

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

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|---|---|-----------------------|
| STATE OF MISSOURI, <i>ex informatione</i> |) | |
| DANIEL WHITE, <i>ex relatione</i> |) | |
| HARLIN CLEMENTS, |) | |
| Relator, |) | Div. 4 |
| |) | |
| vs. |) | Case No. 16CY-CV01441 |
| |) | |
| SEAN CACIOPPO, |) | |
| Respondent. |) | |

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent Sean Cacioppo offers the following memorandum under Rule 74.04(b)(1) in support of his motion for summary judgment:

SUMMARY

- At the time of his election on April 7, 2015, Respondent was not in arrears for any unpaid taxes to the City of Mosby, Missouri (“the City”), and thus has not violated § 115.040 of the City’s Code of Ordinance. (Pp. 3-6).
- At all times since May 2009, Respondent has been an inhabitant and resident of aldermanic Ward 1 of the City under § 79.070, R.S.Mo. (pp. 6-18):
 - Section 79.070 does not require that an elected officer of a fourth-class city *own* property in the city, merely that his domicile – his permanent home where he intends to remain – be there, however arranged. (Pp. 8-9).
 - Since May 2009, Respondent’s domicile has been 22604 NE 122nd Street, Mosby, Missouri 64068, in aldermanic Ward 1 of the City. (Pp. 10-11).
 - That catastrophic flooding of the Fishing River in 2015 destroyed Respondent’s house, necessitating his temporary absence while he is rebuilding it, cannot destroy its status as his domicile. (Pp. 12-18).
- Relator knew or should have known that the material allegations in his petition are false, entitling Respondent to an award of his attorney fees. (Pp. 18-20).

INTRODUCTION

Relator Harlin Clements, Mayor of the City of Mosby (“the City”), alleges two grounds under which he asserts Respondent Sean Cacioppo (“Alderman Cacioppo”) must be ousted from office as the City’s Ward 1 Alderman: that Alderman Cacioppo (1) was in arrears on taxes owed to the City at the time of his election, requiring his ouster under § 115.040 of the City’s Code; and (2) is not a resident and inhabitant of the City, requiring his ouster under § 79.070, R.S.Mo.

It cannot be disputed that Alderman Cacioppo was *not* in arrears on any taxes owed to the City at the time of his election, and that Alderman Cacioppo *is* domiciled in Ward 1 of the City and has been at all times since May 2009. Distilled, these are the only material facts. Under these undisputed material facts, Alderman Cacioppo is entitled to judgment as a matter of law on both of Relator’s grounds.

It equally cannot be disputed that Relator knew or reasonably should have known these undisputed material facts, but instead filed a false return alleging otherwise. As a result, the law of Missouri is that Alderman Cacioppo also is entitled to an award of his attorney fees for responding to this action.

The Court should enter summary judgment in Alderman Cacioppo’s favor on Relator’s petition for writ of quo warranto, and should award Alderman Cacioppo his costs and attorney fees.

SUMMARY JUDGMENT STANDARD

In summary judgment proceedings, if the motion and proceedings on it “show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith.” Rule 74.04(c)(6). Thus, summary judgment is appropriate “if: “(1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law.” *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 765 (Mo. banc 2009) (citation omitted).

ARGUMENT

I. Alderman Cacioppo has a right to judgment as a matter of law refusing his ouster on Relator’s first alleged ground because he has not violated § 115.040 of the City’s Code of Ordinances: at the time of his election on April 7, 2015, he was not in arrears for any unpaid taxes to the City.

The City of Mosby (“the City”) is a fourth-class city of the State of Missouri located entirely within Clay County (Statement of Uncontroverted Material Facts (“SOF”) ¶ 2; Ex. F, p. 1). As a result, under Mo. Const. art. VI, § 15, its “powers ... are limited to those delegated by the legislature,” particularly Chapter 79, R.S.Mo. *City of Lake Lotawana v. Meagher*, 581 S.W.2d 105, 106 (Mo. App. 1979). Fourth-class cities have “no inherent police power,” and instead their “authority to exercise such power ... must come from a specific delegation by the state” *Id.* (citation omitted).

Section 79.250, R.S.Mo. (“the Tax Statute”), provides in relevant part that “[n]o person shall be elected ... to any office” in a fourth-class city “who shall at the time be in arrears for any unpaid city taxes” Taking up this delegation, the City has enacted § 115.040 of its Code of Ordinances (“the Tax Ordinance”), which expressly echoes the Tax Statute and also provides in relevant part that “No person shall be elected to any office” in the City “who shall at the time be in arrears for any unpaid City taxes” (SOF ¶ 4; Ex. A).

