

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel)	SUPREME CT. CASE NO. 10-1655
DENNIS J. VARNAU,)	
)	
Plaintiff/Appellee,)	
)	On Appeal from the Brown
vs.)	County Court of Appeals,
)	Twelfth Appellate District
DWAYNE WENNINGER,)	
)	Court of Appeals
Defendant/Appellant.)	Case No. CA 2009-02-10

**REPLY BRIEF OF
APPELLANT STATE OF OHIO ex rel DENNIS J. VARNAU**

Thomas G. Eagle (0034492) (COUNSEL OF RECORD)
 THOMAS G. EAGLE CO., L.P.A.
 3386 N. State Rt. 123
 Lebanon, Ohio 45036
 Phone: (937) 743-2545
 Fax: (937) 704-9826
 Email: eaglelawoffice@cs.com

COUNSEL FOR APPELLANT, STATE OF OHIO ex rel DENNIS J. VARNAU

Patrick L. Gregory (#0001147)
 717 W. Plane
 Bethel, Ohio 45106
 Phone: (513) 734-0950
 Fax (513) 734-0958

COUNSEL FOR APPELLEE, DWAYNE WENNINGER

Gary A. Rosenhoffer (#0003276)
 302 E. Main St.
 Batavia, Ohio 45103
 Phone: (513) 732-0300
 Fax (513) 732-0648

COUNSEL FOR APPELLEE, DWAYNE WENNINGER

RECEIVED
 JAN 04 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 JAN 04 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
REPLY ON STATEMENT OF FACTS	1
REPLY ARGUMENT	3

Proposition of Law No. I:

A Court cannot grant summary judgment in a post-election <i>quo warranto</i> action based on an unproven and disputed presumption in favor of a moving party that a board of elections conducted an investigation of a candidate's qualifications for that office.....	3
---	----------

Proposition of Law No. II:

A board of elections' placing a candidate on a ballot does not establish the candidate's legal qualifications for the office that is binding in a later action in <i>quo warranto</i> to challenge the candidate's legal qualifications to hold the office.....	13
--	-----------

Proposition of Law No. III:

Allowing action by a board of elections in placing a candidate on a ballot to preclude a candidate who had no right to protest that action or to participate in a protest from challenging the officeholder's qualifications is unconstitutional.....	16
--	-----------

Proposition of Law No. IV:

An opposing qualified candidate for the office of county Sheriff is entitled to a writ of <i>quo warranto</i> where the elected candidate purported to meet the minimum statutory educational requirements for the office by attendance at an institution that at the time was not accredited by the Ohio Board of Regents.....	16
--	-----------

Proposition of Law No. V:

An opposing qualified candidate for the office of county Sheriff is entitled to a writ of <i>quo warranto</i> where the elected candidate had a statutory "break in service" of four or more years which cancels his Ohio Peace Officer Training Academy (OPOTA) certificate.....	19
--	-----------

CONCLUSION 20

PROOF OF SERVICE 20

APPENDIX: Appendix Page

RULES & REGULATIONS:

Sup. Ct. Prac. R. 5.1..... 1

Sup. Ct. Prac. R. 6.2(B)(3)..... 2

Sup. Ct. Prac. R. 6.3(B)..... 3

Ohio R. App. P. 9(A)..... 4

Ohio R. Evid. 106..... 5

Ohio R. Evid. 806..... 6

Ohio R. Evid. 901..... 7

TABLE OF AUTHORITIES

CASES:

Page

Alexander vs. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241..... 8

AMF, Inc. vs. Mravec (1981), 2 Ohio App.3d 29..... 7

Bernardo vs. Anello (1988), 61 Ohio App.3d 453..... 10

Bonacorsi vs. Wheeling & Lake Erie Railway Co., 95 Ohio St. 3d 314,
2002-Ohio-2220..... 4, 5

Bostick vs. Connor (1988) 37 Ohio St.3d 144..... 8

Brannon vs. Rinzler (1991), 77 Ohio App.3d 749..... 4, 6

Brown vs. Ohio Cas. Ins. Co. (1978), 63 Ohio App.2d 97..... 17

Coleman vs. Fish Head Records, Inc. (2001), 143 Ohio App. 3d 537..... 8

<u>Dresher v. Burt</u> (1996), 75 Ohio St.3d 280.....	10
<u>Early vs. The Toledo Blade</u> (1998), 130 Ohio App.3d 302.....	8
<u>Feltch vs. Hodgman</u> (1900), 62 Ohio St. 312.....	11
<u>First National Bank vs. Miami University</u> (1997), 121 Ohio App.3d 170.....	9
<u>Fisher vs. Lewis</u> (1988), 57 Ohio App.3d 116.....	3, 5
<u>Frank W. Schaefer, Inc. vs. C. Garfield Mitchell Agency, Inc.</u> (1992), 82 Ohio App.3d 322.....	8
<u>Glick vs. Dolin</u> (1992), 80 Ohio App.3d 592.....	10
<u>Goldfuss vs. Davidson</u> (1997), 79 Ohio St.3d 116.....	18
<u>Goodyear Tire & Rubber Co. vs. Aetna Casualty and Surety Co.</u> , 95 Ohio St.3d 512, 2002-Ohio-2842.....	11
<u>Graham vs. Drydock Coal Co.</u> (1996), 76 Ohio St.3d 311.....	8
<u>Green vs. B.F. Goodrich Co.</u> (1993), 85 Ohio App.3d 223.....	17
<u>Heffner vs. State</u> (1936), 131 Ohio St. 13.....	14, 15
<u>Helvering vs. Mitchell</u> (1938), 303 U.S. 391.....	17
<u>Hinte v. Echo, Inc.</u> (1998), 130 Ohio App.3d 678.....	7
<u>Johnson v. Cassens Transp. Co.</u> (2004), 158 Ohio App.3d 193.....	7
<u>Johnson vs. Morris</u> (1995), 108 Ohio App.3d 343.....	4
<u>Little Forest Medical Ctr. of Akron vs. Ohio Civ. Rights Comm.</u> (1991), 61 Ohio St.3d 607.....	10
<u>Nicholson vs. Turner/Cargile</u> (1995), 107 Ohio App.3d 797.....	9
<u>Northwoods Condominium Owner's Ass'n vs. Arnold</u> , 147 Ohio App.3d 343, 2002-Ohio-41.....	8
<u>Olverson vs. Butler</u> (1975), 45 Ohio App.2d 9.....	4, 5

