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.

MOTION FOR LEAVE TO AMEND ORIGINAL ACTION IN MANDAMUS AND/OR PROHIBITION FOR ELECTION MATTER TO SUBSTITUTE SUPPLEMENTAL AFFIDAVIT OF COUNSEL

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SEP 06 2007
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

I. INTRODUCTION

As a preliminary matter, Relator contends that her writ meets the requirements of Sup Ct. R. X, Section 4(B), as she attached not only her own affidavit but the affidavit of her counsel. Out of an abundance of caution, the undersigned hereby moves the court to amend Relator's Original Action in Mandamus and/or Prohibition to substitute a Supplemental Affidavit of Daniel P. Carter. The purpose of this action is to cure any potential defects (which Relator contends do not exist) in counsel's affidavit as argued by Respondents.

II. LAW AND ARGUMENT

As this Court held in *State ex. Rel. Hackenworth v. Hughes* (2002), 97 Ohio St.3d 110, 113-114:

> Under Civ. R. 15(A), as made applicable here by S.Ct. Prac. R. X(2), leave to amend a complaint following the filing of a responsive pleading "shall be freely given when justice so requires."

This Court in *Hughes* granted leave to amend a writ, citing the policy favoring liberal amendment of pleadings under Civ. R. 15(A), the lack of prejudice to respondents or the electorate, and the preference to resolve cases on the merits. *Id.*

Relator contends that her affidavit and her counsel's affidavit both comply with S. Ct. R. Prac. X, Section 4(B), as both explicitly provide that they are made with personal knowledge. Nevertheless, both affidavits have been under attack by Respondents.

The Substituted Affidavit of Daniel P. Carter, like the Original Affidavit, states that it is made Pursuant to Sup Ct. R. X, Section 4(B) and that it is based on personal knowledge. Further, it removes the phrase contained in paragraph 3 of the Original

Affidavit, the focus of Respondent's argument, which provides that counsel reviewed the "allegations contained in the Writ of Mandamus/Prohibition and to the best of my knowledge and good faith belief the allegations therein are true and each exhibit thereto is a true and accurate copy of the original thereof." In addition the Supplemental Affidavit reiterates and restates the facts as presented in the hearing before the Cuyahoga County Board of Elections on August 6, 2007. (The Original transcript of the hearing has already been filed with the Court.)

Relator does not seek to reargue its case or file additional merit brief, but only to cure any potential procedural defect contained in Relator's counsel's affidavit. Respondents will suffer no prejudice as it has had an opportunity to fully brief this matter.

III. CONCLUSION

Relator seeks leave to amend merely as a precautionary matter as Relator contends that it has met the requirements of Sup. Ct. R. X, Section 4(B). In the interests of justice and fairness, this Court should grant Relator's Motion to Amend to avoid any dispute as to whether Relator has complied with this Rule. 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.

WHEREFORE, Relator, Deborah S. Reese, hereby moves this Court, pursuant to Civ. R. 15(A) to amend her Original Action in Mandamus and/or Prohibition for Election Matter to Substitute the Supplemental Affidavit of Daniel P. Carter.

Respectfully submitted,

Daniel P. Carter by Jeffrey W. Ruple

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OF COUNSEL:

BUCKLEY KING LPA

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Leave to Amend Relator's Original Action in Mandamus and/or Prohibition for Election Matter to Substitute Affidavit of Counsel 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 by Jay A. Silber

DANIEL P. CARTER (0074848)
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