Alderman Cacioppo was elected as the City’s Ward 1 Alderman on April 7, 2015 (SOF ¶ 3; Ex. B, p. 2; Ex. F, p. 1). Relator alleges that Alderman Cacioppo is “ineligible to hold office in the City” under the Tax Ordinance and must be ousted from office because he “owed city taxes at the time of his election and is therefore not entitled to hold the office of Alderman” (SOF ¶ 1; Ex. F ¶¶ 10, 14). Under the undisputed facts of this case, Relator’s ground is without merit.

At the outset, whether Alderman Cacioppo owed taxes to any entity ***besides the City*** and at any time ***besides on the day of his election*** is irrelevant under both the Tax Statute and the Tax Ordinance. Rather, only owing past-due taxes ***to the City***, and only ***on the day of election***, matter for Relator's claim. *In re Williams*, 943 S.W.2d 244, 246 (Mo. App. 1997).

"Statutes" and corresponding municipal ordinances "that regulate access to the ballot are to be construed, if possible, to prevent disqualification of candidates." *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 (Mo. banc 2004). As a result, the phrase "at the time" in the Tax Statute and, thus, the Tax Ordinance enacted under it, means "at the close of the polls on election day." *Williams*, 943 S.W.2d at 246 (following *State ex rel. Selsor v. Grimshaw*, 762 S.W.2d 868, 870 (Mo. App. 1989), and *State ex rel. Crow v. Page*, 41 S.W. 963, 963 (Mo. 1897)). And the reference to "city taxes" means only those taxes owed ***to the City***, not to any other governmental body. *Id.* As the City is a fourth-class city, such taxes, of course, are personal and real property taxes, not to exceed 1% on the taxable property's assessed value. § 94.250.1, R.S.Mo.

Therefore, to prove his first ground in his petition that Alderman Cacioppo violated the Tax Ordinance, Relator has to be able to prove that, on April 7, 2015, the day of his election, Alderman Cacioppo was in arrears for property taxes then due and owed to the City. *Williams*, 943 S.W.2d at 246. He cannot.

Relator attached to his petition: (1) a Missouri state tax lien that this Court imposed against Alderman Cacioppo in January 2016; and (2) a printout from the Clay County Collector's website showing that, on February 24, 2016, Alderman Cacioppo paid 2015 City taxes on a boat and its components (Ex. F, attachments 3, 3A, and 6). Both of these have nothing to do with whether Alderman Cacioppo owed past-due property taxes to the City on April 7, 2015, the date of his election.

First, the state tax lien itself shows that the arrearage in question had nothing to do with taxes owed to the City, but rather concerned Missouri *state* income withholding tax (Ex. F, attachments 3 and 3A). Thus, as a matter of law, there was no violation of the Tax Statute or Tax Ordinance, which only disqualify candidates for arrearages on *City* taxes. *Williams*, 943 S.W.2d at 246.

Second, as a matter of law, the 2015 City personal property taxes due on Alderman Cacioppo's boat and its components were not yet due on April 7, 2015, and thus there could not have been any arrearage. Fourth-class cities' property taxes are assessed, levied on, and collected along with property taxes owed to the county, and must conform to the county assessor's valuation. § 94.190, R.S.Mo.

Counties assess personal property taxes on all taxable personal property owned as of January 1 of a given year. § 137.080, R.S.Mo. On February 1 of that year, the county assessor sends forms through the mail to all county residents requesting the residents to list their taxable personal property, § 137.115, R.S.Mo., which the resident must return by March 1 of that year. § 137.340, R.S.Mo. Thereafter, the resident has until December 31 of that year in which to pay those personal property taxes; any that remain unpaid on January 1 of the following year are delinquent. § 140.010, R.S.Mo. As fourth-class cities' taxes are assessed, levied on, and collected by the counties, they, too, are not "delinquent" until January 1 of the following year. § 94.300, R.S.Mo.

Accordingly, as a matter of law, the 2015 personal property taxes due to the City on Alderman Cacioppo's boat, which were not paid until February 24, 2016, were not delinquent until January 1, 2016. §§ 94.190 and 94.300. Especially "construed ... to prevent disqualification of candidates," *Brown*, 129 S.W.3d at 374, under the Tax Ordinance, "at the time" of Alderman Cacioppo's election on April 7, 2015, he was not "in arrears for any unpaid [2015] city taxes." Those taxes were not due until December 31, 2015, and it was not *until then* – more than eight months

after his election – that he was in arrears on them. As a matter of law, Alderman Cacioppo’s failure to pay his 2015 City personal property taxes on his boat until February 2016 did not violate the Tax Ordinance.