<u>Penwell vs. Taft Broadcasting</u> (1984), 13 Ohio App.3d 382.....	3
<u>Sethi v. WFMJ Television</u> (1999), 134 Ohio App.3d 796.....	6
<u>Sikorski vs. Link Electric and Safety Control Company</u> (1997), 117 Ohio App.3d 822.....	9
<u>State ex rel. Flynn v. Board of Elections of Cuyahoga County</u> (1955), 164 Ohio St. 193.....	12
<u>State ex rel. Grisell v. Marlow</u> (1864), 15 Ohio St. 114.....	14
<u>State ex rel. Ross vs. Crawford Co. Board of Elections,</u> 125 Ohio St.3d 438, 2010-Ohio-2167.....	12
<u>State ex rel. Schenck vs. Shattuck</u> (1982), 1 Ohio St.3d 272.....	12
<u>State ex rel. Shumate vs. Portage County Board of Elections</u> (1992), 64 Ohio St.3d 12	11
<u>State ex rel. Smith vs. The Salem Water Co.</u> (Ohio Cir. 1890), 5 Ohio Cir. Ct. 58.....	16
<u>State ex rel Simmons vs. Geauga County Department of Emergency</u> <u>Services</u> (1998), 131 Ohio App.3d 482.....	9
<u>State ex rel. Watson v. Hamilton Cty. Bd. of Elections</u> , 88 Ohio St.3d 239, 2000-Ohio-318.....	18
<u>State v. Hirtzinger</u> (1997), 124 Ohio App.3d 40.....	5
<u>State vs. Ishmail</u> (1978), 54 Ohio St.2d 402.....	1
<u>State v. Lane</u> (1995), 108 Ohio App.3d 477.....	7
<u>State vs. Wenninger</u> , 125 Ohio Misc.2d 55, 2003-Ohio-5521.....	2
<u>State v. Wenninger</u> , 2010-Ohio-1009.....	1
<u>St. Paul Fire & Marine Insurance Co. v. Ohio Fast Freight,</u> <u>Inc.</u> (1982), 8 Ohio App.3d 155.....	7
<u>Tokles & Sons, Inc. vs. Midwestern Indemnity Co.</u> (1992), 65 Ohio St.3d 621.....	5
<u>Toledo vs. Ross</u> , 2004-Ohio-5900 (6 th Dist. App.).....	17

<u>Tye vs. Bd. of Educ. of Polaris Joint Voc. School Dist. (1985),</u> 29 Ohio App.3d 63.....	17
<u>Vahila v. Hall (1997), 77 Ohio St.3d 421.....</u>	10
<u>Waste Management of Ohio vs. Cincinnati Board of Health</u> (2005), 159 Ohio App.3d 806.....	9
<u>Weil vs. Estes Oil Co. (1994), 93 Ohio App.3d 75.....</u>	9

CONSTITUTIONAL PROVISIONS, STATUTES:

O.R.C. 311.01.....	2
O.R.C. 311.01(B).....	7, 12, 18, 19
O.R.C. 3501.39(B).....	12
O.R.C. 3513.05.....	12

RULES & REGULATIONS:

Ohio R. App. P. 9(A).....	1
Ohio R. Civ. P. 56.....	4
Ohio R. Civ. P. 56(C).....	3, 10, 17
Ohio R. Civ. P. 56(E).....	3
Ohio R. Evid. 106.....	4
Ohio R. Evid. 803(6).....	5
Ohio R. Evid. 806.....	7
Ohio R. Evid. 901.....	5, 7
Sup. Ct. Prac. R. 5.1.....	1
Sup. Ct. Prac. R. 6.2(B)(3)	1
Sup. Ct. Prac. R. 6.3(B)	1

REPLY ON STATEMENT OF FACTS

Appellee's Brief repeatedly relies upon facts not in this Record, and without citation to any portion of it.¹ The "facts" so referenced are not proven and often untrue or nonexistent. In each instance the Court must disregard such references to facts or matters outside this Record.² These unsupported references include: 1) The trier of fact (the jury in Appellee's criminal trial) did not determine whether or not Wenninger met the educational requirements, but could just have likely found the State failed to prove beyond a reasonable doubt that he *knowingly* falsified the election documents indicating that he did satisfy the requirements when he obviously did not meet them; 2) for the two protests of his candidacy ever filed, the one in 2004 (Martin) was withdrawn by the protestor; and Varnau's was denied by the BCBE (due to party affiliation only, not due to any evaluation of the merits of it); 3) the DeGarmo "letter" is not needed to (and cannot) prove what the law establishes: that TTI was not Board of Regents authorized to issue degrees; 4) the Callender affidavit contradicts the law; and others.

Wenninger makes frequent use of reference to the criminal proceedings against him, that he successfully moved to seal, and opposed unsealing the entire record, so others could use it, too.³ The actual record in this case, or other sources from which this Court can properly take notice (reported decisions), correctly shows that:

Count I of the indictment [of Appellee] alleges that defendant violated R.C. 3599.36 by knowingly falsifying his declaration of candidacy for the office of Sheriff of Brown County, Ohio. Count II of the indictment alleges that defendant violated R.C. 2921.13(A)(1) by knowingly making a false statement in an official proceeding, and violated (A)(3) of that statute by knowingly making a false statement with the purpose to mislead a public official.

¹ See Sup. Ct. Prac. R. 6.3(B), 6.2(B)(3).

² See Sup. Ct. Prac. R. 5.1; Ohio R. App. P. 9(A); State vs. Ishmail (1978), 54 Ohio St.2d 402.

³ See State v. Wenninger, 2010-Ohio-1009.

State vs. Wenninger, 125 Ohio Misc. 2d 55, 57, 2003-Ohio-5521, ¶ 2.⁴ Although Appellee did file a pretrial motion to dismiss those Counts, the trial court overruled the motion: “[T]he defendant is asking the court to make a determination as to whether he complied with the statutory requirements of R.C. 311.01. Such a determination can be made only at the conclusion of the state's case in chief and pursuant to a Crim.R. 29(A) motion.” *Id.* at 59, ¶ 5.⁵

Appellee makes frequent reference to the affidavits of Callender and Spievak, both of which were objected to below (Objection to and Motion to Strike, August 21, 2009), and which Affidavits the lower Court *disregarded* and did *not* rely upon. Entry, August 17, 2010 (copy attached to Appellant's Brief). The objections are maintained and renewed, see this Brief, *infra*.

The suggestion that any action of any board of elections actually ruled on any protest is unsupported. The Martin protest was withdrawn by the protestor without hearing or ruling; and the Varnau protest was denied and dismissed on the procedural ground of ineligibility to protest due to party affiliation. (Deposition of Wenninger, filed October 14, 2009, p. 16, 19-21, 22-25; Appendix A, “BCBE May 8, 2008, letter to Relator,” attached to Wenninger’s Brief and Response to Relator’s Motion for Summary Judgment, filed August 20, 2009).

The suggestion that Appellee could meet the eligibility requirements by either education or experience is irrelevant, as he legally and factually had neither, and also had no valid peace officer certificate due to his break in service. His argument that his own materials included in the BCBE materials prove his case is circular -- because he or his attorneys said he was qualified, he must have been found to be qualified. He does not address, that as a matter of law he was *not*.

⁴ Appellee's Brief, p. 1, Statement of Facts, states instead: “In 2002, Wenninger was indicted by a Brown County grand jury for one count of election falsification and one count of falsification with regard to his 2000 petitions for candidacy for sheriff.”

⁵ Appellee's Brief, p. 2, states instead that: “Wenninger filed a motion to dismiss the election falsification count and the trial court overruled the motion stating that whether Wenninger met the educational requirements of the qualification statute was for the trier of fact to determine.”

Even if his certificate from TTI was valid, it did not meet the statutory requirements.

Contrary to Appellee's statement otherwise, each of the material facts Appellee required to prevail were rebutted, and in fact *disproven*.

REPLY ARGUMENT

Proposition of Law No. I:

A Court cannot grant summary judgment in a post-election *quo warranto* action based on an unproven and disputed presumption in favor of a moving party that a board of elections conducted an investigation of a candidate's qualifications for that office.

