

NO. 07-1509

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
DEBORAH S. REESE

Relator,

v.

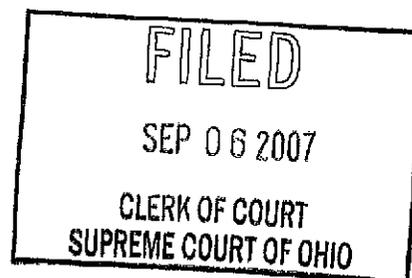
CUYAHOGA COUNTY BOARD OF ELECTIONS, *et al.*

Respondents.

RELATOR'S MOTION TO STRIKE RESPONDENTS' MOTION TO STRIKE AND
DISMISS AND RELATOR'S RESPONSE TO RESPONDENTS' MOTION TO
STRIKE AND DISMISS

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I. INTRODUCTION

Relator, Deborah S. Reese (“Relator”) requests that this Court overrule Respondents’ Motion to Strike and Dismiss as such a motion is not contemplated under this Court’s rules. Further, Relator, in an abundance of caution, has filed a motion for leave to amend her Writ and substitute the affidavit of counsel, which would render Respondents’ motion moot.

Upon review, it is apparent that the Respondents’ motion is meritless. The affidavit of counsel supporting Relator’s writ specifically states that it is based on “personal knowledge,” as required by Sup. Ct. R. X, Section 4(B) and states that it is made pursuant to the rule. In addition, Relator’s own affidavit satisfies the requirements of Supt Ct. R. X, Section 4(B), as it also sets forth the basis of her writ, as that her affidavit is made with personal knowledge and satisfies the other general requirements of an affidavit.

The Court should overrule the Respondents’ challenge to Affidavit of its own employee, Gary F. Barna (“Barna Affidavits”). As set forth herein, Relator, in reliance upon Respondents representations and in good faith, attempted to obtain a complete certified copy of the Respondent’s file regarding the challenge of the candidacy of Judge Maureen Adler Gravens (“Judge Gravens”). *See attached Affidavit of Alicia Whiting-Bozich (Ex. A)*. Since according to the Respondents’ they could not “certify” such a copy, Relator’s counsel was told by Respondents that a BOE representative would provide an affidavit to support the authenticity of the documents. That representative was Executive Assistant to the Director, Gary F. Barna. There is nothing deficient regarding Barna’s Affidavits which support Relator’s Merit Brief. It

meets all the technical requirements of an affidavit. This issue should have been raised in Respondent's Merit Brief, curiously it is raised in this procedural motion.

Additionally, Respondents' should be equitably estopped from claiming that Relator is not entitled to rely upon the Barna Affidavits. Notably, the affidavit of Mr. Barna supplied by Respondents ("Respondent Affidavit") makes no claim that the documents supported by the Barna Affidavits attached to Relator's Merit Brief are not true and accurate copies of the Respondents' file. Finally, this Court has long held that cases should be decided on their merits and not procedural machinations; therefore, Respondents' motion should be overruled. *DeHart v. Aetna Life Insurance Co.* (1982), 69 Ohio St.2d 189,197

II. LAW AND ARGUMENT

A. RESPONDENTS' MOTION TO STRIKE AND DISMISS SHOULD BE STRICKEN AS IT IS NOT PERMITTED UNDER THE SUPREME COURT'S RULES

Respondents have in fact filed a total of three (3) merit briefs in this expedited election despite the pleadings titles: Motion to Dismiss/Motion for Judgment on the Pleadings; Merit Brief; and Motion to Strike/Dismiss. The Supreme Court Rules only contemplate the Respondent filing an Answer and a Merit Brief and this Court has stated on numerous occasions that procedural motions are inappropriate in expedited election cases. S. Ct. R. X, Section 9; *State ex. rel. Hackworth v. Hughes* (2002), 97 Ohio St. 3d 110, 112-113; *State ex rel. City of Toledo v. Lucas Cty. Bd. of Elections* (2002), 95 Ohio St.3d 73, 74; *State ex rel. Yiamouyiannis v. Taft* (1992), 65 Ohio St.3d 205, 206-207, citing *State ex rel. Beck v. Casey* (1990), 51 Ohio St.3d 79, 83 and *State ex rel. Green v. Casey* (1990), 51 Ohio St.3d 83, 84

The issues presented in Respondents' latest Motion to Strike and Dismiss could and should have been raised in Respondents' Merit Brief. The Merit Brief of Relator was timely filed on August 24, 2007 and this was the last filing of the Relator. Respondents then filed their Merit Brief. The pleadings should have stopped at this point. This subsequent filing of the Respondents is an "afterthought." Perhaps Respondents in retrospect though they missed an argument in the Merit Brief and filed his motion to bring a new argument into play. This should not be permitted as it circumvents this Court's rules.