Rather, Relator would have to show that, on April 7, 2015, Alderman Cacioppo was in arrears on his **2014** City personal property taxes. *See, e.g., State ex rel. Selsor v. Grimshaw*, 762 S.W.2d 868, 869 (Mo. App. 1989) (mayoral candidate violated Tax Statute by not paying his 1987 city taxes by date of election in 1988).

Alderman Cacioppo, however, did not owe any property taxes of any kind in Clay County for 2014 (SOF ¶ 5; Ex. B, pp. 2-4; Ex. B-4, p. 3; Ex. C, p. 2; Ex. E). Affidavits from Alderman Cacioppo and his wife, ***as well as the certification of the Clay County Collector herself***, all clearly show this (SOF ¶ 5; Ex. B, pp. 2-4; Ex. B-4, p. 3; Ex. C, p. 2; Ex. E). Plainly, this cannot be disputed.

There can be no general dispute of material fact that, at the time of his election on April 7, 2015, Alderman Cacioppo was not in arrears for any unpaid taxes to the City. As a result, he is entitled to judgment as a matter of law on Relator’s first ground for seeking his ouster for violation of the Tax Ordinance.

II. Alderman Cacioppo has a right to judgment as a matter of law refusing his ouster because he has not violated § 79.070, R.S.Mo.: at all times since May 2009, he has been an inhabitant and resident of aldermanic Ward 1 of the City.

Section 79.070, R.S.Mo., provides in relevant part that “[n]o person shall be an alderman” of a fourth-class city “unless he or she is ... an inhabitant and resident of the city for one year next preceding his or her election, and a resident, ... during the time he or she serves, of the ward from which he or she is elected.”

Under this statute, which has been in effect since 1895 with little substantive amendment, *see* Mo. Laws 1895, p. 69, § 18, a fourth-class city’s alderman must be a resident of his ward when elected and must remain so during his term of office or otherwise forfeits his right to the office. *State ex rel. City of Republic v. Smith*, 139

S.W.2d 929, 933 (Mo. banc 1940); *State ex rel. Johnson v. Donworth*, 105 S.W. 1055, 1055 (Mo. App. 1907).

Relator's second alleged ground for seeking Alderman Cacioppo's ouster is his assertion that Alderman Cacioppo is not a resident and inhabitant of the City, and thus has forfeited his office under § 79.070. He alleges that Alderman Cacioppo "is not a resident of the City of Mosby," having "moved from 22604 NE 122nd Street in Mosby" and "relocated to 8621 SW Price Drive, Lawson, Missouri," and "owns no real property in the City of Mosby" (Ex. F, ¶¶ 12-15).

Under the undisputed facts of this case, Relator's second ground is without merit. For over 120 years, Missouri courts have held that the terms "resident" and "inhabitant" in § 79.070 mean *domicile*: the place the alderman intends to reside as his permanent home. Since April 2009, Alderman Cacioppo and his family have resided within the City's aldermanic Ward 1 at 22604 NE 122nd Street, Mosby, Missouri 64068 ("the Property"), as their permanent home (SOF ¶ 7; Ex. B, pp. 1-2, 6-7; Ex. B-2; Ex. B-3; Ex. C, pp. 1-2, 4-5; Ex. D; Ex. F, ¶ 19). In May 2015, catastrophic flooding of the abutting Fishing River – of which Relator was keenly aware – rendered Alderman Cacioppo's home on the Property totally uninhabitable, requiring Alderman Cacioppo and his family temporarily to stay elsewhere while the Property is being made habitable again, upon which they will return to the Property (SOF ¶¶ 9-16; Ex. B, pp. 4-6; Ex. B-5; Ex. B-6; Ex. B-7; Ex. B-8; Ex. B-9; Ex. B-10; Ex. B-11; Ex. C, pp. 2-5; Ex. D, pp. 2-3).

The law of Missouri is that temporarily and unwillingly being forced off one's legal domicile by a natural disaster such as a flood **does not** change that legal domicile. Under the undisputed facts, Alderman Cacioppo is entitled to judgment as a matter of law that the Property has been his legal domicile since May 2009, and he has not violated § 79.070. As a matter of law, Alderman Cacioppo remains a "resident and inhabitant" of aldermanic Ward 1 of the City of Mosby.

A. Section 79.070, R.S.Mo., does not require that a fourth-class city’s alderman *own* property in the city, but merely that his domicile – where he mainly resides and intends permanently to remain – be there, however legally arranged.

As it has since 1895, § 79.070 requires that an alderman be “an inhabitant and resident of the city” and a “resident ... of the ward from which he or she is elected.” “Residence” has a particular legal meaning, distinguished from “domicile.” *State ex rel. Quest Comms. Corp. v. Baldrige*, 913 S.W.2d 366, 396 (Mo. App. 1996).

