *Id.*; *Bouchard*, 86 S.W.3d at 124 [8]; *see also*, *Table of Statutory Sections 115.527 through 115.601*. Consequently, the procedure specified in sections 115.531 and 115.535 was applicable and not in conflict with section 115.526. § 115.526.3. The Court of Appeals reached a similar conclusion in *Reeves v. Bockman*, 101 S.W.3d 280 (Mo.App.S.D. 2002). The Court specifically held that “§ 115.531 deals specifically with contested primary elections...its application to this case is mandated...and it more closely adheres to the legislative intent that primary elections be immediately resolved.” *Id.* at 286.

Section 115.531.1 mandated that “[t]he judge of the court shall immediately note on the petition the date it was filed and shall immediately set a date, not later than five days after the petition is filed, for a preliminary hearing.” *Id.* That the Legislature also specified therein that “[i]f the petition is filed in vacation, the judge of the circuit court shall immediately convene the court in special session for the purpose of hearing the contest;” or “[i]f no regular judge of the court is available the supreme court shall immediately assign another judge” reinforces the unconditional sense of urgency afforded the parties to a primary election contest. *Id.*

Section 115.535 mandated that “[t]he contested election 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 RSMo.

This Court should also note that the statutory procedure makes no distinction between a qualifications-challenge and any other type of primary election contest. More important, the statutory procedure does not provide any authority to set a primary election contest hearing other than as provided in section 115.531. “The relief the courts may grant is limited to what the statutes specifically authorize.” *Id.*; *Hockemeier v. Berra*, 641 S.W.2d 67, 68 (Mo.banc 1982).

*Failure to Set the Hearing Date
On or Before April 29, 2008 Constituted Error*

Therefore, because the section 115.531 mandatory hearing provision specifically applied to and was not in conflict with the section 115.526 qualifications-challenge, the Court had limited statutory authority to set a hearing on or before Tuesday, April 29, 2008. The Neill Court did not do so. Consequently, the Neill Court clearly erred in light of *Foster v. Evert*, 751 S.W.2d 42, 45 [6] (Mo.banc 1988). In *Foster*, the Supreme Court held that the trial court committed “error” when it failed to set the general election contest for trial “immediately” as required by the election contest statute therein. *Id.* Notably, in *Foster*, the term “immediately” was not defined therein. *Id.* at 44 [4].

In the case at bar, however, the term “immediately” was clearly defined in the primary election contest statutes to mean “not later than five days of the filing of the petition.” § 115.531. In light of section 115.535 “[t]he election contest statutes provide special rules...for expedited trial settings.” *Foster*, 751 S.W.2d at 44. The *Foster* rationale is instructive. However, for reasons explained below, the holding in *Foster* remanding for an immediate trial setting is inapposite. Therefore, because the election

contest statutes are *sui generis*, this honorable Court must declare that the Neill Court erred when it failed to set the hearing date on or before Tuesday, April 29, 2008, and granted Contestant a hearing date beyond Tuesday, April 29, 2008 in light of *Bushmeyer and Foster*.

*Contestant's Failure to Strictly Comply with
the Primary Election Contest Statutes Constituted a Waiver of Rights
Which Divested the Court of Subject-Matter Jurisdiction*

The Neill Court's error notwithstanding, Contestant's successful request for a hearing date not authorized by statute divested the circuit court of subject-matter jurisdiction because "[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.E.D. 1986); *State ex inf. Sanders, ex rel. City of Lee's Summit v. City of Lake*, 220 S.W.3d 794, 804 [10] (Mo.App.W.D. 2007). This fundamental principle is well-established in jurisprudence relating to election contests as well. See, *Reeves*, 101 S.W.3d at 286; *Dally v. Butler*, 972 S.W.2d 603, 608-09 [6]-[7] (Mo.App.S.D. 1998); *State ex rel. Wilson v. Hart*, 583 S.W.2d 550, 552-53[5]-[6] (Mo.App.E.D. 1979). It was 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 *Wilson*, the clerk of the court failed to timely issue a summons to the sheriff. Consequently, the sheriff did not serve the contestee in the timely fashion required by the election contest statutes. The Court dismissed the case for lack of jurisdiction and stated that “[a]lthough the error may well have been the clerk's this circumstance should not work to relator's prejudice.” *Wilson*, 583 S.W.2d at 552[5]-[6].