A. The affidavits upon which Appellee relies are inadmissible.

Respondent filed on August 13, 2009, Respondent's "Partial Reply to Petitioner's Motion for Summary Judgment" and attached materials to it, including letters from attorneys for various parties (including Appellee's attorneys), documents prepared for apparent use in his criminal case, and also "sworn" and unsworn legal opinions from third-parties. Those materials were alleged to support the legal conclusion advocated by Appellee and his counsel, although contrary to the express provisions of the Ohio Revised Code and the Ohio Administrative Code (as expressed and cited in Appellant's Briefs). Those items were inadmissible on Summary Judgment proceedings, and at trial, and therefore cannot be considered by the Court.

Ohio R. Civ. P. 56(C) limits the material that may be considered for summary judgment, and "no evidence or stipulation may be considered except as stated in this rule." Affidavits must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify about the matters stated in the affidavit." Ohio R. Civ. P. 56(E). See also Fisher vs. Lewis (1988), 57 Ohio App.3d 116; Penwell vs. Taft Broadcasting (1984), 13 Ohio App.3d 382. Affidavits containing inadmissible hearsay, or not based on the affiant's personal knowledge, are not to be considered by the Court.

Bonacorsi vs. Wheeling & Lake Erie Ry; Co., 95 Ohio St.3d 314, 2002-Ohio-2220; Johnson vs. Morris (1995), 108 Ohio App.3d 343; Brannon vs. Rinzler (1991), 77 Ohio App.3d 749.

Appellee's only basis for admission of the documents is that they were sent in response to the subpoena he also attached⁶, and citing Ohio R. Evid. 106, which only provides for the admission of parts of statements when other parts are admitted, but is expressly limited to material that is "otherwise admissible." It does not provide for the admission of anything that is not admissible by itself. Appellee's disputed evidentiary material did not comply with Ohio R. Civ. P. 56 and therefore Appellant objected. The lower Court, instead of striking the material, stated that it was not considered. Entry, August 17, 2010. Appellee still relies upon it. It is inadmissible for at least the following reasons.

1. Failure to establish foundation for the statements

Affidavits filed in support of a motion for summary judgment must affirmatively state that the affiant is "competent" to testify to those matters and have personal knowledge of them. Appellee's affidavits did none of that. All it said is the affiant is an elected official who looked at documents and the law, and believed in a legal conclusion from them, although not even the creator or custodian of the documents. The mere statement that one is "duly authorized" to make statements on behalf of another is not sufficient to show personal knowledge or competence to testify to them. Olverson vs. Butler (1975), 45 Ohio App.2d 9. Applying that principle and as applicable to this case, this Court rejected a summary judgment motion relying on such inadmissible material:

Kirkland explicitly states in her affidavit that she had "personal knowledge" that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge that federal funds were used to install

⁶ Arguably, the material Respondent attached was not even responsive to the subpoena.

signs at railroad crossings came from other people. After reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ.R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign. Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted.

Bonacorsi v. Wheeling & Lake Erie Ry. Co., *supra* at 2002-Ohio-2220, ¶27-28.

Appellee's material not only contained unsworn letters and emails, of unknown origin, but obviously were all generated by someone else, and apparently for litigation. In State v. Hirtzinger (1997), 124 Ohio App.3d 40, a customer's own telephone record was excluded, because the customer could not verify how the entry of a phone call got put on the record by the phone company. These documents are no better.

2. The affidavit and documents contain inadmissible hearsay.

All the affidavits did -- and concede they did -- is look at material from someone else and opine upon it, although Callender never was the custodian of the documents as required by Ohio R. Evid. 803(6).⁷ Statements of what someone said or heard out of court are not covered by any hearsay exceptions, without more would not be admitted in court and therefore cannot be admitted in summary judgment. Tokles & Sons, Inc. vs. Midwestern Indemnity Co. (1992), 65 Ohio St.3d 621; Fisher vs. Lewis, *supra*; Olverson vs. Butler, *supra*. The Callender affidavit says, I looked at papers from someone else, and either they told me, or I think, this is what they mean. This is not proper evidence. In Bonacorsi v. Wheeling & Lake Erie Ry. Co., *supra*, this Court was confronted with the affidavit of a party that said they knew how certain money was handled, although it turns out that money was actually handled by someone else. This Court rejected the affidavit and reversed summary judgment for that party:

⁷ Although their authentication as what they are may not be in dispute, for Ohio R. Evid. 901 purposes, that doesn't make them admissible or non-hearsay.

Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. [Citations omitted]. For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. *Id.*; Evid.R. 602. "Personal knowledge" is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.").

Id. at ¶ 26. In Brannon vs. Rinzler (1991), 77 Ohio App.3d 749, 756, the Court affirmed the disregard of a conclusory, hearsay filled affidavit:

"Personal knowledge" is defined as, "[k]nowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay. Personal knowledge of an allegation in an answer is personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied." [Citations omitted].

According to Ohio case law, statements contained in affidavits must be based on personal knowledge and cannot be legal conclusions. [Citations omitted]. The statements set forth in the appellants' form affidavits do not fulfill the personal-knowledge requirement of Civ. R. 56(E). On the contrary, the affidavits contain hearsay statements and legal conclusions, as well as statements contradictory to written documents and depositions. The incorporation of the allegations set forth in the complaint and the statement of facts results in the appellants restating legal conclusions. Neither can the rest of the appellants' averments be categorized as personal knowledge, as they depend on hearsay or other information or are contradictory to statements set forth in the documents the appellants admit they did not read. The trial court properly found that the appellants' affidavits were not based on personal knowledge; thus, appellants' third assignment of error is overruled.

3. The statements are conclusory and not statements of fact.

The affidavits also are conclusory statements and cannot be considered for that reason, too. Brannon vs. Rinzler, supra; Sethi v. WFMJ Television (1999), 134 Ohio App.3d 796. Even Wenninger's affidavit was conclusory, did not establish facts, and is contradicted by facts and

evidence that was objective, material, non-conclusory, and admissible.⁸

4. Affidavits based on a review of others records are not admissible.

Exactly what Appellee purported to do was disallowed (provide hearsay testimony on the content of someone else's records, based only upon a review of those records), in St. Paul Fire & Marine Insurance Co. v. Ohio Fast Freight, Inc. (1982), 8 Ohio App.3d 155. Although this is not proper authentication under Rule 901, it is more importantly not proper for admission under Rule 806. See Hinte v. Echo, Inc. (1998), 130 Ohio App.3d 678 (a person who has no personal knowledge of the source of records sought to be entered into evidence is not qualified to identify the records for purposes of admission). As a result, even if it is not hearsay, it was not relevant and therefore also not admissible. See AMF, Inc. vs. Mravec (1981), 2 Ohio App.3d 29.

5. Documents prepared for litigation are hearsay.

The documents verify they were prepared at the request of attorneys and for the purposes of their litigation. Such litigation records do not count as "business" records for purposes of the hearsay rules. See Johnson v. Cassens Transp. Co. (2004), 158 Ohio App.3d 193 (letter from a doctor to patient's attorney, written while litigation was pending, did not qualify as business records for hearsay exceptions); State v. Lane (1995), 108 Ohio App.3d 477 (laboratory report prepared for prosecution did not qualify as a business record).