“Missouri courts generally have defined ‘residence’ as meaning a physical presence and a degree of permanency,” specially “an intention to remain indefinitely.” *Id.* “On the other hand, ‘domicile’ long has been defined as ‘that place where a person has his true, fixed and permanent home and principal establishment to which, whenever he is absent, he has the intention of returning.’” *Id.* (citation omitted). A “person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead.” *Id.*

For the entirety of § 79.070’s 120-year existence, its terms “resident” and “inhabitant” always have been construed to mean *domicile*. *State ex rel. Lowe v. Banta*, 71 Mo.App. 32, 40-41 (1897). As the Court of Appeals held in *Lowe*, the first decision to interpret what now is § 79.070,

[o]ur lawmakers, in using the terms *residents* and *inhabitants*, when prescribing official qualifications, have treated such words as synonymous. And while ‘residence’ is the favorite term used by legislators in prescribing the eligibility of public officials, the courts have used the more technical term of *domicile*, and in such cases have generally spoken of change of residence as a change of domicile.

Id. (emphasis in the original).

Thus, to have “residence” in a city and ward within the meaning of § 79.070, the subject must have his *domicile* there. *Id.* at 41. “The physical fact of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides.” *Id.* Simply put, under § 79.070,

A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home.

Id. at 41-42 (citation omitted).

Relator first charges that Alderman Cacioppo is not a "resident" or "inhabitant" of the City because he "owns no real property in the City" (Ex. F, ¶ 13). But one's domicile is not dependent on property *ownership*. Rather, it is merely "that place where a person has his true, fixed and permanent home and principal establishment to which, whenever he is absent, he has the intention of returning," however established. *Yates v. Dir. of Revenue*, 279 S.W.3d 215, 218 (Mo. App. 2009).

Accordingly, besides actual ownership of property, Missouri cases have recognized numerous other dwelling arrangements conferring domicile, including:

- renting property, *Henderson v. Murray*, 78 S.W.3d 147, 149-50 (Mo. App. 2002); *Sharp v. Sharp*, 416 S.W.2d 691, 693 (Mo. App. 1967);
- living with a parent, *Mertzluft v. Civil Serv. Comm'n*, 85 S.W.3d 63, 66-68 (Mo. App. 2002); *Lowe*, 71 Mo.App. at 38-39; *Perry v. City of St. Louis Civil Serv. Comm'n*, 924 S.W.2d 861, 864-64 (Mo. App. 1996); and
- living permanently out of a hotel room, *State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 922 (Mo. App. 2004).

The point is, regardless of *how* a person resides in a place, whether it is his domicile depends *solely* on whether he has made it his permanent home and intends it to remain so. Thus, as a matter of law, whether Alderman Cacioppo *owns* property in the City's Ward 1 is irrelevant. It cannot be disputed that, since May 2009, his domicile consistently and without interruption has been the Property – by means of a contract for deed – and remains the Property. He therefore meets and has met the requirements of § 79.070, entitling him to judgment as a matter of law.

B. The Property is Alderman Cacioppo's domicile: since May 2009, he has resided on the Property as his primary, permanent home with his family and always intended and intends the property to be his and his family's permanent home.

As noted *supra*, "A domicile is that place where a person has his true, fixed and permanent home and principal establishment to which, whenever he is absent, he has the intention of returning. A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead." *Yates*, 279 S.W.3d at 218 (quotations and citations omitted).

As such, domicile "is largely a matter of intention, coupled with an act or acts in conformity thereto. It is acquired by an intention to live at a place permanently, or for an indefinite time, coupled with actual bodily presence, though that presence need not be continuous." *Sharp*, 416 S.W.2d at 695. For a place to become one's domicile, the "physical act of staying" there "must be accompanied with the mental determination of making a home or domicile" there. *State ex. rel. Ramey v. Dayton*, 77 Mo. 678, 682 (1883).

"Proof of domicile ... does not depend on any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile" *In re Ozias' Estate*, 29 S.W.2d 240, 243 (Mo. App. 1930). "In determining whether person has the requisite intent to remain at place either permanently or for indefinite period of time, [a] court should consider declarations of the person and the acts done before, at, and after the time the domicile is in dispute." *Paulson v. Mo. Dept. of Revenue*, 961 S.W.2d 63, 66 (Mo. App. 1998).