Accordingly, the Respondents' Motion to Strike and Dismiss itself should be stricken from the record.

B. THE AFFIDAVITS SATISFY THE REQUIREMENTS OF S.Ct. R., SECTION 4(B)

Relator has submitted a total of 4 affidavits in support of her writ, all of which appear to be under attack by the Respondents.

1. The Affidavit of Deborah S. Reese

Although not mentioned in Respondents' present motion, Relator's affidavit has been attacked because she did not have personal knowledge of the facts of her challenge and specifically as to whether the actual petition circulated by Judge Gravens was as an "independent." Relator disagrees that the form of the petition is a deciding issue based upon all of the facts surrounding this case. Apparently Respondents believe that Judge Gravens would be willing to provide an Affidavit authenticating her petitions on behalf of Relator who seeks to have Judge Gravens removed from the ballot. If this were true, no election case would ever survive a procedural motion.

In order to provide adequate facts to state a claim for her writ (whether for mandamus or prohibition), Relator merely needs to establish that she filed a valid protest- which she clearly established in her affidavit. The fact that her protest was denied is not a matter of dispute and is also contained in the original transcript from the August 6, 2007 BOE Hearing filed with the Court.

The remaining requirements to support a writ, whether in mandamus or prohibition are legal issues. The requirements for mandamus are: whether (1) she has a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of respondents to provide it; and, (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Steele v. Morrissey* (2004), 103 Ohio St.3d 355 The requirements for a prohibition are: the (1) board of elections is about to exercise quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Choices for Southwestern City Schools v. Anthony* (2005), 108 Ohio St.3d 1 Accordingly, it would not be proper for Relator to affide to such matters.

C. THE AFFIDAVIT OF COUNSEL MEETS THE REQUIREMENT OF S. Ct. R. X, SECTION 4(B)

The affidavit of Relator's counsel is attacked by Respondents in this recent Motion on the basis that it was not made with personal knowledge. This is simply wrong. In paragraph 1, the affidavit provides that it is based on "personal knowledge." Further, out of an abundance of caution, Relator has sought leave of this Court to substitute a Supplemental Affidavit of Counsel.

While Counsel's affidavit does contain a statement that the facts were true and accurate to the best of his knowledge, the difference between the cases cited by

Respondents and the present case, is that counsel's affidavit in this case further states that it is based on "personal knowledge." This does not appear to be the case in either the *Evans* or the *Hackworth* cases.

Further, as stated, the Affidavit of Relator on its own supports the Writ and meets the requirements of Sup Ct. R. X, Section 4(B), thereby rendering this issue moot.

D. THE ORIGINAL AFFIDAVIT OF GARY BARNA SHOULD NOT BE STRICKEN

Respondents argue Relator is not entitled to rely upon the Barna Affidavits even though they were made under oath by an employee who held himself out as having authority to authenticate documents to Relator's counsel. It is worthy of special notice that nowhere in the "Affidavit of Gary Barna", submitted by Respondents ("Respondent's Affidavit"), does it state that the documents he reviewed for the Barna Affidavits are not true and accurate copies of the Respondent's file. He could not as these documents were obtained from Respondents own file.

Counsel for Relator relied on the representations of the people working at the BOE that the file it was obtaining from the Respondents was the complete file. The fact that Respondents' (not Relator) failed to include the legal opinion of Respondents' counsel with the file does not make the Affidavit of Gary Barna defective.

In an attempt to obtain the record from the Respondents, counsel for Relator requested a certified copy of the entire file from the BOE. (See Ex. A: Affidavit of Alicia Whiting-Bozich at ¶4-6). In response, the BOE provided Relator with what appeared to be the entire file; however, it was not certified, and apparently could not be certified. (Ex. A: Affidavit of Alicia Whiting-Bozich at ¶ 13). Accordingly, counsel contacted the BOE and asked if they could obtain an affidavit in support of the file since it was not

certified. It was such an affidavit that BOE employee Gary Barna agreed to provide. (See Ex. A: Affidavit of Alicia Whiting-Bozich at ¶'s 13-20) In reliance upon Mr. Barna's representation that he could affide that the documents were true and accurate copies of the Respondents' file, counsel obtained Mr. Barna's Affidavit. (See Ex. A: Affidavit of Alicia Whiting-Bozich at ¶'s 13-20) Upon realizing a document was missing when she obtained Mr. Barna's affidavit, counsel obtained a second affidavit of Mr. Barna. (See Ex. A: affidavit of Alicia Whiting-Bozich at ¶'s 18-20)