6. The affidavits and statements of legal opinion are not admissible.

The affidavits were also "testified" on the requirements of law established by Statute, and on the construction of legal documents, were nothing more than an attempted legal opinion, secondarily expressing an opinion on the issues of law in the motions for summary judgment.

⁸ Wenninger's Affidavit (attached to a Motion to Dismiss) also incorrectly recited the education requirements under R.C. 311.01(B). Wenninger's affidavit also was intended to satisfy subsection (9)(a) and not (9)(b). He does not list anything about educational credentials in the

Sworn legal opinions on what is required by law, or what a Statute means or how it should be applied, is inadmissible for summary judgment. Appellee appears to admit this, in stating that the affidavit establishes something as "a matter of law." Appellee's Brief, p. 14.

There is no basis to have a witness render an opinion as to any legal issue before a court. Construction of what a document is or is not, or what a law means or requires, is not a matter of fact or even interpretation but is for the Court to determine as a matter of law. Graham vs. Drydock Coal Co. (1996), 76 Ohio St.3d 311 (construction of the operation of a deed is a matter of law for the court); Alexander vs. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241; Northwoods Condominium Owner's Ass'n vs. Arnold, 147 Ohio App.3d 343, 2002-Ohio-41; Coleman vs. Fish Head Records, Inc. (2001), 143 Ohio App. 3d 537, 541.

What the Appellee purported to do is to have a "second opinion" of their own legal argument presented to the Court, in an effort to outnumber Appellant's counsel as to the legal arguments the Court considers, and perhaps to attempt to compel the Court to conclude that there are more attorneys who have rendered opinions in this case (in the form of arguments) and persuade the Court as to the legal issue. Respondent's tactic is an invalid attempt to present to the Court legal opinions in the guise of sworn testimony and is uniformly prohibited. See, e.g., Bostick vs. Connor (1988) 37 Ohio St.3d 144 (expert testimony properly excluded as to whether truck driver was an employee or independent contractor of a company); Frank W. Schaefer, Inc. vs. C. Garfield Mitchell Agency, Inc. (1992), 82 Ohio App.3d 322 (interpreting court of appeals opinions as to whether an insurance agent was negligent or in breach of contract, excluded); Early vs. The Toledo Blade (1998), 130 Ohio App.3d 302 (testimony by professors on question of invasion of privacy and defamation went to questions of law to be resolved by the Court, and

affidavit. He also incorrectly recited the numbered provisions in subsection (B) in his Summary Judgment Brief, page 3 and 4, making (B)(8), (B)(9).

properly excluded; expert witness should not be allowed to testify about his or her interpretation of law, as that is within the sole province of the Court); Sikorski vs. Link Electric and Safety Control Company (1997), 117 Ohio App.3d 822 (expert testimony as to manufacturer's duty on products liability case went to legal issue not factual issue, and was not admissible); Waste Management of Ohio vs. Cincinnati Board of Health (2005), 159 Ohio App.3d 806 (an expert's interpretation of the law should not be permitted as that is within sole province of the Court); Nicholson vs. Turner/Cargile (1995), 107 Ohio App.3d 797 (expert testimony is not admissible to interpret statutory terms or to define duties by interpreting statutory and regulatory terms); State ex rel Simmons vs. Geauga County Department of Emergency Services (1998), 131 Ohio App.3d 482 (expert opinion is inadmissible regarding the construction and interpretation of a statute, which involves a question of law and not a factual issue); First National Bank vs. Miami University (1997), 121 Ohio App.3d 170 (an expert in international affairs was unqualified to testify on the legal issue of the scope of a trust after the demise of the Soviet Union); Weil vs. Estes Oil Co. (1994), 93 Ohio App.3d 759 (rejecting affidavits on the grammatical construction of insurance policies, since such construction is an issue of law).

Appellee's attempt to convince the Court that Appellant's legal arguments are incorrect by having a compatriot "testify" in the guise of an opinion should be prohibited and the "opinions" should be disregarded by the Court.

B. A nonmoving party has no burden on summary judgment.

The Appellee's restated proposition -- that a non-moving party bears any burden on summary judgment -- is not supported by any authority, and is contradicted by this Court on the point. A moving party cannot discharge its initial burden under Civ. R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case, and this Court

has said so. Vahila vs. Hall, 77 Ohio St.3d 421, 1997-Ohio-259. A party seeking summary judgment, even on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party must be able to specifically point to some evidence (which must be of the type listed in Civ. R. 56(C)) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. Dresher vs. Burt, 75 Ohio St.3d 280, 1996-Ohio-107.

Even if a nonmovant does not respond to a summary judgment motion with evidentiary materials, the movant may still not be entitled to judgment if his own claim is not established as a matter of law. Little Forest Medical Ctr. of Akron vs. Ohio Civ. Rights Comm. (1991), 61 Ohio St.3d 607. When the movant's evidentiary materials do not establish the *absence* of a genuine issue, summary judgment must be *denied* even if no opposing evidentiary matter is presented. Glick vs. Dolin (1992), 80 Ohio App.3d 592. The burden is always upon the party moving for summary judgment to establish nonexistence of any material factual issue *and* entitlement to judgment as a matter of law; thus, even a lack of response by an opposing party cannot of itself mandate granting judgment. Bernardo vs. Anello (1988), 61 Ohio App.3d 453.

Appellee is just wrong in stating that a party is entitled to summary judgment by asking for it, even if the other party does not respond at all -- even though this one did.

C. Precedent from direct appeals of board of elections' decisions or placement of a candidate on a ballot is not relevant to direct actions against an office holder, and such decisions, because a hearing before making them or placing someone on a ballot is not mandatory, does not create a presumption either that a hearing occurred or a candidate's qualifications were actually adjudicated.

Appellee continues the same legal error the lower Court did -- relying upon precedent

from appeals of administrative actions of a board of elections, as authority in direct actions against an office holder. Not only is that (appeal from board of elections) not the case here, it is neither the procedural posture nor the same standard of review.⁹ If a BOE action in placing a candidate on a ballot, without any form of actual protest hearing, was presumptive of anything in a later action, any candidate who could get on any ballot, no matter how illegally, could never be determined to be legally (or factually) unqualified to hold the office.

Appellee's argument also begs a question, or misses it entirely. There is no dispute over what a "presumption" means as far as evidence and a burden of proof is concerned. There just isn't any legal presumption from any action of a board of elections outside of a protest hearing and in a separate case, after an election, on a writ of *quo warranto*. There can't be, or the writ means nothing. And there is no authority before this Court, from Appellee or from the lower Court, saying there is. Appellee's own cited authority contradicts his proposition.

For example, the principle recited from Felch vs. Hodgman (1900), 62 Ohio St. 312, 317, itself requires an act "that can be legally done *only after the performance of some prior act*," for any presumption to apply from the mere performance of an official act (emphasis added). If a first act is required to be done, before a second act is done, and the second act is done, without other evidence it can be presumed the first act was done. Here though the opposite is true: there is no protest hearing required, merely to put someone on a ballot -- one can get on a ballot without a protest or any other hearing or factual or legal adjudication of their qualifications for the office at all. A BOE is not required to "adjudicate" anyone's qualifications, *absent a protest hearing*. State ex rel. Shumate vs. Portage County Board of Elections (1992), 64 Ohio St.3d 12,

⁹ Appellee states (p. 4) that an appeal of an "error of law" it is not a *de novo* review of summary judgment. As this Court has stated: "We review appeals based upon alleged errors of law *de novo*, without deference to the trial court." Goodyear Tire & Rubber Co. vs. Aetna Casualty and Surety Co., 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶ 4. It is the same standard.