In *Reeves*, the contestant filed an election contest in the wrong judicial circuit because she failed to invoke the procedure of the controlling statute. The Court dismissed the case for lack of subject matter jurisdiction and stated that “a contest of the results of a primary election...is governed by § 115.531 and not § 115.575.1.” *Reeves*, 101 S.W.3d at 281.

In *Dally*, the contestant also filed an election contest in the wrong judicial circuit because she failed to invoke the procedure of the controlling statute. The Court dismissed the case for lack of subject matter jurisdiction and expressly denied contestant’s suggestion that her error was not jurisdictional. The Court reasoned that:

Mindful of the difference, we 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 and 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)). “Lack of subject matter jurisdiction may be raised at any stage in the proceedings, even for the first time on appeal.” *Id.*

In this case, Contestant specifically and knowingly requested a date for hearing not otherwise provided by the clear and unambiguous mandatory terms of the primary election contest statutes. § 115.531. Contestant’s request was clearly not authorized in light of sections 115.526 and 115.531. After April 29, 2008, this honorable Court, by operation of law, lost subject-matter jurisdiction over Contestant’s claim in light of the controlling rationale and holding in *Dally*. Consequently, when Contestee squarely

confronted Contestant with her objection to any hearing set beyond April 29, 2008, Contestant “proceeded at her own peril.” *Foster*, 751 S.W.2d at 45 [6]. Contestant’s unwillingness to even attempt to conduct a mandatory hearing anytime prior to April 29, 2008, was caused by her own acts or omission in contravention of the primary election contest statutes. Contestant’s unwillingness certainly did not result from failure to consent or any other “oppressive” or “absurd” tactic on the part of Contestee. Cf. *Bouchard*, 86 S.W.2d at 125.

More important, Contestant could not then or now point to any statutory authority in support of her position for ignoring the procedural and jurisdictional mandates of sections 115.531 and 115.535 in light of *Wilson* and *Reeves*.

In light of the foregoing analysis, this Court is compelled to hold that May 9, 2008, was not authorized by the election contests statutes. “[C]ourts are without jurisdiction to entertain a petition for relief where none is specifically granted by statute.” *Hockemeier*, 641 S.W.2d at 68. Therefore any attempt to conduct an election contest hearing on May 9, 2008, would exceed the subject-matter jurisdiction of this Court. That the error was unintentional cannot now work to Relator-Contestee’s prejudice in light of *Wilson*.

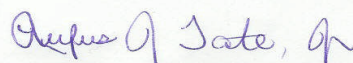
Because the election contest statutes are *sui generis* and Contestant has failed to strictly comply with the terms of the statutes otherwise providing a remedy, the aforementioned jurisprudence in similar election contest cases constrains this honorable Court to grant the Writ of Prohibition for lack of subject-matter jurisdiction. Therefore, “[t]he only authority a trial court has which also lacks subject-matter jurisdiction is to

dismiss the action. Rule 55.27(g)(3); *Wells v. Noldon*, 679 S.W.2d 889 (Mo.App. E.D. 1984).

Relief Requested

Where Contestant knowingly waived her right to pursue a statutory primary election contest, this honorable Court lacks any specific statutory authority to proceed. Therefore, a Writ of Prohibition is necessary and appropriate. “[F]rom time to time in peculiarly limited situations there are instances in which absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order [purporting to hold a primary election contest hearing on May 9, 2008]. In such circumstances, the extemporaneous character of prohibition may be the remedy to be applied.” *Holland*, 865 S.W.2d at 831. “If the trial court had no jurisdiction over the subject matter of this action or if the court acted in excess of the jurisdiction with which it was vested, the writ will lie.” *Id.* “The present circumstances are one of the unusual and exceptional situations where prohibition [must] lie.” *Id.*

Respectfully submitted,



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RULE 84.06(C) CERTIFICATION

Pursuant to Rule 84.06(c), I hereby certify that the foregoing Petition for Original Writ of Prohibition complies with Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 415 Lines, 3,610 Words. A true and accurate copy of the same was delivered by electronic mail (pdf format) to the following:

Hon. Douglas E. Long, Special Judge, e-mail: del2501@embarqmail.com

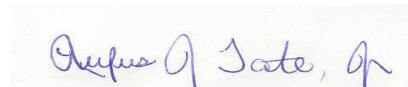
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