Generally, a valid affidavit requires that it be made with personal knowledge, that it sets forth such facts as would be admissible in evidence, and shows affirmatively that the affiant is competent to testify to the matters stated in the Affidavit. Civ. R. 56(D); Sup. Ct. R. X, Section 4(B); *Dresher v. Burt* (1996), 75 Ohio St. 3d 280 The Barna Affidavits in support of Relator's writ contains all of these material elements.

The Barna Affidavits first provide that affiant is of sound mind the age of majority and has been duly sworn. The affidavits state that he is the Executive Assistant to the Director/Deputy at the Cuyahoga County Board of Elections. Thus, the fact that is competent to provide the affidavit is unquestionable. (Preamble to Barna Affidavits, paragraph A of Barna Affidavits)

The Barna Affidavits also state that it is based on personal knowledge and:

that "attached hereto are true and accurate copies of the records filed with or originated from the Cuyahoga County Board of Elections regarding Debora Reese's Protest to the filing of Judge Maureen Adler Gravens as an Independent candidate for Judge of Ricky River Municipal Court for the November 6, 2007 election. The copies are complete and accurate and were prepared under proper supervision from the records which were made and maintained in the course of business by persons authorized by the Cuyahoga County Board of Elections. Barna Aff. at ¶'s B and C.

Finally, the affidavits list each individual document attached thereto, which is being authenticated. There is nothing on the face of the Barna Affidavits which in anyway would indicate they are defective. Furthermore, the Respondent's Affidavit does not state that the documents provided with Barna's original affidavit are not the records from the Respondents. Rather, he "assumes they were," but does not know this for a fact.

This appears to be a blatant attempt to obstruct Respondents from a fair hearing in this matter. Simply put, the Respondents could not certify the documents which they state is based on the failure to locate the "certified" stamp. With no other alternative, Relator sought to have the documents authenticated by affidavit, which they did obtain. Now, Respondents are attempting to persuade this court that the Affidavit of their own employee is defective.

In the interests of justice, the Court should accept Barna Affidavits as they are not defective. Further, Respondents should be estopped to contest the validity of the affidavit.

Equitable estoppel is designed to prevent actual or constructive fraud and to promote the ends of justice. *Ohio State Board of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145 To invoke the doctrine of equitable estoppel, a party must demonstrate (1) a factual misrepresentation; (2) that is misleading; (3) that induced actual reliance, which was both reasonable and in good faith; and (4) that caused detriment to the relying party. *Mark-it Place Foods, Inc, v. New Plan Excel Realty Trust, Inc.* (2004), 156 Ohio App. 3d 65

If indeed Mr. Barna was not authorized to provide the affidavit verifying the authenticity of the documents, he clearly misrepresented that fact to the Relator. Relator was simply attempting to obtain the file from Respondents to support her writ. If Respondents could neither provide a certified copy or provide an affidavit, it should have made this clear to Relator's counsel or provided an alternative course for Relator to obtain the Respondents' complete file.

The fact that Respondents agreed to provide the Barna Affidavits but now argue that they shouldn't have is misleading. Certainly in attempting to submit a writ and supporting argument to this court which would contain Respondents' entire file, Relator was entitled to rely on the representations of Barna and the Respondents staff. Further, Relator attempted to provide the Court with the Respondents' entire file in good faith. To the extent that Respondents now seek to have the affidavit stricken, would cause Relator detriment. Accordingly, it is clear that Relator can meet each and every element of a claim of equitable estoppel and requests the Court hold that the Respondents are estopped from claiming that Relator is not entitled to rely upon Barna's Affidavits.

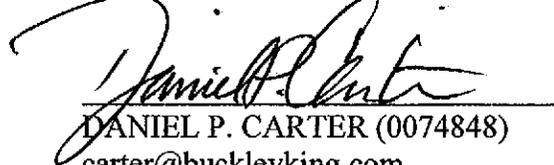
II. CONCLUSION

As this Court has previously stated:

"Fairness and justice are best served when a court disposes of a case on the merits. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds. Local rules, at any level of our state court system, should not be used as a judicial mine field, with disaster lurking at every step along the way." *DeHart v. Aetna Life Insurance Co.* (1982), 69 Ohio St.2d 189, 192.