16 ("That respondent [there a BOE] has not only the authority to review R.C. 311.01(B)'s qualification requirements for the office of sheriff, but also *the duty* to do so *whenever those qualifications are challenged in a protest.*" (Granting a writ *after* a failed protest, emphasis added); State ex rel. Flynn v. Board of Elections of Cuyahoga County (1955), 164 Ohio St. 193, 200, *over'd on other grounds*, State ex rel. Schenck vs. Shattuck (1982), 1 Ohio St.3d 272; R.C. 3513.05; R.C. 3501.39(B). Here there was no such hearing or protest to be heard, on the merits. By Appellee's own authority, no presumption could arise by the act of allowing someone to be on a ballot, when no protest was ever heard or adjudicated.

Appellee's citation to State ex rel. Ross vs. Crawford Co. Board of Elections, 125 Ohio St.3d 438, 2010-Ohio-2167, for the suggestion that a board of elections could have decided something privately, or without any hearing, and in fact without any actual decision, is misplaced. That case addressed whether a "deliberation" after a "hearing" (where testimony and documentary evidence *was* presented) and with a written decision, was a "meeting" subject to the "Sunshine Law" and therefore required to be done in public. The Court said nothing about a "hearing" not being in "public," as Appellee suggests (p. 6), only that the deliberations *after a hearing* need not be *voted in public*. *Id.* at 443-445, ¶ 8, 24-32.

Appellee cites no authority -- other than the ruling here being appealed (which also cited no authority) and now subject to *de novo* review by this Court -- that there is any presumption from any board of elections' action, or *inaction*, much less that would be binding in a later *quo warranto* case. Nonetheless, by showing the BCBE records, and the absence of any such decision or finding, and with Wenninger's own deposition testimony saying there wasn't any, any apparent presumption was not only rebutted, but also affirmatively *disproven*.

Proposition of Law No. II:

A board of elections' placing a candidate on a ballot does not establish the candidate's legal qualifications for the office that is binding in a later action in *quo warranto* to challenge the candidate's legal qualifications to hold the office.

A. Actions by a board of elections outside of a protest hearing have no preclusive effect on later challenges to the elected official.

The only quasi-judicial fact finding a board of elections does is by way of a protest and protest hearing. See Appellant's Brief, p. 12-14. There was no such adjudicated protest or protest hearing on Appellee's qualifications, and Appellee has not cited the Court to any.

Appellant has not argued he had no opportunity to "develop" evidence on his claim. The point is, after both parties obtained and presented their evidence, there is none, from anyone, that any board of elections ever heard, deliberated, or ruled on Appellee's qualifications, in a quasi-judicial fashion or otherwise.

B. *Quo Warranto* is the exclusive procedure to challenge an elected officeholder's qualifications and right to the office and is independent of any action by any board of elections.

Addressing the first sentence of Appellee's argument on this point (Appellee's Brief, p. 9): there is no difference between "*quo warranto* is the exclusive remedy by which title to office may be contested," and "the exclusive manner to challenge the qualifications . . . if elected thereafter, [to] take and hold the office." Disputing the difference between "remedy" to "contest" "title" to an elected office, and "manner" to "challenge" "qualifications" to "take and hold" office, is only semantics.

Appellee cites to one case, factually and procedurally different and otherwise inapplicable. Since then, and on identical facts and procedure, this Court and others have affirmed that principle, that *quo warranto* is *the remedy*, regardless of a board of elections, to oust one who is unqualified from elected office. See Appellant's Brief, p. 15-16. In fact, this

Court, on the facts and history *this case presents*, has affirmed that principle, distinguishing the only case Appellee relies upon, State ex rel. Grisell v. Marlow (1864), 15 Ohio St. 114. "Where the remedy for contest of election under the statute providing the procedure therefor is not available, an action in *quo warranto* may be maintained." Heffner vs. State (1936), 131 Ohio St. 13, at syl. 1, distinguishing Grissell. As the Court is aware, Varnau could not have contested Appellee's candidacy, due to his party affiliation -- the "protest" statute does not by its terms apply to him.

More importantly, because it was not the vote count that was contested but the qualifications of the candidate, the election contest statutes wouldn't apply either. As this Court stated, rejecting the exact argument Appellee makes here:

It is urged that an action in *quo warranto* does not lie; that the remedy available is that provided by the statute for the contest of election. *It is quite obvious that those statutory provisions have no application in this situation. An election contest, under the statute, is to ascertain and decide which candidate received the highest number of legal votes.* [Citations omitted].

* * *

Where the remedy under the statutory provisions for the contest of election is available, an action in *quo warranto* cannot be maintained. That is the effect of the pronouncement of this court in [Grisell vs. Marlow]; *for that case involved only the determination of the question of which of two contestants had received a majority of the votes cast.* The syllabus in that case states the law with reference to the facts upon which it is predicated. [Citation omitted].

In the instant case no question is presented of fraud or irregularity in voting, in the counting or tabulation of the ballots, or in the computation of the result. There is no issue as to the number of votes cast for each candidate and no controversy as to who had received the greatest number of votes. No candidate is making a contest or is interested in or affected by the maintenance of such proceeding. There is no issue and no challenge as to the election of Klies. *In this situation, there could have been absolutely nothing to submit or determine in a proceeding in contest of election under the statute.*

* * *

We approve the action of the Court of Appeals in awarding a judgment of ouster, and

that judgment is accordingly affirmed.

Heffner, *supra* at 15-16 (emphasis added). The inapplicability of the only case Appellee bases his argument is demonstrated by a court shortly after it was issued, and which bears quotation at length:

I quote at large from the decision [Grisell] to make it apparent from its face that it *in no manner touches the case before us* [*quo warranto*]. There is no provision of the constitution which directs the legislature to provide and determine before what authority, and in what mode, the right of a corporation to the exercise of a franchise, privilege or right shall be determined; *but it confers upon the supreme court of the state, and the circuit courts, original jurisdiction in quo warranto, and the power thus conferred, is in no way modified or limited by any other provision of the instrument, and therefore it is that those courts are expressly authorized to exercise such plenary jurisdiction "as could be exercised in that behalf at common law;" nor has the legislature attempted to provide any other mode or means, or any other tribunal, either in the statute authorizing the organization of such corporations, or in any other, whereby, or wherein, such questions might be directly tested.* Indeed, the legislature could not strip those courts of the jurisdiction thus conferred, without express constitutional authority, such as is given in regard to contests of elections.

In Dalton v. The State ex rel., 43 Ohio St. 652, 3 N.E. 685, in reviewing the *Marlow* case, Judge Johnson, in his dissenting opinion, with good show of reason, makes the distinction that "this provision for a contest was to determine the right and title to *an office*, and not the right and title to *a certificate*." And so this able judge concluded that even *this remedy thus provided for by the constitution itself was exclusive only where the title to an office was directly in contest.* The majority of the court did not controvert this conclusion, but held that the matters in dispute could be determined only in a contest in the proper tribunal.