Still, a party's intent is the primary factor in determining his domicile. *Northern v. McCaw*, 175 S.W. 317, 319 (Mo. App. 1915). "The place of residence being entirely one of intention, an expression of such an intention can only be overcome by strong circumstances to the contrary." *Id.*

In this case, it cannot be disputed that the Property, located within the City's aldermanic Ward 1, became Alderman Cacioppo's domicile in May 2009, when he, his wife, and his three children moved there under a contract for deed with William Haight that gave the Cacioppo's immediate and sole possession of the Property, which they have retained ever since (SOF ¶¶ 7-8; Ex. B, pp. 1-2, 6-7; Ex. B-2; Ex. B-3; Ex. C, pp. 2, 4-5; Ex. D). Indeed, in the years since, the Cacioppo's have paid off the full contract price of \$70,000 and now are awaiting delivery of Mr. Haight's warranty deed formally conveying title in the Property to them (SOF ¶ 8; Ex. B, pp. 1-2; Ex. B-1; Ex. C, pp. 1-2).

Alderman Cacioppo's Missouri drivers' license and voter registration both list the Property as his address, and his business's address of organization is the Property (SOF ¶ 7; Ex. B, pp. 1-2, 6-7; Ex. B-2; Ex. B-3; Ex. C, pp. 2, 4-5). At all times since May 2009, Alderman and Mrs. Cacioppo's intent has been that they and their children would, do, and will make the Property their primary, permanent domicile (SOF ¶ 15; Ex. B, pp. 6-7; Ex. B-1; Ex. B-2; Ex. B-3; Ex. C, pp. 4-5; Ex. D, p. 3). Their permanent home, their personal property, and their livestock all have been located on the Property at all times since May 2009 (SOF ¶ 13; Ex. B, p. 6; Ex. C, p. 5; Ex. D, p. 3).

Under these undisputed facts, as a matter of law, the Property became Alderman Cacioppo's domicile under § 79.070 in May 2009. The Property "is that place where [Alderman Cacioppo] has his true, fixed and permanent home and principal establishment to which, whenever he is absent, he has the intention of returning." *Yates*, 279 S.W.3d at 218 (quotations and citation omitted). He has "an intention to live [there] permanently, or for an indefinite time, coupled with [his] actual bodily presence" *Sharp*, 416 S.W.2d at 695. His "physical act of staying" on the Property is "accompanied with the mental determination of making a home" there. *Ramey*, 77 Mo. at 682.

C. As a matter of law, the temporary uninhabitability of Alderman Cacioppo's domicile on the Property due to a natural disaster necessitating his temporary physical absence until it is made habitable again does not affect its status as his domicile.

As one's domicile is a question of one's intent, so is a change of domicile: "To change a domicile, a person must be personally present in the new place and have a present intent to remain there indefinitely or permanently 'without any fixed or certain purpose to return to the former place of abode.'" *Yates*, 279 S.W.3d at 218 (citation omitted).

"Mere presence at another location, no matter how prolonged, will not affect a change of domicile without an intention to make the new place a permanent residence or home." *Id.* (citation omitted). "[W]hen a person has once acquired a ... domicile, then such ... domicile is not lost by reason of his temporary absence therefrom" *State ex rel. Kelly v. Shepperd*, 117 S.W. 1169, 1172 (Mo. 1909). Domicile "is not lost by temporary absence," *Ozias' Estate*, 29 S.W. at 243, nor can domicile in a new place be gained "upon a temporary purpose." *Goeman v. Goeman*, 833 S.W.2d 476, 478 (Mo. App. 1992).

Accordingly, "To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one." *Ozias' Estate*, 29 S.W. at 243. Absent any one of the three requirements, there cannot be a change in domicile, even if the subject temporarily has taken up residence elsewhere. *Id.* It does not matter whether his "temporary absence" is brief or even for "a series of years;" instead, what matters is "the intention with which the removal from the former residence was made." *Hall v. Schoenecke*, 31 S.W. 97, 97 (Mo. 1895).

Under the undisputed facts of this case, the Property did not stop being Alderman Cacioppo's domicile as a result of his temporary absence from it

beginning July 29, 2015, because he had and has no intention to abandon the old domicile or acquire a new one.

Rather, his absence has been due solely to the catastrophic flooding in May and June 2015 of the Fishing River abutting the Property, which rendered his home there totally uninhabitable, and he and his family are unable physically to live there until their new home being built there is finished, upon which they will return (SOF ¶¶ 9-15; Ex. B, pp. 4-7; Ex. B-5; Ex. B-6; Ex. B-7; Ex. B-8; Ex. B-9; Ex. B-10; Ex. B-11; Ex. C, pp. 2-5; Ex. D, pp. 2-3). Despite his physical absence from day-to-day living on the property, Alderman Cacioppo's driver's license, voting registration, and business still list the Property as his address, his personal property and livestock (which he and his family regularly use and tend to) still are on the Property, the insurance proceeds to rebuild the home have been received, and the building permits to build the new home are active (SOF ¶¶ 7, 13-14; Ex. B, pp. 1-2, 5-7; Ex. B-2; Ex. B-3; Ex. B-10; Ex. B-11; Ex. C, pp. 2, 4-5; Ex. D, pp. 2-3).