In order to comply with Sup. Ct. R. X, Section 4(B), Relator submitted her own affidavit as well as her counsel's. In fact, both affidavits state that they are made pursuant to Sup. Ct. R. X, Section 4(B). This is hardly a "substantial disregard" for the Court's rules. Accordingly, the Court should deny Respondents' motion.

Respectfully submitted,



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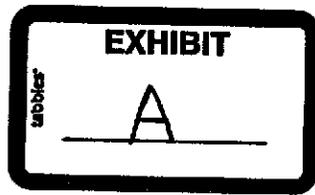
CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Strike Respondent's Motion to Strike and Dismiss Response to Respondent's Motion to Strike and Dismiss, has been served by hand-delivery on Reno J. Oradini, Jr., Esq., Attorney for Respondents, Justice Center, Courts tower, 1200 Ontario Street, Cleveland, Ohio 44113, this 6th day of September, 2007.



DANIEL P. CARTER (0074848)
JEFFREY W. RUPLE (0068742)

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AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Now comes Alicia R. Whiting-Bozich being of sound mind, of the age of majority, and having first been duly sworn according to law and states as follows:

1. I have personal knowledge of the facts set forth herein.
2. I am an associate with the law firm of Buckley King.
3. I am licensed to practice law in the State of Ohio and am in good standing.
4. On August 10, 2007, I was present when our office contacted the Cuyahoga County Board of Elections ("BOE") and requested certified copies of all documents relating to the Maureen Alder Gravens appeal (the "Appeal").
5. I was contacted by Ms. Platten from the BOE who left a voice message identifying herself and indicating to me that the file relating to the Appeal had been copied in its entirety (the "BOE documents") and left at the front desk for pickup.
6. I retrieved the BOE documents from a gentlemen attending to the front desk of the BOE office on August 10, 2007.
7. Upon closer examination of the BOE documents, I became aware that the BOE failed to certify the BOE documents.
8. On August 22, 2007, I again contacted the BOE and I indicated to Mr. Lawler, and an employee/agent who identified herself as Tony, that the BOE documents provided were not certified and that I was seeking to have the BOE documents certified and/or have the BOE's original file recopied and certified.
9. I was instructed by the BOE to bring the BOE documents already provided to me back to the BOE office and that the BOE would certify the pre-existing copies of the BOE documents.
10. Upon arriving at the BOE, I was introduced to Gary Barna ("Mr. Barna") and told that Mr. Barna is the Executive Assistant to the Director/Deputy at the BOE and that he would certify the documents.
11. I was then instructed by a BOE employee/agent, identifying herself as Tony ("Tony"), that the BOE did not have a certification stamp or other means by which to certify their documents.

12. Mr. Barna was present for the discussion between Tony and me regarding the BOE's inability to certify the BOE documents in the same or similar fashion as a court, and Mr. Barna indicated to me that he could time stamp them, which would indicate they came from the BOE.
13. As I watched Mr. Barna time stamp the documents, I asked Mr. Barna if he would be willing to verify that the documents are true and accurate copies by way of affidavit, and Mr. Barna cordially agreed to do so.
14. I returned to my office, prepared the affidavit per my discussion with Mr. Barna, and then I returned to the BOE office with a notary.
15. Upon my return to the BOE office, I asked Mr. Barna if he wanted to compare the BOE documents given to me from the BOE with the original file to ensure accuracy.
16. Mr. Barna declined to do so indicating to me that it was unnecessary as he recognized that the BOE documents were filed with or originated from the BOE.
17. I personally observed Mr. Barna review the affidavit and check all of the BOE documents against the affidavit before signing.
18. I returned to the BOE office on August 23, 2007 with a supplemental affidavit to verify that certain other BOE documents, which were either filed with or originated from the BOE, are true and accurate copies.
19. I again asked Mr. Barna to compare the BOE documents with the original ones in possession of the BOE, and Mr. Barna again graciously declined.
20. I personally observed Mr. Barna again review the affidavit, compare the BOE documents against the affidavit, and sign the affidavit before a notary.

FURTHER AFFIANT SAYETH NAUGHT.

Alicia Whiting Bozich
ALICIA WHITING-BOZICH

SWORN TO before me and signed in my presence this 5th day of September, 2007.

Jeff W. Ruple
Notary Public

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JEFFREY WILLIAM RUPLE, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date.
Section 147.03