So jealously guarded is this right of the state to a quo warranto, that in the case of The State ex rel. Attorney General vs. The Cincinnati Gas Light and Coke Co., 18 Ohio St. 262, it was held that a judgment in favor of the defendant, rendered in a proceeding in quo warranto brought by the prosecuting attorney of a county, in a district court, was not final, and was not a bar to an action to determine the very same question upon the relation of the attorney-general, against the same defendant.

* * *

A decision thus rendered between two private parties, can not bind the State, where there is no statute directing that such proceeding should be the mode to ascertain whether the State had conferred upon a corporation such right, although as essential to the exercise of jurisdiction in appropriation proceedings, the probate court is required to pass upon the question. It may be conclusive between the parties until reversed, *but that can not affect*

the right of the State to determine, by quo warranto, whether one of its creatures is exercising, without right, this extraordinary power. There is nothing in the Marlow case to justify a contrary holding.

State ex rel. Smith vs. The Salem Water Co. (Ohio Cir. 1890), 5 Ohio Cir. Ct. 58, 65-66

(emphasis added).

That case is clearly different, as here Appellant had no right to protest the candidacy of Wenninger because of the statute only allowing like-party affiliated candidates to do so; and could not have filed an election contest because it wasn't the vote count at issue. It appears Appellee acknowledges this state of *facts* and this material difference, conceding the procedural point: Appellant *couldn't* use the protest procedures. See Appellee's Brief, p. 8-9.

As every Court -- other than the lower Court here -- has seemed to acknowledge, if an election contest, or a protest, or any action just putting someone on a ballot, were a basis to bar a *quo warranto* challenge, there never could be a *quo warranto* challenge of anyone, no matter how unqualified they were.

Proposition of Law No. III:

Allowing action by a board of elections in placing a candidate on a ballot to preclude a candidate who had no right to protest that action or to participate in a protest from challenging the officeholder's qualifications, is unconstitutional.

It does not appear Appellee challenges any of the authorities Appellant has cited. None of the authorities Appellee has cited appear to have anything to do with the issue raised and the proposition presented.

Proposition of Law No. IV:

An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate purported to meet the minimum statutory educational requirements for the office by attendance at an institution that at the time was not accredited by the Ohio Board of Regents.

- A. **An acquittal in a criminal case has no bearing on a later civil action.**

Appellee's criminal prosecution does not resolve any factual issue before this Court. The issue in his criminal prosecution was (essentially) whether the State proved beyond a reasonable doubt that Appellee: 1) knowingly; 2) falsified; 3) his qualifications. If anything, the overruling of a motion for directed verdict or pre-trial judgment of acquittal says there was at least a dispute of fact over each of those elements -- *there was evidence on each element*, or the case couldn't have proceeded.

Further, as this Court is aware, a not guilty verdict in a criminal case has no bearing on a later civil case even if on the same facts. The parties, rules of decision, rules of procedure, and objectives in a criminal proceeding differ from those in a civil proceeding. Therefore, an acquittal on a criminal charge is not a bar to a subsequent civil action if the objective of the civil action is not quasi-criminal or punishment. See Helvering vs. Mitchell (1938), 303 U.S. 391. See also, Toledo vs. Ross, 2004-Ohio-5900 (6th Dist. App.), ¶ 8.

B. A court may consider any material submitted in a summary judgment proceeding that is not subject to objection by the opposing party.

Appellee did not object to any of Appellant's proffered evidence at the lower Court, but chooses now to do so, suggesting a court cannot consider objectionable material, even if no objection is made to it. The one case cited by Appellee does not even suggest that, but just the opposite. "While reliance on evidentiary material beyond that set forth in Civ.R. 56(C) has been allowed, *it is only when the opposing party has raised no objection.*" Green vs. B.F. Goodrich Co. (1993), 85 Ohio App.3d 223, 228. See also, Tye vs. Bd. of Educ. of Polaris Joint Voc. School Dist. (1985), 29 Ohio App.3d 63 ("A party opposing summary judgment may create a genuine issue of material fact through her own affidavits and other material not objected to . . ."); Brown vs. Ohio Cas. Ins. Co. (1978), 63 Ohio App.2d 97, 90-91 ("Therefore, because no objection was raised, it cannot be held that the trial court erred by considering the documents

attached to the motion for summary judgment when ruling on the motion.").

Appellee has therefore also waived any argument on appeal that such material should not have been considered by the lower Court, by not raising the alleged error to the lower Court's attention by objection or otherwise when the trial court could have avoided or even corrected the error. See Goldfuss vs. Davidson (1997), 79 Ohio St.3d 116, 121.

C. Appellee's qualifications for the office is unsupportable.

Therefore, the only evidentiary support for Appellee's contention he was qualified for the office is the affidavits the lower Court should not have considered, and said it didn't; and Appellee's own affidavit, which was conclusory on the points. The other evidence, that was not objected to, contradicted all of that.

That he met the two-year educational requirement was only supported by the Callender and Spievak affidavits, which was inadmissible and the lower Court said it disregarded. That he met the required number of hours at any institution sufficient for two post-secondary years, was similarly not supported. Appellee also agrees that the ministerial action of a Court of Common Pleas means nothing. Thus, where Wenninger acted on his own behalf to appoint himself as a sheriff or peace officer, that meant nothing, and public policy would not support such action where the election law is specific: an unqualified candidate shall not be elected or appointed. See Appellant's Brief, p. 19. See also, State ex rel. Watson v. Hamilton Cty. Bd. of Elections, 88 Ohio St.3d 239, 244-245, 2000-Ohio-318 (reciting the State policy of insuring the highest standards for Ohio's chief county law enforcement officers).

Wenninger was not a valid candidate in the 2000 election because he did not satisfy R.C. 311.01(B)(9)(a) or (9)(b). He never was a corporal or higher to satisfy (a), and did not have two years of post-secondary education authorized by the Ohio Board of Regents to satisfy (b). Since

he could not be "appointed or elected" unless he met all the requirements of 311.01(B), even though elected, he forfeited the position January 1, 2001, immediately upon assuming the seat by not removing his disqualification -- his lack of educational credentials to satisfy (9)(b). Strict compliance with the election laws defeat his arguments otherwise. His affidavits, even if admissible, cannot supplant the Revised Code and Administrative Code provisions which dictate TTI was not an OBR approved school, nor that he had two years worth of hours. Since he was never legally sheriff, he could not appoint himself as Sheriff with OPOTA, and therefore started his "break in service" on his peace officer certificate. After four years, January 1, 2005, his peace officer certificate expired. He could not assume the position of sheriff on January 3, 2005, without a valid peace officer certificate. On January 2, 2005, Wenninger assumed the same legal status as that of a civilian, and could no longer serve in any peace officer position in Ohio.

Proposition of Law No. V:

An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate had a statutory "break in service" of four or more years which cancels his Ohio Peace Officer Training Academy (OPOTA) certificate.

Appellee appears to agree, and cites to the Court no authority or fact in the Record otherwise, that he never legally held the office of Sheriff due to the statutory break in service invalidating his peace officer certificate. When considered with the concession, Appellee's Brief, p. 6 ("Varnau as the office seeker in this action, must prove that either the BCBE did not review Wenninger's qualifications or that Wenninger is not qualified to hold the office."), and since it was proven there was no "review" of Wenninger's qualifications (Wenninger admitted it in his own deposition), and that he was not legally qualified, this Proposition is not only not moot, but requires the writ be issued.