The law of Missouri is that Alderman Cacioppo's having been forced by circumstance of natural disaster temporarily to live at Mr. Fields' property in Lawson while their home on the Property is being rebuilt **does not and cannot** constitute a change of domicile under § 79.070. There are and have been no intention to abandon the old domicile and no intention of acquiring a new one.

In *Lowe*, for example, Mr. Banta established domicile in a room in his father's home in the City of Westport.¹ 71 Mo.App. at 38. After getting married, he and his wife rented a small apartment in neighboring Kansas City. *Id.* At the same time, while living in Kansas City, he bought a vacant lot in Westport, on which he began

¹ At the time of *Lowe* in 1897, Westport, which today is a neighborhood in Kansas City, Jackson County, was a separate city. Shortly after the facts of *Lowe*, it was annexed by Kansas City. See *City of Kan. City v. Stegmiller*, 52 S.W. 723 (Mo. banc 1899).

building a house for him and his wife to live. *Id.* He kept receiving mail at his father's address, claimed Westport as his home, and intended to move into the house under construction in Westport as soon as it was completed. *Id.* At all times, he "considered Westport his permanent habitation and residence." *Id.*

When, while living in the apartment in Kansas City, Mr. Banta was elected as an alderman of the City of Westport, the Jackson County Prosecutor sought a writ of quo warranto ousting him from office, arguing that, under what today is the nearly identical § 79.070, he lost his domicile in Westport upon moving to the apartment in Kansas City, and thus was disqualified from his office. *Id.* at 37-38.

The Court of Appeals refused a writ, holding that, despite Mr. Banta's temporary absence from Westport while his new house was being built, this did not amount to a change in domicile. *Id.* at 39-42. "[A]t the date of [his] election, prior thereto and since, he was, and continued to be, an inhabitant and resident of the second ward of the city of Westport. Habitancy and residence, as used in [§ 79.070], have the same meaning, and both indicate the same degree of permanency and fixedness as domicile." *Id.* at 39-40. And Mr. Banta's "permanent abode or habitation was at all time in the second ward of the city of Westport," as he "never abandoned his legal residence" in Westport and "his stay at the Kansas City flats was for mere temporary purpose ... until his own house should be erected" in Westport. *Id.* at 42. "[T]here was no change of the residence required by statute, and hence [the prosecutor]'s action to oust [Mr. Banta] must fail." *Id.*

Lowe is extremely similar to this case, though the evidence of Alderman Cacioppo's domicile in Ward 1 of the City here is even stronger. Unlike in *Lowe*, Alderman Cacioppo's temporary absence from the Property is not due to his having *chosen* to build a new home in the City, but because he and his family were *forced* off the property by a natural disaster rendering it totally uninhabitable. If Mr. Banta choosing to live in Kansas City while voluntarily building a home in

Westport did not destroy his domicile in Westport, certainly the destruction of Alderman Cacioppo's home, *necessitating* his living elsewhere while a new one is being built, cannot either.

No reported Missouri decision directly addresses the effect of a loss of a person's home due to a natural disaster and temporary absence elsewhere on his legal domicile. Unsurprisingly, however, because domicile is entirely about one's intent, each of the only three reported American decisions addressing this issue uniformly has held that, when a disaster destroys a person's home and he is forced to live elsewhere while it is being rebuilt, no matter how long it takes he does not lose his domicile there as long as he still intends to return. *See Ogden v. Gray*, 99 So.3d 1088 (La. App. 2012); *State v. Stalnaker*, 412 S.E.2d 231 (W.V. 1991); *Fain v. Crawford*, 16 S.E. 106 (Ga. 1892).

In *Ogden*, Mr. Gray and his wife purchased a home in District E in New Orleans in 1988, where they established their domicile and lived continuously afterward. 99 So.3d at 1093. In 2005, severe damage from Hurricane Katrina rendered the home uninhabitable. *Id.* For seven years while the home was being repaired, Mr. Gray and his wife lived with his mother in Baton Rouge. *Id.* In 2012, while still unable to live in the New Orleans home, but still repairing it, Mr. Gray filed to run for District E's seat on the New Orleans City Council, listing the New Orleans home as his address, which his voter registration and driver's license still reflected. *Id.* at 1090, 1093-94. Two citizens objected to Mr. Gray's candidacy, arguing he no longer qualified as domiciled in District E. *Id.* at 1090.

The Louisiana Court of Appeals disagreed and held that, despite Mr. Gray's absence from his New Orleans home and the length of that absence, it was temporary due to circumstances beyond his control – the home's destruction by Hurricane Katrina – and, as he was repairing the home and intended to return, the home remained his domicile. *Id.* at 1097.

