IN THE SUPREME COURT OF OHIO

STATE EX REL KEVIN B. TODD	)	**S.C. CASE NO. 2007-1002**
Appellee,	)	**ON APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS**
vs.	)	
SHERRY FELGER, MAYOR, VILLAGE OF NEW WATERFORD, ET AL.	)	**C.A. CASE NO. 06CO38**
Appellant.	)	

REPLY BRIEF OF APPELLANTS SHERRY FELGER, MAYOR, VILLAGE OF NEW WATERFORD, ET AL.

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FACTUAL REBUTTAL

Appellee did not agree to the Statement of the Facts presented in Appellants' Merit Brief, nor did he identify any specific fact as disputed. Appellee simply referenced Stipulations and Lois Gall's[1] February 9, 2007 Affidavit filed in the original action. Appellee failed to address the second Lois Gall Affidavit which established that the total number of valid signatures was not established and cannot be determined without further review by the Board of Elections as compared the voter registration records of the Columbiana County Board of Elections. (R -149 Ex. D Par. 6-7)

REBUTTAL ARGUMENT

A. PROPOSITION OF LAW NO. 1

THE COURT OF APPEALS ERRED IN HOLDING THAT *R.C.§ 703.20*, STANDING ALONE, ESTABLISHES THE REQUIREMENTS FOR A LEGALLY SUFFICIENT PETITION TO DISSOLVE THE CORPORATE POWERS OF A VILLAGE.

Appellee's brief essentially restates the entire opinion rendered in *State ex rel. Christopher v. Gaia* (2000) 138 Ohio App.3d 527, 741 N.E.2d 914 opinion without acknowledging Appellants' constitutional and statutory arguments. Given the dearth of decisional law in this area and because it is clear that the lynchpin of this case is the failure of the Seventh District Court of Appeals in *Gaia* to identify a petition under *R.C.§ 703.20* as an initiative petition, it is necessary, yet again, to review the facts and analysis therein to establish that Court of Appeals erred in *Gaia*, and in following *Gaia* , erred in granting the writ herein.

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[1] Appellee's Table of Contents and Appendix identifies Ms. Gall's Affidavit as "Affidavit of Lois Goll." Appellee's Brief at Page ii.

The facts in *Gaia* were simple, few and straightforward. The relator filed a complaint for a peremptory writ of mandamus seeking to compel the Village of Craig Beach and the Mahoning County Board of Elections to place the issue of surrender of corporate power on the ballot. Based upon the pleadings the undisputed facts established: relator's petitions were legally sufficient; the village clerk forwarded the petitions to the Mahoning County Board of Elections; the board ultimately returned the petitions to the village directing that a special election be held in accord with *R.C. § 703.20;* the village, by motion, voted not to hold an election. The sole issue before the Court with regard to the village was whether the Village of Craig Beach was required to hold a special election on the surrender of corporate powers when presented with legally sufficient petitions containing the requisite number of signatures as verified by the board of elections.

The Court's analysis, rather than identifying the sufficiency and number of the signatures required by *R.C. § 703.20* necessary to place the issue on the ballot, inexplicably focused on the obligation of the village council to canvas the signatures. The Court began by stating that "[t]he Ohio Revised Code details the affirmative duties placed upon village officials when petitioned by the electorate concerning surrender of its corporate powers." *Gaia* at 531, 916. Had the Court then cited the relevant provisions of the Revised Code applicable to a petition to surrender corporate powers, specifically *R.C. § 731.28*[2], the holding in *Gaia* would not have changed,

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[2]*R.C. § 731.28* states in pertinent part: When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall transmit the petition to the board together with the certified copy of the proposed ordinance or other measure.

however, the case at bar would have been resolved. The Court, however, ignored the Revised Code entirely, relying instead on decisional law to establish the council's duty to canvas signatures, including a pre code case, *Dutten v. Hanover* (1884), 42 Ohio St. 215, 1884 WL 230 and *State ex rel. Morgan v. Hodge* (App.1948), 52 Ohio Law Abs. 575, 83 N.E.2d 824.[3] The result of the Court's failure to identify applicable statutory provisions was a confusing recitation of law unrelated to the final decision ordering an election.

While the *Dutten* and *Morgan* cases cited in the *Gaia* opinion relate to the issue of surrender or corporate powers, at least in terms of a council's obligation to canvas petitions, the Court cited one final case, totally unrelated to *R.C. § 703.20.* Holding that the village was required to canvas petitions already verified by the board of elections and then set a date for a special election the opinion stated in pertinent part: "In order to comply with R.C. 703.20 the legislative authority of Craig Beach Village must canvas the petition and determine whether the requisite number of signatures have been collected." *Gaia* at 532, 917 citing *State ex rel. Hinchliffe v. Gibbons* (1927), 116 Ohio St.390, 396, 156 N.E. 455, 457.

The *Hinchcliffe* case was based upon the failure of Cleveland City Council to place upon the ballot certain charter amendments on the ballot. It did not cite, interpret or otherwise deal with the application or requirements of *R.C. § 703.20.* The Court's reliance on the case is incorrect and misleading. Reading between the lines *Hinchcliffe* was more likely relevant to the motion of the board of elections to be dismissed as an improper party.

Based upon the foregoing it is apparent that in relying on decisional law the Court of

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[3] Both *Dutten* and *Morgan* predate the adoption of *R.C. § 731.28* and predecessor statute *General Code 4227-1.* Baldwin's Ohio Revised Code Annotated 2007.

Appeals failed to correctly identify the relevant statutory provisions applicable to petitions submitted pursuant to *R.C. § 703.20.* Had the Court correctly identified the applicable law they would have reached the conclusion that Appellee's petitions were initiative petitions, and therefore, by the Court's own admission, Appellee's failure to file a pre-circulation copy would be fatal. (R-135 Par. 8)

B. PROPOSITION OF LAW NO. 2

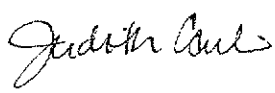
WHERE A CITIZEN SEEKS TO PLACE AN ISSUE ON THE BALLOT AND SPECIFICALLY IDENTIFIES THE DATE THE ISSUE IS TO BE PLACED ON THE BALLOT IS THE DATE OF THE NEXT GENERAL ELECTION THE PETITION IS MOOT ONCE THE DATE FOR SAID ELECTION HAS PASSED.

The Court of Appeals did not address Appellants' argument that the petition is moot since the date of the election identified in Appellee's Ordinance has passed. Appellee raised for the first time in his merit brief the argument that the Ordinance submitted was provided as "courtesy" to facilitate the placement of the issue on the ballot. However in making his argument he admits that he was well aware that time was of the essence. This admission, considered with Appellee's months long delay in requesting expedited hearing, further support a finding that this case is moot. Appellee knew the relevant dates for certification and placement on the ballot. He created the Ordinance specifically identifying that the issue was to be place on the November 7, 2006 ballot. Thus, this matter should be dismissed as moot.

CONCLUSION

The arguments and authorities set forth herein establish that the Court of Appeals failed to correctly interpret the constitutional and statutory authority governing municipal initiative and referendum and erred in granting a Writ of Mandamus and must be reversed.

Respectfully Submitted,



Judith A. Carlin #0047298

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Reply Brief of Appellants Sherry Felger, Mayor, Village of New Waterford, et al. was sent via U.S. Mail, postage prepaid, this 20th day of September, 2007 to:

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