Even so, the claim in *quo warranto* involves a pure legal analysis of Wenninger's claim

to the office. Such analysis is solely legal in perspective, devoid of any equity considerations, and is specifically aimed at determining the legal credentials, or the lack thereof, in support of Wenninger's claim to the office. He has certainly proven none. Varnau is therefore entitled to the writ.

CONCLUSION

For the reasons here and previously stated, it is respectfully requested that the Judgment of August 16, 2010, of the Twelfth District Court of Appeals be reversed, and the writ of *quo warranto* issue removing Appellee Wenninger from office and instating Appellant Varnau to it; or to make all other orders necessary and appropriate under the law.

THOMAS G. EAGLE CO., L.P.A.



Thomas G. Eagle (#0034492)
Counsel of Record for Appellant Dennis Varnau
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone: (937) 743-2545
Fax: (937) 704-9826
E-mail: eaglelawoffice@cs.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 3d day of January, 2011.



Thomas G. Eagle (0034492)

Staff Notes

2010:

This rule was condensed into a single division and the timeframe for filing of appellant's brief was removed because it is already addressed in Rule 6.2.

S.Ct. Prac. R. 4.4. Effect of pending motion to certify a conflict upon discretionary appeal or claimed appeal of right filed in supreme court

(A) If a party has perfected a discretionary appeal or a claimed appeal of right with the Supreme Court in accordance with S.Ct. Prac. R. 2.2(A), but also has timely moved the court of appeals to certify a conflict in the case, that party shall file a notice with the Supreme Court that a motion to certify a conflict is pending in the court of appeals. The Supreme Court will stay consideration of the jurisdictional memoranda filed in the discretionary appeal or claimed appeal of right until the court of appeals has determined whether to certify a conflict in the case.

(B) If the court of appeals determines that a conflict does not exist, the party that moved the court of appeals to certify a conflict shall immediately file a notice of that determination with the Supreme Court. In accordance with S.Ct. Prac. R. 3.6, the Supreme Court will consider the jurisdictional memoranda filed in the discretionary appeal or the claimed appeal of right.

(C) If both a certified conflict and discretionary appeal or claimed appeal of right are perfected, the Supreme Court will review the court of appeals order certifying a conflict when it reviews the jurisdictional memoranda filed by the parties. In accordance with S.Ct. Prac. R. 3.6 and 4.2, the Supreme Court will issue an order determining both whether a conflict exists and whether to allow the discretionary appeal or the claimed appeal of right, and consolidating the cases if necessary.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 6-1-00, 7-1-04, 1-1-08, 1-1-10)

Staff Notes

2010:

This rule was amended to clarify the Court's process when either a discretionary appeal or a claimed appeal of right, and a certified conflict are filed.

SECTION 5

RECORD ON APPEAL

S.Ct. Prac. R. 5.1. Composition of the record on appeal

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and

certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. Where applicable, the record on appeal shall consist of all of the above items from both the court of appeals and the trial court.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 5.2. When record is to be transmitted to supreme court from court of appeals

In every case on appeal to the Supreme Court from a court of appeals, the clerk of the court of appeals or other custodian having possession of the record shall not transmit the record to the Supreme Court unless and until the Supreme Court issues an order to the custodian to transmit the record pursuant to S.Ct. Prac. R. 5.3.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 5.3. Certification and transmission of record from court of appeals

(A) Upon order of the Supreme Court, the clerk of the court of appeals or other custodian having possession of the record shall certify and transmit the record to the Clerk of the Supreme Court. Unless otherwise ordered by the Supreme Court, the record shall be transmitted within twenty days of the order. If the case involves termination of parental rights or adoption of a minor child, or both, preparation and transmission of the record shall be expedited and given priority over preparation and transmission of the records in other cases.

(B) The record shall be transmitted along with an index that lists all items included in the record. All items and exhibits listed in the index, regardless of whether they are transmitted, shall be briefly described. The clerk of the court of appeals or other custodian transmitting the record shall send a copy of the index to all counsel of record in the case. The Clerk of the Supreme Court shall notify counsel of record when the record is filed in the Supreme Court.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 5.4. Submission of record from board of tax appeals

(A) Transmission of the record in an appeal of a decision from the Board of Tax Appeals shall be as prescribed by section 5717.04 of the Revised Code. For the purposes of filing the record with the Clerk of the Supreme Court, the Board may transmit a video or audio record of any hearing before the Board, and

if a writ
ed.

(B) I
cluded,
the hea
when th
S.Ct. P.
an appe
vided,
written

(Adopte

2010:

This r
record i

S.Ct

The
the Re
waiver
Utilities
Clerk o
the pro
at the
been fil
days in
for a w
file the
at the
transcr
been fil

(Adopte
1-1-08.

(A)
any ph
Clerk o
(B) of t

(B)
video e
or phot

(C)
sion (A
record
being t
exhibit

(Adopte
1-1-08,

2010:

SECTION 6
BRIEFS ON THE MERITS
IN APPEALS

**S.Ct. Prac. R. 6.1. Limitation on
application of briefing rules**

The filing deadlines imposed by S.Ct. Prac. R. 6.2 through 6.7 do not apply to appeals involving the imposition of the death penalty for an offense committed on or after January 1, 1995, and instituted under S.Ct. Prac. R. 2.1(C)(1). Filing deadlines for briefs in those appeals are governed by S.Ct. Prac. R. 19.6. (Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 6-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 6.2. Appellant's brief

[See Appendix D following these rules for a sample brief.]

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant shall file a merit brief with the Supreme Court within twenty days from the date the Clerk of the Supreme Court files the record from the court of appeals.

(2) In every other appeal, the appellant shall file a merit brief within forty days from the date the Clerk files the record from the court of appeals or the administrative agency. In any case, the appellant shall not file a merit brief prior to the filing of the record by the Clerk.

(B) Contents

The appellant's brief shall contain all of the following:

(1) A table of contents listing the table of authorities cited, the statement of facts, the argument with proposition or propositions of law, and the appendix, with references to the pages of the brief where each appears.

(2) A table of the authorities cited, listing the citations for all cases or other authorities, arranged alphabetically; constitutional provisions; statutes; ordinances; and administrative rules or regulations upon which appellant relies, with references to the pages of the brief where each citation appears.

(3) A statement of the facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case pursuant to S.Ct. Prac. R. 7.1 through 7.2.

(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. If several propositions of law are

presented, the argument shall be divided with each proposition set forth as a subheading.

(5) An appendix, numbered separately from the body of the brief, containing copies of all of the following:

(a) The date-stamped notice of appeal to the Supreme Court, the notice of certified conflict, or the federal court certification order, whichever is applicable;

(b) The judgment or order from which the appeal is taken;

(c) The opinion, if any, relating to the judgment or order being appealed;

(d) All judgments, orders, and opinions rendered by any court or agency in the case, if relevant to the issues on appeal;

(e) Any relevant rules or regulations of any department, board, commission, or any other agency, upon which appellant relies;

(f) Any constitutional provision, statute, or ordinance upon which appellant relies, to be construed, or otherwise involved in the case;

(g) In appeals from the Public Utilities Commission, the appellant's application for rehearing.

(C) Page limit

Except in death penalty appeals of right, the appellant's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 6-1-00, 7-1-04, 1-1-08, 1-1-10)

Staff Notes

2010:

The citation to *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39, 213 N.E.2d 182, 184 was removed.