In *Stalnaker*, beginning in 1984 Mr. Stalnaker and his wife owned and lived in a trailer on the back of a commercial lot where he operated a car wash. 186 S.E.2d at 232. In 1989, the trailer was destroyed by a tornado. *Id.* The Stalnakers also owned a farm in a different election district from the trailer, where they lived after the tornado while Mr. Stalnaker was building an apartment on the property in which he and his wife could live. *Id.* In 1990, while living at the farm before moving into the apartment, Mr. Stalnaker filed to run for county commissioner from the trailer/apartment's district, listing that as his address on his certificate of candidacy. *Id.* The local prosecutor charged him with false swearing on his certificate, alleging he was domiciled at the farm and not the trailer/apartment. *Id.* A jury found him guilty and he appealed. *Id.*

The West Virginia Supreme Court of Appeals reversed. *Id.* at 232, 234. It was “undisputed that Mr. Stalnaker’s domicile was his trailer until a tornado destroyed it in 1989. After Mr. Stalnaker constructed an apartment on the trailer’s site, he returned to live there, at least part of the time.” *Id.* at 234. “Mr. Stalnaker’s change in residence for convenience while he was constructing a replacement for his trailer does not, without more, indicate a change in domicile.” *Id.* To the contrary, his “construction of an apartment and his presence in the apartment at least part of the time, show his intention of returning to his original domicile.” *Id.* “Because the [prosecution] failed to present any evidence of Mr. Stalnaker’s intent to change his domicile,” it had “failed to establish that the farm was Mr. Stalnaker’s domicile. Therefore, [it] failed to prove that Mr. Stalnaker falsely swore on his certificate of candidacy.” *Id.*

Finally, in *Fain*, while living in DeKalb County, Georgia, the defendant left to visit some relatives, intending to return, but while he was gone “his residence, with all of his household furniture, was destroyed by fire ...” 16 S.E. at 106. While he intended to return to his destroyed home once it could be rebuilt, he was forced

to remain with relatives in Fulton County until then. *Id.* While residing temporarily in Fulton County, the plaintiff filed a suit against him. *Id.* The defendant objected to venue, arguing that he remained domiciled in DeKalb County and only was temporarily residing in Fulton County due to the fire, and thus only DeKalb County could have venue of the case. *Id.*

The Supreme Court of Georgia agreed with the defendant that his domicile had not changed due to circumstances beyond his control, the fire, when he plainly intended to return to his home once he could:

Where a person leaves one county with his family for the purpose of visiting his relatives in another county, with no intention of removing his domicile from the former county, and during his absence his home is destroyed by fire, and, in consequence thereof, he prolongs his visit for four weeks, but without any intention to abandon his former residence, the fact of his prolonged visit does not make the county to which he has gone his residence.

Id.

Plainly, when a person's domicile is rendered uninhabitable by a disaster, requiring him temporarily to live elsewhere while his domicile is being made habitable again, as in all these other states the law of Missouri is and must be that his temporary absence does not annihilate his domicile.

And that is exactly what happened here. Under the undisputed facts, the destruction of Alderman Cacioppo's domicile on the Property under § 79.070 did not and could not change by mere virtue of his temporary residence in Lawson while his home on the Property is being rebuilt. He has no "present intent to remain [in Lawson] indefinitely or permanently 'without any fixed or certain purpose to return to'" the Property. *Yates*, 279 S.W.3d at 218 (citation omitted). His "[m]ere presence in Lawson, no matter how prolonged, will not affect a change of domicile" *Id.* (citation omitted). He cannot gain domicile in Lawson "upon a temporary purpose"

of simply residing there while his home on the Property is being made habitable again. *Goeman*, 833 S.W.2d at 478.

As a matter of law, of the “three things” “essential” to “constitute a change of domicile,” two are missing in this case: “(2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one.” *Ozias’ Estate*, 29 S.W. at 243. It does not matter how long it takes for Alderman Cacioppo’s home on the Property to be rebuilt; his “intention with which the removal from the former residence was made” is to return once it is rebuilt. *Hall*, 31 S.W. at 97.

Under the undisputed facts of this case, the Property has been Alderman Cacioppo’s domicile since May 2009 without change and without interruption, and remains so at present. He fully satisfies the requirements of § 79.070 to be and remain Ward 1 Alderman of the City. Alderman Cacioppo is entitled to judgment as a matter of law on Relator’s second ground seeking his ouster.

III. Relator knew or reasonably should have known that Alderman Cacioppo was not in arrears for any unpaid City taxes on April 7, 2015, and only temporarily is absent from the Property due to a natural disaster, but falsely claimed otherwise in his petition, entitling Alderman Cacioppo to an award of attorney fees.

Generally, in a writ case, the American Rule on attorney fees applies, and each side pays its own attorney fees. *State ex rel. Duddy v. Lasky*, 451 S.W.2d 352, 356 (Mo. App. 1970). This is “unless the relator has made a false return, in which case” the respondent is entitled to recover his attorney fees as damages. *City of Cottleville v. St. Charles Cnty.*, 91 S.W.3d 148, 149 (Mo. App. 2002).

Here, Relator plainly knew – or at least certainly should have known – that both of his two grounds in his First Amended Petition in Quo Warranto are demonstrably false (SOF ¶¶ 6, 16; Ex. B, pp. 2-4, 6-7; Ex. B-4; Ex. B-6; Ex. B-8; Ex. B-9; Ex. B-10; Ex. C, p. 5; Ex. F, attachment 6).

First, to support his claim that Alderman Cacioppo was in arrears for unpaid taxes to the City at the time of his election, he attached to his petition a receipt from the Clay County Collector for property taxes that Alderman Cacioppo paid in February 2016, which included a percentage due to the City (Ex. B, p. 3; Ex. F, attachment 6). As that receipt shows, though, those taxes were for the year 2015, which were not due until December 31, 2015, more than eight months *after* Alderman Cacioppo's election (Ex. B, p. 3; Ex. F, attachment 6). As a longtime Missouri and Clay County resident, Relator knew very well – or at least plainly should have known very well – that property taxes for a year are not due until December 31 of that year, and are not “in arrears” until unpaid on January 1 of the following year. *Supra* at pp. 5-6.

Moreover, to obtain that receipt from Clay County's online property tax information system in the first place, Relator *first* would have had to go through a screen stating that Alderman Cacioppo *did not* owe *any* taxes to any Clay County jurisdiction in 2014, which are the only ones that *could* have been delinquent on the day of Alderman Cacioppo's election on April 7, 2015 (Ex. B, pp. 2-4; Ex. B-4; Ex. F, attachment 6). Clearly, Relator either knew or certainly *should* have known that his statement that Alderman Cacioppo was in arrears on City taxes at the time of his election was *false*. Relator is entitled to an award of his attorney fees.

Second, the City is a town of only 150 people (Ex. B, p. 6; Ex. C, p. 5). Relator has known Alderman Cacioppo and his wife for many years (Ex. B, p. 6; Ex. C, p. 5). While claiming Alderman Cacioppo owns no property in the City and had moved from the City, Relator nonetheless knew well – and certainly should have known – that Alderman Cacioppo resided on the Property and only temporarily was absent due to the 2015 floods until his house could be rebuilt (Ex. B, pp. 6-7; Ex. C, p. 5).

The following shows this further:

- Relator, the City's Mayor, told the *Kansas City Star* that he encouraged all residents to evacuate the City due to the floods (Ex. B-9);
- The City's own flood reports showed that Alderman Cacioppo's home on the Property was totally destroyed by the floods, which Relator had the ability to see for himself (Ex. B-10);
- The City issued the Cacioppo's building permits for the Property on July 30, 2015, one day after they temporarily began residing at Mr. Fields' property in Lawson, which Relator had the ability to see for himself (Ex. B-11).

Plainly, for Relator, the mayor of a small town, to claim in a quo warranto petition that one of the town's aldermen is not domiciled in the town, especially knowing full well that the most catastrophic disaster in the town's history destroyed the alderman's home, that the alderman is rebuilding the home, and that the alderman has kept the home and will return to it once it is rebuilt, is unreasonable. More than unreasonable, it is *false*.

Knowingly or recklessly so, Relator's petition *falsely* claims that Alderman Cacioppo was in arrears for unpaid taxes to the City at the time of his election and that Alderman Cacioppo has abandoned his home in the City. As a result, Alderman Cacioppo is entitled to an award of his attorney fees.

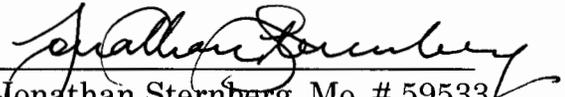
CONCLUSION

There can be no genuine dispute of material fact. Under the undisputed material facts, Alderman Cacioppo is entitled to judgment as a matter of law on Relator's First Amended Petition in Quo Warranto.

WHEREFORE, Respondent Sean Cacioppo prays the Court to enter a summary judgment quashing its preliminary order in quo warranto, denying Relator's request for a permanent writ of quo warranto ousting Respondent, dismissing Relator's petition for writ of quo warranto with prejudice, and awarding Respondent his costs and attorney fees.

Respectfully submitted,

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Certificate of Service

I certify that, on March 30, 2016, I mailed and e-mailed a true and accurate copy of the foregoing to the following:

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