S.Ct. Prac. R. 6.3. Appellee's brief

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, within twenty days after the filing of appellant's brief the appellee shall file a merit brief.

(2) In every other appeal, the appellee shall file a merit brief within thirty days after the filing of appellant's brief.

(3) If the case involves multiple appellants who file separate merit briefs, the appellee shall file only one merit brief responding to all of the appellants' merit briefs. The time for filing the appellee's brief shall be calculated from the date the last brief in support of appellant is filed.

(B) Contents

The appellee's brief shall comply with the provisions in S.Ct. Prac. R. 6. 2(B), answer the appellant's contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken. A statement of facts may be omitted from the appellee's brief if the appellee agrees with the statement of facts given in the appellant's merit brief. The appendix need not duplicate any materials provided in the appendix of the appellant's brief.

(C) Page limit

Except in death penalty appeals of right, the appellee's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 6-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 6.4. Appellant's reply brief

(A) Time to file

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant may file a reply brief within fifteen days after the filing of appellee's brief.

(2) In every other appeal, the appellant may file a reply brief within twenty days after the filing of appellee's brief.

(3) If the case involves multiple appellees who file separate merit briefs, the appellant shall file only one reply brief, if any, responding to all of the appellees' merit briefs. The time for filing the appellant's reply brief, if any, shall be calculated from the date the last brief in support of appellee is filed.

(B) Page limit

Except in death penalty appeals of right, the reply brief shall not exceed twenty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 6-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 6.5. Merit briefs in case involving cross-appeal

(A) Requirements

In a case involving a cross-appeal, each of the parties shall be permitted to file two briefs, and each brief shall conform to the requirements of S.Ct. Prac. R. 6.2(B).

(B) First brief

(1)(a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant/cross-appellee shall file the first merit brief within twenty days from the date the Clerk files the record from the court of appeals.

(b) In every other appeal, the appellant/cross-appellee shall file the first merit brief within forty days from the date the Clerk files the record from the court of appeals or the administrative agency.

(2) Except in death penalty appeals of right, this first brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

(C) Second brief

(1) (a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellee/cross-appellant shall file the second merit brief within twenty days after the filing of the first brief.

(b) In every other appeal, the appellee/cross-appellant shall file the second merit brief within thirty days after the filing of the first brief. The second brief shall be a combined brief containing both a response to the appellant/cross-appellee's brief and the propositions of law and arguments in support of the cross-appeal.

(2) Except in death penalty appeals of right, the second brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

(D) Third brief

(1) (a) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant/cross-appellee shall file the third merit brief within twenty days after the filing of the second brief.

(b) In every other appeal, the appellant/cross-appellee shall file the third merit brief within thirty days after the filing of the second brief. If the appellant/cross-appellee elects to file a reply brief in that party's appeal, the third brief shall be a combined brief containing both a reply and a response to the arguments in the cross-appeal. Otherwise, the third brief shall include only a response in opposition to the cross-appeal.

(2) Except in death penalty appeals of right, the third brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

(E) Fourth brief

(1) The fourth brief may be filed by the appellee/cross-appellant only as a reply brief in the cross-appeal.

(a) In every appeal involving termination of parental rights or adoption of a minor child, or both, if a fourth brief is filed, it shall be filed within fifteen days after the filing of the third brief.

(b) In every other appeal, if a fourth brief is filed, it shall be filed within twenty days after the filing of the third brief.

impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court on reasonable notice to the adverse party, provided, however, that when an injunction is appealed from it shall be suspended only by order of at least two of the judges of the court of appeals, on reasonable notice to the adverse party.

(B) Stay may be conditioned upon giving of bond; proceedings against sureties

Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself or herself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as the surety's agent upon whom any process affecting the surety's liability on the bond or undertaking may be served. Subject to the limits of its monetary jurisdiction, this liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes may be served on the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

(C) Stay in juvenile actions

No order, judgment, or decree of a juvenile court, concerning a dependent, neglected, unruly, or delinquent child, shall be stayed upon appeal, unless suitable provision is made for the maintenance, care, and custody of the dependent, neglected, unruly, or delinquent child pending the appeal.

(Adopted eff. 7-1-71; amended eff. 7-1-73, 7-1-01)

Staff Notes

2001:

Rule 7(B) Stay may be conditioned upon giving of bond; proceedings against sureties

Language in division (B) was changed to make it gender-neutral. No substantive change to this division was intended.

Rule 7(C) Stay in juvenile actions

The July 1, 2001 amendment eliminated the last sentence of App. R. 7(C) regarding appeals concerning a dependent, neglected, unruly, or delinquent child. This provision, to which was added appeals of cases concerning abused children, was placed in App. R. 11.2(D), which also was amended effective July 1, 2001.

App R 8 Bail and suspension of execution of sentence in criminal cases

(A) Discretionary right of court to release pending appeal

The discretionary right of the trial court or the court of appeals to admit a defendant in a criminal action to bail and to suspend the execution of his

sentence during the pendency of his appeal is as prescribed by law.

(B) Release on bail and suspension of execution of sentence pending appeal from a judgment of conviction

Application for release on bail and for suspension of execution of sentence after a judgment of conviction shall be made in the first instance in the trial court. Thereafter, if such application is denied, a motion for bail and suspension of execution of sentence pending review may be made to the court of appeals or to two judges thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee.

(Adopted eff. 7-1-71; amended eff. 7-1-75)

App R 9 The record on appeal

(A) Composition of the record on appeal

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered

At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, App.R. 9(C) or 9(D) may be uti-

proof is not necessary if evidence is excluded during cross-examination.

(B) Record of offer and ruling

At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C) Hearing of jury

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(D) Plain error

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Adopted eff. 7-1-80)

Evid R 104 Preliminary questions

(A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(B) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or

subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(C) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require.

(D) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(E) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Evid R 105 Limited admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Adopted eff. 7-1-80)

Evid R 106 Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Article II

JUDICIAL NOTICE

Evid R 201 Judicial notice of adjudicative facts

(A) Scope of rule

This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When discretionary

A court may take judicial notice, whether requested or not.

(D) When mandatory

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice

Judicial notice may be taken at any stage of the proceeding.

The notice requirement, which is based on Evid. R. 609(B), may trigger an objection by a motion *in limine* and the opportunity for determining admissibility at a hearing outside the jury's presence. See *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994) (unsworn statements made to detective prior to declarant's murder by defendant). ("Prior to admitting such testimony, the district court must hold a hearing in which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness's absence.")

Evid R 805 Hearsay within hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Adopted eff. 7-1-80)

Evid R 806 Attacking and supporting credibility of declarant

(A) When a hearsay statement, or a statement defined in Evid.R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness.

(B) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

(C) Evidence of a declarant's prior conviction is not subject to any requirement that the declarant be shown a public record.

(D) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Adopted eff. 7-1-80; amended eff. 7-1-98)

Evid R 807 Hearsay exceptions; child statements in abuse cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination

would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reason-

ably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.
(Adopted eff. 7-1-91)

Article IX

AUTHENTICATION AND IDENTIFICATION

Evid R 901 Requirement of authentication or identification

(A) General provision

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation,

in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form; (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.
(Adopted eff. 7-1-80)

Evid R 902 Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document purporting to be executed or attested in the official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the